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Tuition Residence Requirements: A Second Look in Light of Zobel and Martinez

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Tuition Residence Requirements: A Second Look in Light of *Zobel* and *Martinez*

INTRODUCTION

In the early 1970's the constitutionality of tuition residence requirements generated a great deal of debate among legal scholars.[1] A pervasive feeling existed that residence requirements might work grave injustices in certain circumstances.[2] This sentiment, which energized the legal discourse, probably stemmed from a variety of sources. For example, the perception of injustice may have flowed partially from the notion that education, despite Supreme Court pronouncements to the contrary,[3] was in some way a "fundamental right." Similarly, the realization that a college education was becoming a virtual "necessity" for survival in our rapidly changing modern economy may help explain the concern that such requirements might be unjust. Finally, the skyrocketing cost of a college education may have contributed to the fear of injustice.[4] From whatever source the perception derived, even a cursory examination of the literature generated in this area reveals that the cost and availability of higher education greatly interested many legal scholars.

Two recent United States Supreme Court decisions will likely revitalize the long-dormant interest in the constitutionality of tuition residence requirements. The Supreme Court's analysis in *Zobel v. Williams*[5] and *Martinez v. Bynum*[6] appears to undercut much of the judicial logic that upheld tuition residence requirements in the past. In so doing, these cases shed

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1. Some of the more thoughtful articles include: Spencer, *The Legal Aspects of the Nonresident Tuition Fee,* 6 OR. L. REV. 332 (1927); Note, *Residence Requirements for Tuition: An Unsolved Dilemma,* 6 IND. L. REV. 283 (1972); Note, *The Constitutionality of Resident/Non-Resident Tuition Differentials,* 24 S.C.L. REV. 398 (1972); Comment, *Nonresident Tuition Charged By State Universities in Review,* 38 UMKC L. REV. 341 (1970).

2. As, for example, if such a requirement effectively precluded a student from ever acquiring in-state status while still a student. For a recognition of this problem see Vlandis v. Kline, 412 U.S. 441 (1973).

3. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

4. In addition to generally rising costs, nonresidents, depending on the institution, may be required to pay from one and one quarter to more than three times the tuition charged a resident student attending the same institution. Note, *The Constitutionality of Resident/Non-Resident Tuition Differentials,* 24 S.C.L. REV. 398 (1972).

5. 457 U.S. 55 (1982).

6. 461 U.S. 321 (1983).

considerable doubt on the validity of the penalty analysis developed in *Shapiro v. Thompson*[7] and its progeny, at least as applied to durational residence requirement for tuition purposes. This Note suggests that the Supreme Court has, in fact, abandoned much of the analysis employed in earlier decisions upholding tuition residence requirements[8] and has adopted a new line of reasoning that renders certain current tuition residence requirements unconstitutional. In effect, *Zobel* and *Martinez* recharacterize previous cases dealing with durational residence requirements and imply that any durational residence requirement is constitutionally invalid except to the extent that it serves solely as a test of bona fide residence.[9] Because certain tuition residence requirements are much more restrictive than necessary to merely assure that a person is a bona fide resident,[10] they may be invalid in light of *Zobel* and *Martinez*. More specifically, this Note argues that a one-year tuition residence reuirement augmented by a provision refusing to count time spent in the state for the predominant purpose of attending a university towards the specified waiting period is unconstitutional.

Part I of this Note traces the evolution of the case law in the area of tuition residence requirements to clarify the underpinnings of the present state of the law. Part II then discusses the two recent cases of *Zobel* and *Martinez* and their potential impact in analyzing the constitutionality of present tuition residence requirements. Part III of the Note concludes by suggesting that the Supreme Court in *Zobel* and *Martinez* abandoned the rationale underlying early decisions in this area, and in so doing, paved the way for a renewed attack on the constitutionality of certain tuition residence requirements. Namely, tuition residence requirements falling into a grey area beyond the one-year durational residence requirement which the Supreme Court in *Zobel* explicitly held to be a valid test of bona fide residence, may be unconstitutional.[11]

I. TUITION RESIDENCE REQUIREMENTS: AN OVERVIEW

A. The Residence Requirement

Although many students have attacked the constitutionality of tuition residence requirements in the past 15 years,[12] it is a widely accepted practice

7. 394 U.S. 618 (1969).

8. Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970).

9. *Zobel,* 457 U.S. at 64 n.13; *Martinez,* 461 U.S. at 325.

