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Strangers in Their Own Land: Durational Residency Requirements for Tuition Purposes, Though Illegal, Are Here to Stay

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Strangers in Their Own Land: Durational Residency Requirements for Tuition Purposes, Though Illegal, Are Here to Stay

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I. INTRODUCTION

It is common practice for public universities to impose durational residency requirements on students for tuition purposes. Of course, out-of-state students complain about the practice, which usually involves higher tuition rates for at least their first year of study, but interestingly, very few scholars have directly addressed the constitutional implications of durational residency requirements in the tuition
context. There is no surprise in that, however. An intellectually hon-
est analysis of the practice reveals some real questions about its con-
stitutionality, but the academic community relies upon the economic
effects of the practice, at least in part, to maintain fiscal integrity.
Self-interest is a powerful restraint.

Naturally, a number of law students have challenged the practice
by writing notes or articles in other law reviews, but it seems that
their conclusions have not been taken seriously, as nothing has
changed. Nor is there much case law challenging durational residency
requirements for tuition purposes; university students (and their par-
ents) seem to have accepted the practice as the norm, and cases
brought by those who have challenged it are often decided based on a
very narrow set of facts (and thus are limited to those facts).

Though courts have dealt with durational residency requirements
in many contexts, often finding them unconstitutional, they have re-
fused to extend their holdings to the tuition context, and the United
States Supreme Court has never directly addressed the issue. How-
ever, since the Court’s decision in Saenz v. Roe,1 the constitutionality
of durational residency requirements in any context, including for tui-
ton purposes, has become even more suspect. If ever there was a time
to challenge the practice, it is now.

The most effective strike would be made by a “perfect” plaintiff—
an unquestionably bona fide resident of a state—against a public uni-
versity of a state that maintains an extremely strict policy of residency
classification denying the plaintiff the benefit of in-state tuition be-
because of an irrebuttable presumption of nonresident status. Were
such an attack to be decided on purely legal grounds, the perfect plain-
tiff would almost certainly be victorious. Indeed, there are few, if any,
legal doctrines or justifications that allow a state to classify its citi-
zens differently for different purposes. Constitutional law also prohib-
its a state from creating a barrier to a United States citizen’s right to
travel or from violating a citizen’s due process rights by irrebuttably
presuming his nonresident status. Nevertheless, practical and politi-
cal considerations probably preclude a perfect victory and perhaps any
victory at all.

For illustrative purposes, Part II will present background concern-
ing Nebraska law and the University of Nebraska system. Part II will
also describe the efforts of one perfect plaintiff—me—to obtain in-
state tuition not by “gaming the system” as many students do, but
instead by unquestionably establishing a bona fide residence in Ne-
braska. Finally, Part II will discuss the history and development of
the right to travel and some of the landmark tuition cases that have
helped set the stage for the present battle. Understanding the history

and development of the law in those areas is vitally important to understanding Part III.

Using Nebraska as a model, Part III will evaluate the strengths and weaknesses of the legal arguments against durational residency requirements for tuition purposes, which, as already mentioned, include violations of the right to travel and due process. Part III will also discuss why those legal arguments, despite their potency, will probably fail due to practical and political considerations. Finally, Part IV will conclude with a few ideas on how to bridge the divide between the law and reality, thereby avoiding the situation where student residents feel that they are strangers in their own land.

II. BACKGROUND

The United States Constitution guarantees its citizens the enjoyment of certain rights, privileges, and immunities, and it forbids the abridgment of those rights by the states. Nevertheless, states have reserved power to act on their own behalf, so long as they do not violate the supreme law of the land or the rights of its people.

Every first-year law student learns that “citizenship” and “domicile” are synonymous. Similarly, “[t]he terms ‘residence’ and ‘domicile’... are generally convertible.” Thus, a state must not violate, by legislation or otherwise, the rights of those United States citizens who reside or are domiciled within its borders. Whether a citizen is a bona

2. See U.S. CONST. amends. I–VII.
3. See id. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); id. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”).
4. See id. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
5. See id. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
6. See id. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); id. amend. X.
fide resident of a state has been the subject of much litigation. The resulting case law has provided a two-prong test for determining bona fide residency: First, the citizen must be physically present in the state. Second, the citizen must intend to remain in the state. Nebraska has adopted a similar definition by statute. In addition to the two-prong test, Nebraska also statutorily imposes durational residency requirements for tuition purposes on students who otherwise meet its bona fide residency test. This raises a number of legal questions.

A. Nebraska Law and the University of Nebraska System

Nebraska defines “residence” as “that place at which a person has established his or her home, where he or she is habitually present, and to which, when he or she departs, he or she intends to return.” It is defined similarly under Nebraska’s Election Act, which mandates that a registered voter “declare under penalty of election falsification that . . . I live in the State of Nebraska.”

Nebraska has also established durational residency requirements before a state citizen can obtain certain benefits, including divorce, public assistance, and tuition. The last of these is of particular interest here.

11. NEB. REV. STAT. § 18-2510.01 (Reissue 1997). The heading for Chapter 18 is instructive: “Cities and Villages; Laws Applicable to All.” (emphasis added).
   (1) that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning, (2) the place where a person has his or her family domiciled even if he or she does business in another place, and (3) if a person is homeless, the county in which the person is living.
13. Id. § 32-116 (Reissue 2004).
14. Id. § 32-312 (Cum. Supp. 2006). Election falsification is a Class IV felony with a penalty of “up to five years imprisonment, a fine of up to ten thousand dollars, or both.” Id.
15. Id. § 42-349 (Reissue 2004) (imposing one-year durational residency requirement to obtain divorce).
16. Id. § 68-115 (Reissue 2003) (imposing one-year durational residency requirement to obtain public assistance).
The Nebraska Constitution gives governmental authority over the University of Nebraska to a board of regents. By statute, Nebraska educational institutions are required to charge nonresidents with non-resident fees. The governing board of each institution has power to fix and collect those fees and to determine resident status subject to minimum standards. Those minimum standards are set forth in section 85-502:

Rules and regulations established by the governing board of each state post-secondary educational institution shall require as a minimum that a person is not deemed to have established a residence in this state, for purposes of sections 85-501 to 85-504, unless:

(1) Such person is of legal age or is an emancipated minor and has established a home in Nebraska where he or she is habitually present for a minimum period of one hundred eighty days, with the bona fide intention of making this state his or her permanent residence, supported by documentary proof.

The board of regents has taken its mandate seriously, emphasizing in its policies "that the statutes provide a set of minimum standards which will govern a determination of resident status for tuition purposes only." The board further notes that "an individual who moves to Nebraska primarily to enroll in an institution of higher education of the state is presumed to be a non-resident for tuition purposes for the duration of his or her attendance at the University." For everyone else, though, a number of factors in addition to physical presence can demonstrate bona fide residency. These include the existence of a current Nebraska driver's license, voter registration, auto registration, a Nebraska bank account, current employment, and Nebraska income

17. NEB. CONST. art. VII, § 10.
19. Id.
20. Id. § 85-502.
22. Id. Additionally, the University of Nebraska–Lincoln Office of Admissions includes on its website the following language:

Enrolling more than half time any term at a university, college or community college in Nebraska during the 12 months immediately preceding the term for which residency classification is sought will be considered strong evidence that an individual moved to Nebraska primarily to enroll in a post-secondary institution in Nebraska. The student would therefore be considered a non-resident for tuition purposes for the duration of his or her attendance at the University of Nebraska–Lincoln.

tax records. The difference between resident and nonresident tuition at the University of Nebraska is substantial.

B. The "Perfect" Plaintiff

My own experience provides as good an example of a "perfect" plaintiff's efforts to obtain in-state tuition as I can imagine, and because a "perfect" plaintiff would make the strongest case against durational residency requirements for tuition purposes, I include it for illustration.

I moved to Nebraska on July 17, 2004, concededly to attend law school at the University of Nebraska. I am not a traditional student, however. I arrived with my wife and three children, then ages four, two, and five months. I also brought with me the administrative offices of an educational software company, which continued to employ me as its president and directing officer. I knew that I would pay nonresident tuition rates during my first year of law school because of the durational residency requirement of section 85-502. What I did not expect was an inability under the university's policies to become a Nebraska resident for tuition purposes after my first year of law school. Because I had been provided with only the university's website and residency application, I did not read the board of regents' policies directly. The website and application suggested that while many—and maybe even most—students moving to Nebraska to attend school would be considered nonresidents for the duration of their attendance, the initial purpose of their move to the state would be considered only "strong evidence" precluding them from obtaining resident status.

Given my nontraditional circumstances, I was surprised when my application for resident status after my first year of law school was denied.

I had done everything I thought was required to obtain Nebraska residency. Both my wife and I obtained Nebraska driver's licenses and registered to vote. We moved our bank accounts to a Nebraska financial institution and hired a Nebraska financial advisor. I also obtained part-time employment, not with just anyone, but with the State of Nebraska itself as a law clerk for the District Court of Lancaster County. The county provides my family health benefits and with-

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23. Univ. of Neb., supra note 21, at RP-5.7.1.
24. For the 2006-2007 academic year, undergraduate residents at the University of Nebraska paid $160 per credit hour, while nonresidents paid $475. University of Nebraska-Lincoln Undergraduate Office of Admissions, Estimated Tuition & Other Costs (2007), http://admissions.unl.edu/cost/index.asp. Law student residents paid $207.75 per credit hour, while nonresidents paid $582.50. University of Nebraska College of Law, Tuition and Other Costs, http://law.unl.edu/inside.asp?d=tuition-costs (last visited Feb. 6, 2007).
25. See supra text accompanying note 22.
26. See supra note 22.
holds Nebraska taxes from my pay. Because we do not earn very much income, my children qualify for Nebraska Medicaid coverage, which has been in force since our arrival to the state. At the end of both 2004 and 2005, I filed Nebraska income tax returns.

From the time of our arrival in Nebraska, my family became involved in the community in an attempt to make Nebraska our permanent home. We regularly attend a local church. We joined the YMCA and obtained memberships at local museums and zoos. In 2005, my wife registered for classes at Southeast Community College, another state school, and she was classified as a resident for tuition purposes there. I served as a merit badge counselor for a local troop of the Boy Scouts of America. My oldest son participated in various youth sports with a number of local organizations. He started attending elementary school in 2005, which we support through fundraising activities and, of course, taxes. My second son began attending school in 2006.

In all respects, my family and I established bona fide residency in Nebraska shortly after our arrival. Nevertheless, my application for resident status for tuition purposes was denied four days after its submittal.27 Deciding my further appeal,28 the dean of admissions wrote me the following: "While I am very sympathetic to your situation, I must abide by the State of Nebraska's residency laws. State law does not provide residency for tuition purposes for nonresidents moving to the State for educational purposes."29

Since I disagreed with the dean's conclusion, I decided to see just what the law did provide. What I found is that durational residency requirements of any kind implicate the right to travel. Also, the case law convinced me that the board of regents' policy presuming—apparently irrebuttable—that a new resident of Nebraska is a nonresident for tuition purposes for the duration of his or her attendance at the university is constitutionally infirm.

C. The Right to Travel

There is no explicit reference to a "right to travel" in the Constitution. Nevertheless, it is fairly well established that the right "is firmly embedded in our jurisprudence."30 While the Articles of Confederation...
tion explicitly recognized the right of each state's citizens to move freely between the states, some argue that the right to travel was so obvious a principle that its inclusion in the Constitution was unnecessary. Others perceive the right as subsumed in other protections of the Constitution. In any case, the right to travel has enjoyed well over 150 years of judicial recognition, despite some confusion about its place in constitutional jurisprudence and the appropriate standard of review applicable to it.

In the *Passenger Cases*, the Supreme Court struck down a state law that imposed a tax on persons arriving from other states. Eighteen years later, the Court in *Crandall v. Nevada* held unconstitutional a state statute taxing railroads based on the number of passengers transported out of the state. In both of these early cases, the inherent right to individual travel between the states was recognized. In addition, the *Slaughter-House Cases*, while limiting the scope of the Privileges or Immunities Clause of the Fourteenth Amendment to national rather than state rights, recognized the right of a citizen to move to another state at will as one of the attributes of national citizenship.

The Court did not have another good opportunity to confront the issue until 1941. In *Edwards v. California*, the Court struck down a

31. ARTICLES OF CONFEDERATION art. IV (1781) ("[T]he people of each State shall have free ingress and regress to and from any other State.


33. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.38, at 1067 (7th ed. 2004) (explaining that the Privileges and Immunities Clause of Article IV and the Commerce Clause "are similar to those [provisions] which were joined with the mobility provision in the Articles of Confederation"). Article IV of the Articles of Confederation read in part:

[T]he free inhabitants of each of these States . . . shall be intitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . . .

ARTICLES OF CONFEDERATION art. IV (1781).

34. As will be shown, the Supreme Court has attributed the right to travel to several constitutional provisions, including the Commerce Clause of Article I, the Privileges and Immunities Clause of Article IV, and the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment. See infra section II.C.

35. In deciding right-to-travel cases, the Court has sometimes used a rational basis test, while at other times it has used strict scrutiny or even a type of ad hoc balancing test. See infra section II.C.

36. 48 U.S. (7 How.) 283 (1849).

37. 73 U.S. (6 Wall.) 35 (1867).

38. 83 U.S. (16 Wall.) 36 (1872).

39. See id. at 79–80.

40. 314 U.S. 160 (1941).
state statute making it a crime to knowingly bring indigent nonresidents into the state. California argued "that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering."41 Couching the right to travel in the Commerce Clause,42 a majority of the Court rejected the argument, saying that a state may not "isolate itself from difficulties common to all of [the states] by restraining the transportation of persons and property across its borders."43 The concurring Justices found the right protected not under the Commerce Clause, but under the Privileges or Immunities Clause of the Fourteenth Amendment.44

In 1966, the Court in United States v. Guest45 finally acknowledged the right to travel as a fundamental right.46 Three years later, the Court decided Shapiro v. Thompson,47 which became "[t]he landmark decision concerning the right to travel and the permissible scope of the burdens on that right which result from residency requirements."48 Shapiro involved two state statutes and a District of Columbia stat-

41. Id. at 173.
42. See id. at 172 ("[T]he transportation of persons is 'commerce,' within the meaning of that provision."). The Court felt it "unnecessary to decide whether [California's law was] repugnant to other provisions of the Constitution." Id. at 177.
43. Id. at 173. The Court continued, quoting Justice Cardozo, by saying that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Id. at 173–74 (internal quotation marks omitted) (quoting Baldwin v. Seelig, 294 U.S. 511, 523 (1935)).
44. Id. at 177–78 (Douglas, J., concurring) ("While the opinion of the Court expresses no view on that issue, the right involved is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present. The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."); id. at 182 (Jackson, J., concurring). Justice Jackson perhaps said it most strongly:

This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

Id. at 183.
45. 383 U.S. 745 (1966). Guest involved a prosecution for conspiracy "to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of, inter alia, their 'right to travel.'" Id. at 757 (quoting indictment of the defendants).
46. Id. at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.").
48. NOWAK & ROTUNDA, supra note 33, § 14.38, at 1069.
ute denying welfare benefits to persons who had not resided within the respective jurisdictions for at least one year.

The states offered four justifications for the waiting-period requirement. First, they justified it "as a protective device to preserve the fiscal integrity of state public assistance programs" by deterring people "likely to become continuing burdens on state welfare programs" from entering the jurisdiction. In rejecting the argument, the Court stated, "We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance," but recognizing the right to travel as "fundamental," the Court held that

the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."

49. This Comment will refer to the various states and the District of Columbia as simply, "the states."

50. There have been efforts to distinguish Shapiro on the grounds that it involved "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life," Shapiro, 394 U.S. at 627, as opposed to other nonessential benefits, in order to qualify for review under a lighter rational basis test. See, e.g., Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) (employment preference); Sosna v. Iowa, 419 U.S. 393 (1975) (divorce); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (free nonemergency medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights). Nevertheless, those efforts have largely failed. "The right involved need not be a fundamental right in order to require the strict scrutiny analysis, for a durational residency requirement burdens the right to travel which is itself a fundamental right." Nowak & Rotunda, supra note 33, § 14.38, at 1069. In fact, the Shapiro Court was quite explicit about this point: "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Shapiro, 394 U.S. at 638 (first emphasis added). In Dunn, where it did not matter "whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel)" because both were fundamental rights, Dunn, 405 U.S. at 335, the Court made the point even clearer: "It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel . . . In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right . . . .'" Id. at 339–40 (quoting Shapiro, 394 U.S. at 634).