10. For example, a residence requirement imposing a one-year waiting period, but refusing to count physical presence in the State for the predominant purpose of attending college or university towards that waiting period, effectively precludes a student from ever acquiring in-state status while in college. Such a requirement precludes *all* students who enroll from out of state and later become bona fide residents from ever acquiring in-state status, and thus is more restrictive than necessary to test the bona fides of a person's residency.

11. *See infra* note 176 and accompanying text.

12. *See, e.g.,* cases discussed *infra* Parts II-B & II-D.

for tax-supported universities to differentiate among students with respect to tuition on the basis of residence.[13] Rather than focusing on the validity of this differentiation, however, the controversy now focuses on the prerequisites to establishing in-state status. Most universities require that students be "residents" of, or "legally domiciled" in, the state where the university is located.[14] Universities generally implement the requirement in the form of a durational residence requirement which demands actual presence within the state for six months to one year prior to enrollment.[15] Other states enhance this restriction by refusing to count towards the specified waiting period time spent in the state for the predominant purpose of attending a university.[16]

Durational residence requirements such as these specify that a person must reside in a state for a certain period of time before demanding the privileges restricted to state residents.[17] Bona fide residence reqirements, on the other hand, merely require that a person *does* establish residency before demanding resident privileges.[18] In order to be a bona fide resident, a person must essentially meet the requirements for domicile. Namely, the person must be present in the state with the intent to remain indefinitely.[19]

The logic underlying durational residence reqirements is that they assure that the student intends to remain in the state indefinitely and is not temporarily in the state for the sole purpose of securing the benefits of the state's higher education facilities.[20] That is, the durational residence requirement is justified as a measure to determine whether the student is in fact a bona fide resident. The effect of such durational residence reqirements, however, is to create two distinct "nonresident" categories: (1) true nonresidents — citizens of states other than the one where the university is

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13. *See generally* Spencer, *The Legal Aspects of the Nonresident Tuition Fee,* 6 OR. L. REV. 332 (1927). *See also* Note, *Residence Requirements for Tuition: An Unsolved Dilemma,* 6 IND. L. REV. 283 (1972) [hereinafter cited as Note, *Residence Requirements for Tuition*]; Note, *The Constitutionality of Resident/Non-Resident Tuition Differentials,* 24 S.C.L. REV. 398 (1972) [hereinafter cited as Note, *Resident/Non-Resident Tuition Differentials*].

14. Note, *Residence Requirements for Tuition, supra* note 13, at 284. For tuition purposes "domicile" and "residence" are generally treated as synonomous. The concepts are distinguishable, however. Domicile requires physical presence at a place with intent to remain indefinitely, whereas residence generally requires less stringent connections with the state. *Id.* at 284 n.8.

15. *Id.* at 284.

16. Indiana's tuition residence requirement provides an example of such a scheme. INDIANA UNIVERSITY, INDIANA UNIVERSITY STUDENT HANDBOOK, Rules Determining Resident and Nonresident Student Status for Indiana University Fee Purposes (1984). *See infra* note 213.

17. *Martinez,* 461 U.S. at 329.

18. *Id.* at 329-30.

19. *See infra* notes 201-03 and accompanying text.

20. Requiring a student to maintain residence within the state for one year constitutes "an evidence of the *bona fides* of his intention to remain a permanent resident of the state and that he is not temporarily residing within the state for the mere purpose of securing the advantages of the university." Bryan v. Regents of Univ. of Cal., 188 Cal. 559, 561-62, 205 P. 1071, 1072 (1922).

located; and (2) bona fide residents — citizens of the state where the university is located who have not yet lived in the state for the requisite time period, and who therefore do not qualify for in-state tuition rates.[21] As noted above, *Zobel* and *Martinez* are extremely important in the area of durational residence requirements because they explain this connection between durational and bona fide residence requirements and require that such waiting periods do *no more* than assure domicile in a particular state.[22] Any durational residence requirement which does more than provide a test of bona fide residence may be unconstitutional.

Before analyzing the decisions leading the law to its present state, it is important to note that, generally, a state need not give nonresidents all the benefits provided for its residents.[23] All citizens of the state are, however, entitled to equal protection regardless of the length of their residency.[24] The constitutionality of any residence requirements creating distinctions between classes of residents must therefore be analyzed under the equal protection clause of the fourteenth amendment.[25] The more complex question, and the one courts struggle with in the area of residence requirements, concerns the standard of scrutiny to be applied. Generally, in examining classifications challenged on constitutional grounds, courts require that disparate treatment not be arbitrary and that the classification be reasonably related to some valid governmental purpose.[26] If, however, the classification has some effect on the exercise of a "fundamental right,"[27] or if the classification is based upon a "suspect class" such as race,[28] the statute will be upheld only if it passes strict judicial scrutiny. In order to pass such scrutiny, the statutory classification must be "necessary to promote a compelling state interest."[29]

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21. Note, *Residence Requirements for Tuition, supra* note 13, at 285.