52. Id. at 629.

53. Id. at 630 (internal quotation marks omitted) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).

54. Id. at 631 (alteration in original) (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)). It should be noted that the Court's holding does two things: First, it recognizes a "classification" between new and old residents. Second, it imposes a bar not just to restrictions on travel, but to any "penalty" that results after the travel has already occurred. This is an extension of the traditional right-to-travel doctrine, which only prohibited barriers to free movement between the states.
Alternatively, the states justified the challenged classification "as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits." The Court rejected this argument anecdotally, noting,

[We do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others [sic] factors, the level of a State’s public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.]

The states further justified the waiting period "as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes." Finding such a reason improper under the Equal Protection Clause of the Fourteenth Amendment, the Court commented that such “reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.”

Finally, the states justified the one-year requirement as serving “certain administrative and related governmental objectives,” including budget planning, residency determination, protection from fraud, and encouragement of new residents into the labor force. Accepting these objectives as permissible, the Court nevertheless rejected the states’ argument again because the statutes in question implicated the right to travel, necessitating strict scrutiny. In doing so, the

See Guest, 383 U.S. at 757. Justice Harlan in his dissent seems to have recognized the extension. See Shapiro, 394 U.S. at 657–59 (Harlan, J., dissenting). See also infra notes 118–23 and accompanying text (discussing the implications of Saenz v. Roe, 526 U.S. 489 (1999), on the right to travel).

55. Shapiro, 394 U.S. at 631.
56. Id. at 632.
57. Id.
58. Id. at 632–33.
59. Id. at 633–34.
60. Id. at 634. The Court commented,

At the outset, we reject appellants’ argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in 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.

Id. (citations omitted). The district courts had held that the states’ waiting-period requirement violated the Equal Protection Clause of the Fourteenth Amendment, and the District of Columbia’s requirement violated equal protection as secured by the Due Process Clause of the Fifth Amendment. See id. at 623, 625. The Supreme Court, however, saw “no occasion to ascribe the source of this right
Court established a test for evaluating durational residency requirements that would stand for thirty years: "Any classification which serves to penalize the exercise of [the right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." None of the asserted administrative and governmental objectives were sufficiently compelling to justify the penalty—the denial of state benefits for one year.

The Court left open the possibility, though, that some benefits might be justifiably limited. In a footnote, the Court stated,

We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. 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.

It was not long before the Court was forced to address the question.

In Dunn v. Blumstein, a new resident of Tennessee challenged that state's one-year residence requirement as a prerequisite to voter registration. Tennessee argued that the purpose of the law was to protect the ballot box against fraud and afford some certainty that voters were knowledgeable about local interests. In its view, this was different from Shapiro, where "the vice of the welfare statute . . . was its objective to deter interstate travel." Thus, strict scrutiny would not apply except where there existed "some evidence to indicate a deterrence of or infringement on the right to travel." Adopting the Shapiro test and applying strict scrutiny, the Court rejected those arguments and commented that "[d]urational residence laws impermissibly condition and penalize the right to travel by imposing their

to travel interstate to a particular constitutional provision," id. at 630, though it ultimately ruled the durational residency requirements as unconstitutional under the same provisions as the district courts, id. at 638, 641-42. This effectively began a thirty-year review of durational residency requirements under a very strict equal protection analysis.

61. Id. at 634 (emphasis omitted).
62. Id. at 638 n.21.
63. 405 U.S. 330 (1972).
64. Id. at 345.
65. Id. at 339 (quoting Brief of Appellants at 13, Dunn, 405 U.S. 330 (No. 70-13)).
66. Id. (quoting Brief of Appellants at 13, Dunn, 405 U.S. 330 (No. 70-13)).
67. The Court stated that Tennessee's view "represents a fundamental misunderstanding of the law." Id. Moreover, in applying strict scrutiny, the Court found it "impossible to view durational residence requirements as necessary to achieve" the state's asserted purposes "in light of Tennessee's total statutory scheme for regulating the franchise." Id. at 345-46. Because a Tennessee voter's qualifications, including bona fide residency, were determined by oath when the voter registered, and because Tennessee did not routinely verify the veracity of the voter's affirmation, "the durational residence requirement was an effective voting obstacle only to residents who [told] the truth and [had] no fraudulent purposes." Id. at 346-47.
prohibitions on only those persons who have recently exercised that right."\(^{68}\)

In *Memorial Hospital v. Maricopa County*,\(^ {69}\) a hospital, which was denied reimbursement for providing medical services to an asthmatic indigent, challenged an Arizona statute requiring one year of bona fide residence in a county as a prerequisite to obtaining free nonemergency medical care. Commenting that "[t]he amount of impact required to give rise to the compelling-state-interest test was not made clear"\(^ {70}\) in *Shapiro*, the Court determined that "medical care is as much 'a basic necessity of life' to an indigent as welfare assistance."\(^ {71}\) Concluding that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents,"\(^ {72}\) the Court again utilized the *Shapiro* test and applied strict scrutiny.\(^ {73}\) In response to the state's assertion that the waiting period was required "to insure the fiscal integrity of its free medical care program by discouraging an influx of indigents, particularly those entering the County for the sole purpose of obtaining the benefits of its hospital facilities,"\(^ {74}\) the Court held that "a State may not protect the public fisc by drawing an invidious distinction between

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68. *Id.* at 342.
70. *Id.* at 256-57. The questions under the *Shapiro* test ultimately became what state interests are compelling and what constitutes a penalty. In *Shapiro*, the denial of the basic "necessities of life" qualified as a penalty, as did the denial of the franchise in *Dunn*. On the other hand, the Court has never struck down a state statute requiring some period of residence as a condition of receiving in-state tuition at a public university.
71. *Id.* at 259.
72. *Id.* at 261.
73. Then-Justice Rehnquist did not agree, at least in part because "there is [no] constitutional right to nonemergency medical care at state or county expense or a constitutional right to reimbursement for care extended by a private hospital." *Id.* at 278 (Rehnquist, J., dissenting). He felt that more emphasis should be placed on the benefit withheld, looking to "the nature of the aid which the State or county provides." *Id.* at 286. He further felt that the right to travel had been extended too far.

The eligibility requirement [in *Maricopa County*] has not the slightest resemblance to the actual barriers to the right of free ingress and egress protected by the Constitution, and struck down in cases such as *Crandall* and *Edwards*. And, unlike *Shapiro*, it does not involve an urgent need for the necessities of life or a benefit funded from current revenues to which the claimant may well have contributed. It is a substantial broadening of, and departure from, all of these holdings . . . . *Id.* at 288. His response was to use a more traditional test examining "whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote." *Id.* at 285.
74. *Id.* at 263 (majority opinion).
classes of its citizens” and reaffirmed its previous holding that the inhibition of immigration into a state was a constitutionally impermissible goal.

In a new line of cases, the Court changed course somewhat. In *Sosna v. Iowa*, the Court upheld Iowa’s one-year durational residency requirement as a prerequisite for obtaining a divorce. Calling the requirement one “of a different stripe,” the majority, through then-Justice Rehnquist, reasoned that because Sosna was not “irretrievably foreclosed from obtaining some part of what she sought,” the requirement was “consistent with the provisions of the United States Constitution.” The majority also considered the interests of others involved in a divorce proceeding, the state’s concern that it would “become a divorce mill” with decrees subject to collateral attack in other states’ courts, and the fact that forty-eight states had similar requirements. Not surprisingly, the majority largely ignored the *Shapiro* test and declined to apply strict scrutiny.

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75. Id.
76. Id. at 263–64 (citing *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)).
77. 419 U.S. 393 (1975).
78. Id. at 406.
79. Id. Then-Justice Rehnquist contrasted Sosna’s situation with the welfare recipients in *Shapiro*, the voters in *Dunn*, and the indigent patient in *Maricopa County*, who were foreclosed from receiving the benefits they needed when they needed them. Iowa’s requirement only “delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time.” Id.
80. Id. at 410.
81. The Court was concerned with both social and legal issues.
   A decree of divorce is not a matter in which the only interested parties are the State as a sort of “grantor,” and a divorce petitioner such as appellant in the role of “grantee.” Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support.
   Id. at 406–07.
82. Id. at 407–09.
83. Id. at 404–05 & n.15.
84. See supra note 73 and accompanying text. Then-Justice Rehnquist wrote the *Sosna* opinion.
85. Justice Marshall, who had written the majority opinions in both *Dunn* and *Maricopa County*, was disgusted.

The Court today departs sharply from the course we have followed in analyzing durational residency requirements since [*Shapiro*].

The Court’s failure to address the instant case in these terms suggests a new distaste for the mode of analysis we have applied to this corner of equal protection law. In its stead, the Court has employed what appears to be an *ad hoc* balancing test, under which the State’s putative interest in ensuring that its divorce petitioners establish some
In *Zobel v. Williams*\(^8\) and *Hooper v. Bernalillo County Assessor*,\(^7\) the Court again declined to employ either the *Shapiro* test or strict scrutiny to residency requirements, saying it was unnecessary.\(^8\) *Zobel* concerned an Alaska law that paid Permanent Fund dividends to residents based on the length of each citizen's residence in the state. *Hooper* concerned a New Mexico statute granting a tax exemption to those Vietnam veterans who resided in the state before a certain date. Because both cases involved a distinction between residents based on when they first established residence in the state as opposed to a traditional durational residency requirement,\(^9\) both courts applied rational basis review to strike down the statutes under the Equal Protection Clause of the Fourteenth Amendment.\(^9\)

roots in Iowa is said to justify the one-year residency requirement. I am concerned . . . about the implications of the majority's analysis . . .

The Court omits altogether what should be the first inquiry: whether the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel . . . I think it is clear beyond cavil that the right to seek dissolution of the marital relationship is of such fundamental importance that denial of this right to the class of recent interstate travelers penalizes interstate travel within the meaning of *Shapiro*, *Dunn*, and *Maricopa County*.\(^8\)


88. *Zobel*, 457 U.S. at 60–61 ("If the statutory scheme cannot pass even the minimal test proposed by the State, we need not decide whether any enhanced scrutiny is called for."); *Hooper*, 472 U.S. at 618 ("As in *Zobel*, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.").
89. *Zobel*, 457 U.S. at 60 n.6; *Hooper*, 472 U.S. at 618 n.6.
90. *Zobel*, 457 U.S. at 65; *Hooper*, 472 U.S. at 624. In a footnote later cited in *Hooper*, the *Zobel* plurality stated that "right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Zobel*, 457 U.S. at 60 n.6. Five Justices, however, agreed that the right to travel represented something more than the plurality ascribed to it, despite the difficulty of attributing it to some textual source within the Constitution. In fact, a majority of the Court felt that *Zobel* turned on whether and to what extent the right to travel was implicated.

I agree with Justice [O'Connor] that these more fundamental defects in the Alaska dividend-distribution law are, in part, reflected in what has come to be called the "right to travel." . . .

As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation. A scheme of the sort adopted by Alaska is inconsistent with the federal structure even in its prospective operation.

Id. at 66–67 (Brennan, J., concurring). See also id. at 71–81 (O'Connor, J., concurring in the judgment) (placing the right to travel under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution). Given this major-
The year after *Hooper*, the Court again abruptly changed direction, returning to *Shapiro* and its progeny in *Attorney General of New York v. Soto-Lopez*.91 There, two veterans challenged a state statute providing civil service employment preference to veterans who had entered the armed forces while residing in New York. Despite its factual similarity to *Hooper*, four Justices92 abandoned the "logical sequence of analysis" used in that case in favor of "the better approach . . . which the Court has employed in other equal protection cases—to inquire first as to the proper level of scrutiny and then to apply it."93

Reaffirming that strict scrutiny is triggered "where a State's law 'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration,'"94 the plurality determined that the New York law imposed such a penalty95 and evaluated the law under that heightened standard. None of the justifications offered for the law were able to withstand such a review.96 Even though

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92. Justice Brennan wrote the plurality opinion, in which Justices Marshall, Blackmun, and Powell joined.
94. *Id.* at 905 (quoting *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974)).
95. *Id.* at 908-09. Justice Brennan explained, *Soto-Lopez* and *Baez-Hernandez* have been denied a significant benefit that is granted to all veterans similarly situated except for State of residence at the time of their entry into the military. While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial. The award of bonus points can mean the difference between winning or losing civil service employment, with its attendant job security, decent pay, and good benefits. Furthermore, appellees have been permanently deprived of the veterans' credits that they seek. As the Court of Appeals observed: "The veteran's ability to satisfy the New York residence requirement is . . . fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status." Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their rights to migrate.

96. New York offered four interests to justify the requirement:
   (1) the encouragement of New York residents to join the Armed Services;
   (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service.

*Id.* at 909 (citing Brief for Appellant at 15, *Soto-Lopez*, 476 U.S. 898 (No. 84-1803)). All failed strict scrutiny because "each . . . could be promoted fully by granting bonus points to all otherwise qualified veterans." *Id.* "[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of
"[c]ompensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments," the Court determined that "this policy, even if deemed compelling, does not support a distinction between resident veterans . . . . Once veterans establish bona fide residence in a State, they 'become the State's "own" and may not be discriminated against solely on the basis of [the date of] their arrival in the State.'"

The Court, interestingly, struck down the law not only because it violated equal protection insofar as the right to travel implicated that constitutional provision, but also because it violated— independent of equal protection—the veterans' right to travel itself. This was perhaps a precursor to the Court's holding in Saenz v. Roe thirteen years later, where it would finally expressly identify the constitutional source of the right.

In Saenz, recent California residents successfully brought an action challenging the constitutionality of a state statute imposing a durational residency requirement, which limited welfare benefits through the recipient's first year of residency to an amount equal to that payable to the recipient by the state of her prior residence. California justified the requirement by pointing out that it would finally expressly identify the constitutional source of the right.

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The dissenters believed that "something more than the minimal effect on the right to travel or migrate that exists in this case must be required to trigger heightened scrutiny or the plurality's right to travel analysis will swallow all the traditional deference shown to state economic and social regulation." Id. at 925 (O'Connor, J., dissenting). Justice O'Connor elaborated:

Certainly the New York veterans' preference program imposes a less direct burden on a less "significant" interest than many resident-preference programs that this Court has upheld without difficulty. For example, this Court has summarily affirmed certain state residency requirements for state college tuition rates, and a limited eligibility statute in New York for scholarship assistance, even though those requirements constituted a potentially prohibitive burden on access to "important" educational opportunities.

Id. at 923 (citations omitted).

save almost $11 million in annual welfare costs. California also argued that because the statute "was not enacted for the impermissible purpose of inhibiting migration by needy persons . . . , unlike the legislation reviewed in Shapiro, it [did] not penalize the right to travel because new arrivals [were] not ineligible for benefits during their first year of residence," and it should therefore not be subject to strict scrutiny. Persuaded by the long-running debate about the appropriate standard of review applicable to right-to-travel cases, the Court concluded "that it will be useful to focus on the source of the constitutional right [to travel]."

The Court proceeded to define the right as having three components. First, it protects "the right of a citizen of one State to enter and to leave another State." This was the traditional understanding vindicated in cases like Edwards and Guest. Because this particular component was not implicated in Saenz, the Court declined to identify its constitutional source any further than it had already done.

Second, the right to travel "protects the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." This component, the Court concluded, is "expressly protected by the text of the Constitution" in the first sentence of Article IV, Section 2.

Finally, the right to travel protects, "for those travelers who elect to become permanent residents [of another State], the right to be

101. Id. at 497. The amount that would have been saved—$10.9 million—was a relatively small part of California's annual expenditures of approximately $2.9 billion for the entire program. Id.

102. Id. at 499–500.

103. Id. at 500. The Court was also persuaded to address the issue because of the "potential relevance" of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 to the case. Id. The PRWORA expressly authorized any state that received a block grant under its Temporary Assistance for Needy Families program to "apply to a family the rules (including benefit amounts) of the program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c) (2000).