22. Zobel v. Williams, 457 U.S. 55 (1982); Martinez v. Bynum, 461 U.S. 321, 325-30 (1983). *Zobel* and *Martinez* in essence recharacterize previous cases dealing with residence requirements as requiring that such residence requirements do no more than test the bona fides of a person's residency.

23. Blake v. McClung, 172 U.S. 239, 256 (1898); American Commuters Ass'n v. Levitt, 279 F. Supp. 40, 48 (S.D.N.Y. 1967), *aff'd,* 405 F.2d 1148 (2d Cir. 1969).

24. The equal protection clause of the fourteenth amendment requires uniform treatment of "persons standing in the same relation to the governmental action" in question. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

25. Note, *Residence Requirements for Tuition, supra* note 13, at 286.

26. The Supreme Court first articulated the "rational basis" standard of equal protection analysis in Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). In *Lindsley* the Court stated that one who assails a classification on equal protection grounds carries the burden of showing that the classification "does not rest upon any reasonable basis, but is essentially arbitrary." *Id.* at 78-79. *See also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

27. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

28. Loving v. Virginia, 388 U.S. 1 (1967).

29. *Kramer,* 395 U.S. at 627.

B. The Early Tuition Cases

Early case law dealing with tuition residence requirements applied the less demanding form of scrutiny which merely required that the residence requirement not be arbitrary or invidious, thus making it very difficult for a student to mount a successful challenge. The first case to deal with tuition residence requirements was the 1922 case of *Bryan v. Regents of University of California.*[30] In *Bryan,* the petitioner challenged a California state statute requiring nonresident students to pay a tuition fee not required of residents.[31] The statute defined a nonresident student as one who had not been a bona fide resident of California for more than one year preceding his entrance into the university.[32] The petitioner, although a bona fide resident of California, could not register as a resident because her parents had not resided in California for a full year prior to her enrollment.[33] The petitioner specifically complained that the statute violated the privileges and immunities clause of the California Constitution in that the legislature lacked a reasonable basis for extending lower tuition rates to bona fide residents of greater than one year while denying the privilege to bona fide residents of less than one year.[34] The California Supreme Court upheld the classification as evidence of a student's bona fide intent to remain in the state by comparing the tuition residence requirement to the one-year waiting period to exercise the right to vote.[35] The court thus found that the one-year waiting period was not unreasonable or arbitrary.[36]

Following *Bryan,* the issue of the constitutionality of tuition residence requirements did not arise again for 38 years.[37] In 1960, the Idaho case of *Newman v. Graham*[38] resurrected the issue and revived the assault on tuition residence requirements. The regulation challenged in *Newman,* however, presented the court with a slightly different twist to the issue addressed in *Bryan.* In *Bryan,* the regulation did not absolutely deny a student the opportunity to comply with the waiting period while still in college.[39] The regulation challenged in *Newman,* on the other hand, permanently froze a student's nonresident status for his entire academic career, regardless of the fact that he might at some point become a bona fide resident of the state.[40]

30. 188 Cal. 559, 205 P. 1071 (1922).
31. *Id.* at 560, 205 P. at 1071.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 561-62, 205 P. at 1072.
36. *Id.*
37. Note, *Resident/Non-Resident Tuition Differentials, supra* note 13, at 401.
38. 82 Idaho 90, 349 P.2d 716 (1960).
39. *Bryan,* 188 Cal. at 560, 205 P. at 1071.
40. *Newman,* 82 Idaho at 92, 349 P.2d at 717.