104. Saenz, 526 U.S. at 500.

105. Id.

106. Id.

107. Id. at 501. The Court, quoting Article IV of the Articles of Confederation and Guest, commented that "[t]he right of 'free ingress and reggress to and from' neighboring States . . . may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" Id. (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).

108. Id. at 500.

109. Id. at 501. The first sentence of Article IV, Section 2 of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. ART. IV, § 2.
treated like other citizens of that State." The Court identified the Privileges or Immunities Clause of the Fourteenth Amendment as the constitutional source for this component. The Court further identified this third component as the one at issue in Saenz. Recognizing "[t]hat newly arrived citizens 'have two political capacities, one state and one federal,' add[ing] special force to their claim that they have the same rights as others who share their citizenship," the Court applied strict scrutiny, reasoning that "[n]either mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year." Returning to the language of Shapiro, the Court further held that "since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty."

Amazingly, only two Justices dissented from this unprecedented opinion of the Court. Former Chief Justice Rehnquist was particu-

110. Id. at 500.

111. Id. at 502–03. The opening words of the Fourteenth Amendment are as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1. The remainder of the section provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Id. The Saenz Court further explained that it has always been common ground that [the Privileges or Immunities Clause] protects the third component of the right to travel. Writing for the majority in the Slaughter-House Cases, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bond fide residence therein, with the same rights as other citizens of that State." Justice Bradley, in dissent, used even stronger language to make the same point: "The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right." Saenz, 526 U.S. at 503–04 (citation omitted) (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80, 112–13 (1872)).

112. Saenz, 526 U.S. at 502.

113. Id. at 504.

114. Id.

115. Id. at 505.

116. Former Chief Justice Rehnquist and Justice Thomas dissented, each joining the other's opinion. See id. at 511 (Rehnquist, C.J., dissenting); id. at 521 (Thomas, J., dissenting).

117. Former Chief Justice Rehnquist began his dissent this way:
larly concerned that the Court had expanded the right to travel too far beyond its original scope, "conflating it with the right to equal state citizenship"118 and ignoring the fact that, "for most of this country's history, what the Court today calls the first 'component' of the right to travel was the entirety of this right."119 "Indeed," reasoned the former Chief Justice, "under the Court's logic, the protections of the Privileges or Immunities Clause recognized in this case come into play only when an individual stops traveling with the intent to remain and become a citizen of a new State."120 Continuing, the former Chief Justice argued that by equating the right to travel with the rights of equal state citizenship,121 the Court essentially held that "a State, outside certain ill-defined circumstances, cannot classify its citizens by the length of their residence in the State without offending the Privileges or Immunities Clause of the Fourteenth Amendment,"122 in effect creating a "right to immediately enjoy all the privileges of being a [State] citizen in relation to that State's ability to test the good-faith assertion of this right."123 If the former Chief Justice is correct, then the Court's prior decisions upholding durational residency requirements

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The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, Colgate v. Harvey, [296 U.S. 404 (1935)], overruled five years later by Madden v. Kentucky, [309 U.S. 83 (1940)]. . . . Because I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent. Saenz, 526 U.S. at 511 (Rehnquist, C.J., dissenting). For further discussion about the nature of the Court's opinion in Saenz, see Laurence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?, 113 HARV. L. REV. 110 (1999).

118. Saenz, 526 U.S. at 514 (Rehnquist, C.J., dissenting).
119. Id. at 512 (citation omitted).
120. Id. at 513.
121. Id. at 514.
122. Id. at 515.
123. Id. at 516. The former Chief Justice asserted that because of the difficulty in policing the subjective element of bona fide residence—an intent to remain—states' use of durational residency requirements as objective criteria for testing the good-faith assertion of the citizen have "practical appeal." Id. at 517 ("It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain."). However, in so asserting, the former Chief Justice made an assumption that is "conceptually impossible." See infra section III.D.
for tuition, divorce, and political party registration are questionable.

D. The Tuition Cases

Many of the right-to-travel cases contain dicta concerning the implications of those decisions on durational residency requirements for tuition purposes. There is little Supreme Court precedent on the matter, though, for the Court has decided only three tuition cases, two of those by summary affirmation only.

In Starns v. Malkerson, students who had recently moved to Minnesota challenged a durational residency requirement classifying new residents as nonresidents for tuition purposes for one year. The students argued that Shapiro required strict scrutiny review of the statute because it infringed upon their "basic, fundamental right . . . to interstate movement." A three-judge district court panel disagreed.

The panel distinguished Shapiro because "the one-year waiting period for welfare assistance [in that case] had as a specific objective the exclusion from the jurisdiction of the poor who needed or may need relief." In contrast, because "approximately 50,000 students enrolled in the University in the fall of 1968, [and] over 6,000 were nonresidents[,] . . . [Minnesota's] one-year waiting period [did] not deter

125. See Sosna v. Iowa, 419 U.S. 393 (1975) (upholding one-year residence requirement for eligibility to obtain a divorce in state courts).
126. See Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, though not specifically addressing durational residency requirement argument).
127. See infra section III.D.
131. Id. at 237.
132. Id. (citing Shapiro, 394 U.S. at 628-29).
any appreciable number of persons from moving into the state.”

Furthermore, according to the panel, Shapiro was a different case because there "the one-year waiting period for welfare assistance had the effect of denying the basic necessities of life to needy residents." According to the panel, a denial of lower tuition did not have "any dire effects on the nonresident student equivalent to those noted in Shapiro." 

Thus, determining that the denial of in-state tuition to the students was "not a case of an infringement of a fundamental right," it found that Minnesota's one-year durational residency requirement did "not constitute a penalty upon the exercise of the constitutional right of interstate travel," and proceeded to test it under traditional equal protection standards using a rational basis standard of review. Under that test, it upheld the requirement as "a rational attempt by the State to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments and expenditures therein." The Supreme Court summarily affirmed.

133. Id. at 237-38. It should be obvious that this argument simply makes no sense. It is impossible, after all, to tell how many people were deterred from attending the university from out of state by looking at the number of out-of-state residents who did attend. Furthermore, the issue is not about a state's conferral of benefits on residents versus nonresidents, but rather, its decision to discriminate between old and new residents.

134. Id. at 238.

135. Id. The court further explained, quoting another tuition case from California:

While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. Shapiro involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in Shapiro could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning do not involve similar risks. Nor was petitioner (unlike the families in Shapiro) precluded from the benefit of obtaining higher education. Charging higher tuition fees to non-resident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.

Id. (internal quotation marks omitted) (quoting Kirk v. Bd. of Regents, 273 Cal. App. 2d 430, 440 (1969)).

136. Id.

137. Id.

138. Id. at 238-41.

139. Id. at 240. The panel conceded that the regulation "does discriminate against a class of residents." Id. at 238. "However," the panel stated, "uniform treatment does not mean that a state may never distinguish between citizens, 'and mere classification . . . does not of itself deprive a group of equal protection.'" Id. at 239 (citation omitted) (quoting Carrington v. Rash, 380 U.S. 89, 92 (1965)).

Three years later in *Sturgis v. Washington*, another three-judge district court panel relied on *Starns* to again uphold, by a 2–1 vote, a one-year durational residency requirement for tuition purposes. Though *Dunn v. Blumstein* had since been decided, the majority distinguished it on the grounds that it involved the fundamental right to vote, while “the right to a higher education . . . is not a fundamental right.” Again, the Supreme Court summarily affirmed.

After oral argument, but before the panel decision in *Sturgis*, the Supreme Court decided *Vlandis v. Kline*, a Connecticut case brought by a new resident of the state challenging a state law classifying all out-of-state applicants to the university as nonresidents for tuition purposes for the duration of their attendance. The presumption of nonresidence was irrebuttable. In a plurality opinion, the Court held the Connecticut law invalid, finding that “a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.”

Connecticut offered three justifications for its law: cost equalization between residents and nonresidents; favoritism toward “established residents, whose past tax contributions to the State have been higher;” and “administrative certainty . . . in preventing out-of-state students from coming to [the state] solely to obtain an education and then claiming [state] residence in order to secure the lower tuition

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142. Judge East, in dissent, “disagree[d] with the *Starns*’ reading of *Shapiro*, and believe[d] that authority [was] undeserving of the majority’s faith.” *Id.* at 42 (East, J., dissenting). He would have followed the approach taken in *Shapiro* and *Dunn*—looking to the rights affected by the classification (more money required of the new resident); the basis of the classification (recent travel); and the interests of the state—and applied strict scrutiny, under which he would have voided the statute. *Id.* at 43–44.
143. *Id.* at 41 (majority opinion).
144. *Id.*
146. 412 U.S. 441 (1973).
147. *Vlandis* was different from *Starns* and *Sturgis* because it did not raise the question whether durational residency requirements for tuition purposes were permissible. *Vlandis* dealt only with the validity of “a permanent, irrebuttable presumption of nonresidency based on the fact that a student was a nonresident at the time he applied for admission to the state university system.” *Id.* at 455 (Marshall, J., concurring).
148. *Id.* at 446 (plurality opinion) (internal quotation marks omitted) (quoting Heiner v. Donnan, 285 U.S. 312, 329 (1932)). The Court also referred to its decision in *Carrington v. Rash*, 380 U.S. 89 (1965), holding that “a permanent irrebuttable presumption of nonresidence violate[s] the Equal Protection Clause of the Fourteenth Amendment.” *Vlandis*, 412 U.S. at 447 n.4.
149. *Id.* at 448.
150. *Id.* at 449.
and fees.” The first of these justifications was rejected because the law, by “basing the bona fides of residency solely on where a student lived when he applied for admission to the University[, used] a criterion wholly unrelated to that objective.” The second was rejected as too arbitrary and too problematic under the Equal Protection Clause of the Fourteenth Amendment, given Shapiro and Dunn. The third was likewise rejected because “there were other reasonable and practicable means . . . for determining bona fide residence.”

In striking down Connecticut’s law, the Court nevertheless attempted to limit the reach of its decision, saying it should not be construed to deny a State 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. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

Justice Marshall was not so sure the Court’s limiting language actually had any effect in narrowing the opinion or even whether it was a correct statement of the law. He joined the plurality opinion, but not “insofar as it suggest[ed] that a State may impose a one-year resi-

151. Id. at 451.
152. Id. at 448–49. The effect of the law was that “instead of ensuring that only its bona fide residents receive their full subsidy, [it] ensures that certain of its bona fide residents, such as the appellees, do not receive their full subsidy, and can never do so while they remain students.” Id. at 449.
153. Id. at 450.
154. Id. at 450 n.6.
155. Id. at 451. It is unclear what standard of review the plurality applied here. In stating that “the Constitution recognizes higher values than speed and efficiency,” id. (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)), the plurality seems to have dismissed Connecticut’s goal of administrative certainty as insufficiently legitimate, applying a type of intermediate scrutiny. But the plurality continues by saying that other criteria for evaluating residence, “while perhaps more burdensome to apply, . . . are certainly sufficient,” id. at 452, applying stricter scrutiny. The plurality’s ultimate holding suggests that strict scrutiny was applied:

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

Id. at 452. Indeed, Chief Justice Burger, in dissent, thought as much; he believed, though, that absent a fundamental right, such scrutiny was unwarranted. Id. at 460–61 (Burger, C.J., dissenting) (“Distressingly, the Court applies ‘strict scrutiny’ and invalidates Connecticut’s statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny.”).

156. Id. at 452–53 (plurality opinion) (footnote omitted).
157. See id. at 454–65 (Marshall, J., concurring).
dency requirement as a prerequisite to qualifying for in-state tuition benefits." He felt that Shapiro and Dunn raised "serious question[s] as to the validity of [Starns]" in sustaining such a requirement. The dissenting Justices expressed similar concerns. It is to this question—whether durational residency requirements for tuition purposes are constitutionally valid—that this Comment now turns, using Nebraska as a model for analysis.

III. DISCUSSION

Among the successful arguments offered in favor of durational residency requirements for tuition purposes, a few stand out: some because they have been voiced more often and others because they strike at the core issue—namely how to balance the rights of an individual who desires, and is willing to pay for, a college education, with a state's desire, given limited resources, to provide the benefit of such an education only to its own citizens. Perhaps the most often cited argument is the cost equalization justification upheld in Starns and

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158. Id.
159. Id. at 455. Justice White expressed similar concerns, but said he “did not . . . disagree with the judgment [in Starns],” but that he “ha[d] difficulty distinguish-

160. Chief Justice Burger commented, “Commendably, the Court has tried to cast the

161. Then-Justice Rehnquist acknowledged the dilemma more than thirty years ago:

This country's system of higher education presently faces a serious
crisis, produced in part by escalating costs of furnishing educational ser-

Id. at 469 (Rehnquist, J., dissenting).

Id. at 464.
Arguments distinguishing the benefit of higher education from other "fundamental" rights, from other basic necessities of life, or from other less "portable" benefits are also common. Finally, states have asserted that given the difficulty of policing the subjective intent element of a bona fide residence, a durational residency requirement serves to demonstrate the student's intent to make the state his or her permanent home. Effectively, this erects a barrier to student attempts to "game the system." But given the history and development of the right-to-travel jurisprudence and the holding in *Vlandis*, it is extremely doubtful whether those arguments can continue to support Nebraska's durational residency requirement for tuition purposes on purely legal grounds.

A. Cost Equalization

Certainly, operating and maintaining a state university is expensive. There is also no question that states can—and do—charge higher college tuition to nonresidents in order to partially offset some of their costs in providing public education. But that is not the issue here. The issue is whether a state can charge higher college tuition to new residents than to established residents in order to achieve that cost equalization. The tuition cases have all answered that question in the affirmative. It seems clear, though, that the right-to-travel cases, if applied to the tuition context, would lead to a contrary result.

All of the right-to-travel cases after *Shapiro* recognized that durational residency laws created a classification between new and old residents. By distinguishing the tuition cases from the right-to-travel cases, courts hearing tuition cases have avoided having to apply the *Shapiro* and *Dunn* approach. Even after *Saenz*, courts have continued to avoid applying right-to-travel analysis to tuition cases. See, e.g., *Lockett* v. Univ. of Kan., 111 P.3d 170 (Kan. Ct. App. 2005) (failing to mention *Saenz*).
sidents. But they also made it abundantly clear that the Constitution "does not provide for, and does not allow for, degrees of citizenship based on length of residence." In Shapiro, the Court acknowledged that "a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." The Court reaffirmed that principle in Maricopa County and Soto-Lopez.

To the extent that cost equalization is justified by a desire to reward long-time residents for past contributions, the Court, even when it has declined to rely on Shapiro and its progeny and apply strict scrutiny, has denounced such an objective as illegitimate.

The Saenz Court effectively drove the nail in the coffin when it concluded, "In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." It could not be clearer: cost equalization does not justify durational residency requirements for tuition purposes.

B. Fundamental Rights and the Basic Necessities of Life

The vast majority of United States citizens never earn college degrees. No one asserts that obtaining a higher education is a fundamental right. But, under the right-to-travel cases, that does not matter. Nevertheless, in both Starns and Sturgis, the courts declined to apply the Shapiro test because, in their view, there was a substantial difference between lower tuition and some other fundamental

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171. See supra section II.C.
175. Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 910–11 (1986). See also supra note 97 and accompanying text (discussing Soto-Lopez Court's finding that goal of rewarding veterans for their service "does not support a distinction between resident veterans").
177. Saenz, 526 U.S. at 507.
178. In 2004, for example, the population of the United States was 293,907,000. U.S. Census Bureau, Statistical Abstract of the United States: 2006, at 8 tbl.2 (125th ed. 2005). The total number of college degrees conferred in 2004 numbered only 2,727,000, id. at 142 tbl.206, and only 32.3% of the civilian labor force was a college graduate, id. at 389 tbl.580.
right, the infringement of which would compel strict scrutiny.179 This author agrees with Judge East: This was a misreading of Shapiro.180