Because this regulation did not afford students an opportunity to show a change of resident status, the Idaho Supreme Court, applying state constitutional law, found that it was unreasonable and denied equal protection to persons of the same class who were similarly situated.[41] In contrast, a later Colorado case, *Landwehr v. Regents of the University of Colorado,*[42] held that a regulation similar to that found unconstitutional in *Newman* was not arbitrary or unreasonable and therefore did not violate the United States Constitution.[43]

A federal court case following the *Newman* and *Landwehr* decisions seems to fall somewhere between these polarized positions. In *Clarke v. Redeker,*[44] an Illinois resident entered the University of Iowa as an undergraduate, married an Iowa resident, and purchased property in Iowa.[45] After becoming, in essence, a bona fide Iowa resident, he entered Iowa's law school and requested resident status.[46] The registrar, however, interpreted the residency regulations to require that his nonresident status continue.[47] The regulation in question made it virtually impossible to establish residency while in student status because it created a presumption that an out-of-state student was in Iowa primarily for educational purposes and would not be considered to have established residence in Iowa.[48]

Plaintiff argued that the Iowa regulation violated the United States Constitution, relying primarily on the United States Supreme Court's decision in *Carrington v. Rash.*[49] In *Carrington,* the plaintiff challenged a clause in the Texas Constitution that denied military personnel the right to vote in Texas if they first established residency in Texas while serving as a member of the military.[50] The Court in *Carrington* held that this provision violated

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41. *Id.* at 95, 349 P.2d at 719.

42. 156 Colo. 1, 396 P.2d 451 (1964).

43. *Id.* at 5, 396 P.2d at 453. The court failed to set forth any of the reasons for its holding. It merely held, after citing several cases supporting its view, that the classification was not arbitrary or unreasonable and was not so lacking in a foundation as to contravene constitutional principles. *Id.*

44. 259 F. Supp. 117 (S.D. Iowa 1966).

45. *Id.* at 120-21.

46. *Id.* at 120.

47. *Id.*

48. The regulation read as follows:

> A student from another state who has enrolled for a full program, or substantially a full program, in any type of educational institution will be presumed to be in Iowa *primarily for educational purposes,* and will be considered not to have established residence in Iowa. Continued residence in Iowa during vacation periods or occasional periods of interruption to the course of study does not of itself overcome the presumption.

Id. at 121 (emphasis added). The statute is set out at length here because it provides an example of a regulation which the analysis in this Note suggests may now be unconstitutional in light of *Zobel* and *Martinez.*

49. 380 U.S. 89 (1965).

50. *Id.*

the equal protection clause because it denied new service members the opportunity of ever controverting the presumption of nonresidence.[51]

The *Clarke* court distinguished the Texas constitutional provision on the grounds that the Iowa regulation did not *absolutely* prevent reclassification as a resident in appropriate circumstances.[52] The statute merely presumed a student to be in Iowa for the predominant purpose of obtaining an education.[53] Because the court construed the regulation as being rebuttable, it held that the regulation was not palpably unreasonable or arbitrary.[54] Significantly, the court also held that the legislation was reasonably related to the state's valid interest in achieving a partial cost equalization between resident and nonresident students.[55]

Two conclusions thus emerged from these early cases dealing with tuition residence requirements under the rational basis standard of scrutiny. First, a statute or regulation creating an irrebuttable presumption of nonresidency, thereby freezing residency status for the duration of a student's academic career, would be found unreasonable and would therefore violate the equal protection clause.[56] Second, regulations which merely created a rebuttable presumption as to a student's residence would probably be constitutional.[57]

C. *New Challenges:* Shapiro *and its Progeny*

In 1969 the Supreme Court, with its decision in *Shapiro v. Thompson,*[58] began to analyze residence reqirements in a new context and placed the constitutionality of all durational residence requirements in doubt. More specifically, the Court developed a relationship between equal protection and the right to interstate travel and migration.[59] The Supreme Court recognized that citizens have a constitutional right "to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which

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51. *Id.* at 96.
52. 259 F. Supp. at 122.
53. *Id.* at 121.
54. *Id.* at 122-23.
55. *Id.* at 123. The primary justification advanced was that parents or students paid taxes to support the university. By granting state residents lower tuition rates and charging nonresidents higher rates, the cost of operating the university was more evenly distributed between the two groups. *Id.* The Supreme Court later rejected this view in *Zobel. See infra* notes 171-75 and accompanying text.
56. *See Clarke,* 259 F. Supp. 117.
57. *See Bryan,* 188 Cal. 559, 205 P. 1071; *Landwehr,* 156 Colo. 1, 396 P.2d 451; *Clarke,* 259 F. Supp. 117. *But see Newman,* 82 Idaho 90, 349 P.2d 716.
58. 394 U.S. 618 (1969).
59. The Court further expanded and explained this relationship in Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) and Dunn v. Blumstein, 405 U.S. 330 (1972).

unreasonably burden or restrict this movement."[60] Tying this constitutional right of freedom to travel to the equal protection clause of the fourteenth amendment enabled the Court to apply strict scrutiny to statutes imposing durational residence requirements.[61] With this development came the prospect of stricter judicial scrutiny for students wishing to challenge tuition residence requirements.