The Shapiro test was relatively straightforward: "[A]ny classification which serves to penalize the exercise of [the right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."181 It is true that Shapiro concerned the denial of the most basic necessities of life—food, shelter, and the like—but that was not the controlling factor.182 Indeed, there is no constitutional right to welfare benefits at all.183 The Court applied strict scrutiny because "the classification [in Shapiro] touche[d] on the fundamental right of interstate movement."184

In Dunn, which concerned the fundamental right to vote, the Court held that "[i]t is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. . . . [A]ny classification which serves to penalize . . . that right" would trigger strict scrutiny.185 Additionally, Maricopa County dealt with a denial of non-emergency medical services, clearly not a fundamental right,186 though concededly the Court there viewed the medical services in question as more closely related to the benefits denied in Shapiro than to a denial of in-state tuition.187 In Soto-Lopez, the Court applied strict scrutiny even though the benefit denied there—a civil service employment preference for veterans—was neither a fundamental right nor a benefit that rose "to the same level of importance as the necessities of life and the right to vote."188

Again, Saenz resolved the question decisively. By identifying the Privileges or Immunities Clause of the Fourteenth Amendment as the source of the right to travel, at least insofar as that right embraces a citizen's right to be treated equally in his or her new state of residence, the Court clearly established that "the discriminatory classifi-

179. See supra text accompanying notes 135–42.
180. See supra note 142.
182. Arguably, the Court was unclear about what exactly was the controlling factor, see supra notes 70–73 and accompanying text, but Saenz resolved the question: It does not matter, see infra text accompanying note 189.
184. Shapiro, 394 U.S. at 638.
187. See id. at 259–60 & 260 n.15 (majority opinion); supra text accompanying notes 71–72.
188. Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 908 (1986). The Court did say, though, that the benefit sought was "unquestionably substantial." Id.
cation is itself a penalty" that requires strict scrutiny. Thus, since the nature of the benefit withheld is immaterial to right-to-travel analysis, a durational residency requirement for tuition purposes, just as for any other purpose, must be evaluated using strict scrutiny since the requirement is a penalty on the exercise of that right. Former Chief Justice Rehnquist, though he disagreed with the result, apparently interpreted Saenz the same way. Since cost equalization would not justify a durational residency requirement for tuition purposes under a heightened level of scrutiny, some other justification must be found.

C. Portability

Just as almost all the right-to-travel cases before it, Saenz attempted to create an exception from its holding for tuition cases. In Saenz, the Court did so by implicitly excepting from right-to-travel analysis durational residency requirements for obtaining certain benefits that might be considered “portable,” whatever that means. According to the Court,

because whatever benefits [received] will be consumed . . . in [the state], there is no danger that recognition of [a claim to those benefits] will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile.

In his dissent, former Chief Justice Rehnquist called this “‘you can’t take it with you’ distinction . . . more apparent than real.” To make his point, he compared welfare benefits with lower tuition. His comparison is worth quoting in full.

Welfare payments are a form of insurance, giving impoverished individuals and their families the means to meet the demands of daily life while they receive the necessary training, education, and time to look for a job. The cash itself will no doubt be spent in California, but the benefits from receiving this income and having the opportunity to become employed or employable will stick with the welfare recipients if they stay in California or go back to their true domicile. Similarly, tuition subsidies are “consumed” in-state but the recipient takes the benefits of a college education with him wherever he goes. A welfare subsidy is thus as much an investment in human capital as is a tui-

190. See supra notes 118–23 and accompanying text. The former Chief Justice also saw “no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university.” Saenz, 526 U.S. at 518 (Rehnquist, C.J., dissenting).
191. See supra section III.A.
193. Saenz, 526 U.S. at 505.
194. Id. at 519 (Rehnquist, C.J., dissenting).
tion subsidy, and their attendant benefits are just as “portable.” More importantly, this foray into social economics demonstrates that the line drawn by the Court borders on the metaphysical, and requires lower courts to plumb the policies animating certain benefits like welfare to define their “essence” and hence their “portability.”195

This comparison shows the absurdity of the Court’s attempt to save the tuition cases from invalidity. The only flaw in the former Chief Justice’s logic is his conclusion, for he takes the Court’s dicta too seriously. Lower courts will not have to worry about “portability” when evaluating a durational residency requirement denying a benefit because the “essence” of the benefit is immaterial to the analysis required. “[T]he discriminatory classification is itself a penalty.”196

D. Gaming the System

Perhaps one reason the Court is so concerned about carving out a tuition exception is that it fears students will fraudulently claim bona fide residency in an effort to “game the system.” According to at least three Justices in Vlandis, doing so would be both relatively easy and worthwhile:

The very act of enrolling in a [state] university with the intention of completing a program of studies leading to a degree necessitates the physical presence of the student in the [state]. Additional indicia of residency . . . —obtaining a . . . motor vehicle registration or driver’s license, registering to vote . . . — impose no significant burden on the out-of-state student in comparison with the thousands of dollars he will save in tuition and fees during the pursuit of a four-year course in undergraduate studies. Thus, what the Court concedes to the States in the way of distinguishing between resident and nonresident students, while perhaps a valuable bit of authority in issuing fishing and hunting licenses, is all but useless in making students who come from out of State pay even a portion of their fair share of the cost of the education that they seek to receive in . . . state universities.197

In discussing similar concerns, former Chief Justice Rehnquist in Saenz accused the majority of “ignoring] a State’s need to assure that only persons who establish a bona fide residence receive the benefits provided to current residents of the State.”198 He reminded the Court that it had declared in Vlandis that “[t]he State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but have come there solely for educational purposes, cannot take advantage of

195. Id. at 519–20 (footnote omitted).
196. Id. at 505 (majority opinion) (emphasis added).
198. Saenz, 526 U.S. at 516 (Rehnquist, C.J., dissenting). The former Chief Justice was in part responding to the majority’s statement, “We . . . have no occasion to consider what weight might be given to a citizen’s length of residence if the bona fides of her claim to state citizenship were questioned.” Id. at 505 (majority opinion).
the in-state rates.'" But an attempt to use durational residency requirements as a means of proving bona fide residency is an untenable proposition. In Dunn, the Court addressed whether durational residency requirements are justified on the grounds that "they create an administratively useful conclusive presumption that recent arrivals [to the state] are not residents."

As a technical matter, it makes no sense to say that one who has been a resident for a fixed duration is presumed to be a resident. In order to meet the durational residence requirement, one must, by definition, first establish that he is a resident. A durational residence requirement is not simply a waiting period after arrival in the State; it is a waiting period after residence is established. Thus it is conceptually impossible to say that a durational residence requirement is an administratively useful device to determine residence.

For the same reasons, it makes no sense to say that an individual is a bona fide resident for one purpose, but not for another. Indeed, if one of the most fundamental of all rights—the right to vote—is granted by a state only upon a showing of bona fide residence, it befuddles the mind to conceive how that residence is somehow less bona fide when evaluated for purposes of granting a concededly nonfundamental right. Aside from common sense and the dictates of logic, it would seem that principles of equitable estoppel would also preclude a state from asserting such an idea.

The fact of the matter is, as the Court has repeatedly asserted, there is a big difference between discriminating between residents and nonresidents in granting state benefits and discriminating between long-time and new residents in granting them. Nebraska has not recognized that difference.

E. The Perfect Plaintiff Versus the University of Nebraska

If I have been successful in making my case, the obvious conclusion is that the perfect plaintiff wins in a suit challenging the University of Nebraska's durational residency requirements for tuition purposes. None of the legal arguments and justifications supporting the durational residency requirement have any weight after Saenz: cost equalization cannot overcome strict scrutiny; portability is a tenuous

199. Id. at 517–18 (Rehnquist, C.J., dissenting) (quoting Vlandis, 412 U.S. at 453–54).
201. Id. at 350 n.20 (emphasis omitted).
202. There is no question that the same word, for example, can have different meanings depending on the purpose for which it is used. See, e.g., Hafer v. Melo, 502 U.S. 21 (1991) (defining a "person" for § 1983 purposes); Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (same); Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (deciding whether a "fetus" is a "person" for purposes of a homicide statute). However, that is very different from the case here, where the question is not the meaning of "bona fide resident," but rather, whether an individual has satisfied the definition of that term.
203. Indeed, the point is made in virtually all of the right-to-travel cases. See supra section II.C.
argument; and durational residency cannot be legitimately used to es-
tablish bona fide residency. That does not leave much, if anything, in 
the way of justification for the practice.

Even without applying Saenz, though, it is questionable whether 
the University of Nebraska could withstand a suit by the perfect 
plaintiff. Vlandis was clear: a presumption of nonresidency must be 
rebuttable. It appears, though, that the University of Nebraska does 
not see it that way.

There is no question that I am a bona fide resident of Nebraska, 
and I decisively established that fact when I submitted my Application 
for Residency Classification for Tuition Purposes. Indeed, I did every-
thing that has typically been required in establishing bona fide resi-
dency and more. Nevertheless, the university denied me resident 
status because “[s]tate law does not provide residency for tuition pur-
poses for nonresidents moving to the State for educational pur-
poses.” In effect, in presuming that “an individual who moves to 
Nebraska primarily to enroll in an institution of higher education of 
the state is . . . a non-resident for tuition purposes for the duration of 
his or her attendance at the University,” the university is violating 
the mandate of Vlandis.

Thus, even if I were unable to prevail under the right-to-travel 
cases, the University of Nebraska, by denying me residency classifica-
tion on the basis of an irrebuttable presumption, is violating my Four-
teenth Amendment rights to due process.

F. Practical and Political Considerations

So why not bring suit? Now is the time. Saenz set the stage—the 
perfect plaintiff versus a system that loses even without Saenz. Nev-

ertheless, practical and political considerations make it unlikely that 
the Court will reverse its course of attempting to distinguish the right-
to-travel cases from the tuition cases. Here, money and politics carry 
the day.

Virtually all states discriminate against nonresidents for tuition 

purposes. There is no problem with this. However, a large number of 
states have durational residency requirements, which discriminate 
not against nonresidents, but against new residents. If the Court 
were to hold such requirements unconstitutional, the impact on state 
universities could be staggering.

For example, the tuition budget at the University of Nebraska at 
Lincoln for the 2005–2006 academic year shows that nonresident tui-

204. See Gascoyne, supra note 9.
205. Letter from Alan L. Cerveny to author, supra note 29.
206. UNIV. OF NEB., supra note 21, at RP-5.7.1.
tion accounts for almost forty-three percent of gross tuition income. Presumably, at least some of that income is paid by bona fide residents of Nebraska, like the perfect plaintiff, who cannot overcome Nebraska's irrebuttable presumption of nonresidency. Even if only twenty percent of nonresidents were to claim bona fide residency for tuition purposes, the effect on the University's budget would amount to millions of dollars. Multiply that effect across hundreds of state colleges and universities around the country, and the result would be a substantial reduction in revenue for public educational institutions, which would then be forced to recoup those losses in some other way. The simplest way to make up the difference would be to increase tuition for residents, an unpopular course of action.

Indeed, with educational costs rising anyway, a Court decision that effectively mandated even greater costs would be exceedingly unpopular, fueling additional criticism aimed at a Court that is already being labeled "activist" both in government and the press. If Saenz was unprecedented, then a suit by a "perfect plaintiff" against the

207. E-mail from Chris Kabourek, Dir. of Budget, Univ. of Neb.-Lincoln, to Sandy Placzek, Assoc. Professor of Law Library, Head of Pub. Servs., Univ. of Neb. Coll. of Law (Apr. 26, 2006) (on file with author). According to Mr. Kabourek, the budgeted tuition income for the 2005-2006 academic year was as follows:

<table>
<thead>
<tr>
<th>Tuition Type</th>
<th>Dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resident Tuition</td>
<td>$68,490,982</td>
</tr>
<tr>
<td>Nonresident Tuition</td>
<td>$50,703,008</td>
</tr>
<tr>
<td>Less Remissions</td>
<td>($33,479,075)</td>
</tr>
<tr>
<td>Less Refunds</td>
<td>($2,741,462)</td>
</tr>
<tr>
<td>Net Tuition</td>
<td>$82,973,453</td>
</tr>
</tbody>
</table>

Id. Because the precise effect of remissions and refunds on the ratios between resident and nonresident tuition income were not readily available, only rough estimates of the actual percentage of total budget attributable to nonresident tuition income are possible. Id. ("Remissions are financial aid (and represents tuition that is waived). An example would include the tuition that is waived for an employee of the University who takes classes. There are several financial aid programs for nonresident students who, if qualified, can get the nonresident portion of their tuition waived."). In any case, the amount of nonresident tuition income relied upon by the university is substantial.


209. In a recent speech at the University of Nebraska College of Law, Justice Ginsburg illustrated her point that "in some political circles, it is fashionable to criticize and even threaten federal judges who decide cases without regard to what the 'home crowd' wants" by identifying statements made by politicians quoted in prominent national newspapers. Ruth Bader Ginsburg, Judicial Independence: The Situation of the U.S. Federal Judiciary, 85 Neb. L. Rev. 1, 7–9 & nn.30–38 (2006).

University of Nebraska would really rock the boat. It simply is not going to happen.

**IV. CONCLUSION**

Not unlike the admonition of the Bible that, "Ye shall have one manner of law, as well for the stranger, as for one of your own country," the right of interstate travel must be seen as insuring new residents the same right to... government benefits and privileges in the States to which they migrate as are enjoyed by other residents.\(^{211}\)

This does not necessarily mean, however, that state colleges and universities must simply let everyone coming to the state enjoy the benefits of in-state tuition. Rather, it means that states must evaluate more closely whether those who claim bona fide residency really do intend to stay. One way to do this would be to presume, rebuttably, that any student from outside the state is a nonresident, not just for tuition purposes, but for all purposes.

Thus, to register to vote in Nebraska, for example, a student new to the state might have to do more than just show physical presence in Nebraska and sign a form.\(^{212}\) He might have to show that he has obtained a Nebraska driver's license, registered his car in Nebraska, established a bank account in Nebraska, and so on. And to obtain a Nebraska driver's license, he might have to register his car and establish a bank account. And to register his car, he might have to, at the least, establish a bank account. In other words, by forcing the student to go to the trouble of jumping through a larger number of hoops, the ease with which students could abuse the system is lessened.

Of course, some students will be willing to jump through any number of hoops to obtain in-state tuition. Beyond prosecuting students for fraud for lying about their intent, there is little that can be done to...

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\(^{211}\) Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) (quoting Leviticus 24:22 (King James)).

prevent students from "gaming the system." But let us be honest: Students game the system now.213 At a minimum states can—and should—reward honest students who are legitimately bona fide residents by granting them the benefits offered to, in some cases, illegal aliens.214

States should permit students to prove their case and obtain residency classification from the time they become residents. Doing so recognizes that in some cases—as in the case of the perfect plaintiff here—whole families relocate to make better lives for themselves. Those families should not be discriminated against solely because they are new residents. There is no reason for them to be strangers in their own land.

John W. Anderson

213. For example, the author knows a number of students who have managed to obtain in-state tuition by virtue of the fact that their spouses obtained employment as a recruit to the state. The employer, by writing a letter saying the employer "recruited" the spouse to the state—an utterly false statement—provides the student with the means of obtaining in-state tuition, despite the fact that the student and his spouse never even register to vote, register their automobiles, or establish Nebraska bank accounts. In some cases, the spouse works as little as two weeks before quitting. The student retains the benefit of residency classification, however, for the duration of his or her attendance at the university.

214. The Nebraska Legislature recently amended section 85-502 to include illegal aliens as residents for tuition purposes. See L.B. 239, 99th Leg., 1st Sess. (Neb. 2006) (modifying NEB. REV. STAT. § 85-502). There may be good reasons for such a law, but those same reasons—and perhaps some even better ones—justify treating citizens and residents at least as well as illegal aliens. Justice Jackson long ago recognized the absurdity of the contrary viewpoint:

Even as to an alien who had "been admitted to the United States under the Federal law," this Court, through Mr. Justice Hughes, declared that "He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union." Why we should hesitate to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens passes my understanding. The world is even more upside down than I had supposed it to be, if California must accept aliens in deference to their federal privileges but is free to turn back citizens of the United States unless we treat them as subjects of commerce.

Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) (quoting Truax v. Raich, 239 U.S. 33, 39 (1915)).