In *Shapiro,* the Court reviewed statutes from the District of Columbia, Connecticut, and Pennsylvania, all of which imposed one-year durational residence requirements before new citizens could become eligible for welfare benefits.[62] Because the statutes attempted to prevent the poor from immigrating, they implicated the constitutional right to interstate migration.[63] The Court found that any state restriction that *penalized* the exercise of that right had to be supported by *compelling* government interests.[64]

Employing this strict standard, the Court struck down the statutes, finding that the states' proffered interests were not sufficiently compelling.[65] The Court first rejected defendants' argument that the states had a compelling interest in preventing persons from becoming a continuing burden on state welfare programs.[66] More importantly, at least for the anlaysis of residence requirements, the Court rejected defendants' suggestion that rewarding older citizens on the basis of past contributions was a *compelling* state interest.[67] The Court noted that such reasoning "would permit the State to apportion

60. *Shapiro,* 394 U.S. at 629. Although all courts agree that the right to interstate travel is a constitutional right, courts have disagreed about which specific clause in the Constitution creates the right. Courts have in the past attributed the right to the privileges and immunities clause of article IV and the fourteenth amendment, the commerce clause, the due process clause, and the general notion of national citizenship. Recent Developments, *Constitutional Law—Right to Travel—Validity of Alaska's Income Distribution Plan,* 50 TENN. L. REV. 537, 540-41 nn.25-29 (1983).

61. Although the right to interstate travel and migration is a full-fledged "constitutional" as opposed to a "fundamental" right, the Court employs a similar test when analyzing equal protection claims arising in cases dealing with the right to travel. As noted previously, when a statutory classification has some effect on the enjoyment of a fundamental right, it will be upheld only if the classification is necessary to further a compelling state interest. *See supra* notes 22-26 and accompanying text. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000 (1978).

62. 394 U.S. at 618.

63. Although the Court could have decided this case as merely a constitutional right to travel case, *see, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) and Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), the Court was probably justified in applying equal protection analysis since the line drawn by the statute was drawn explicitly on the basis of the exercise of that right. Thus, although the statute may have had no actual deterrent effect on the right to travel, it did draw a line *purposefully* discriminating against those exercising their right. The effect was nevertheless important since the Court did require that the statute *penalize* the right. 394 U.S. at 634.

64. *Id.* at 634.

65. *Id.* at 627-38.

66. *Id.* at 627-33.

67. *Id.* at 632-33.

all benefits and services according to the past tax contributions of its citizens. The equal protection clause prohibits such an apportionment of state services."[68]

A broad reading of *Shapiro,* one which tuition residence requirement challengers immediately seized upon, suggests that any residence requirement could be construed as penalizing the exercise of the right to travel, thereby triggering strict scrutiny. The Court, however, explicitly withheld judgment on durational residence requirements in areas other than welfare benefits. The Court stated in a footnote:

> 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.[69]

The Court thus posited two possible rationales for upholding tuition residence requirements.

The Court appeared to adopt the broader reading of *Shapiro* in *Dunn v. Blumstein*[70] and suggested that any interference with the right to interstate migration would automatically trigger strict scrutiny. The provision attacked in *Dunn* imposed a one-year state and a three-month county residence requirement as a prerequisite to voting.[71] The Court employed strict scrutiny in striking down the durational residence requirement and emphasized that "durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' "[72] Furthermore, the Court reinforced the importance of the penalty analysis employed in *Shapiro* by refusing to accept Tennessee's suggestion that its statute could be distinguished from the statute in *Shapiro* because it did not actually deter immigration.[73] The Court stressed that actual deterrence was not the basis for its holding in *Shapiro.* Rather, the crucial factor was that durational residence requirements create classifications that serve to *penalize* the right to travel.[74] Specifically, the Court found that durational residence laws penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such

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68. *Id.*
69. *Id.* at 638 n.21 (emphasis in original).
70. 405 U.S. 330 (1972).
71. *Id.* at 331.
72. *Id.* at 342 (quoting *Shapiro,* 304 U.S. at 634).
73. *Id.* at 339.
74. *Id.* at 340.

laws forced a person who wished to travel and change residence to choose between travel and the basic right to vote.[75]

Because *Shapiro* and *Dunn* each involved more than just the constitutional right to travel, they suggested that strict scrutiny in right-to-travel cases should be reserved for situations in which the right to travel is coupled with another basic right. In *Shapiro,* the statute denied indigents establishing a new residence the basic "necessities" for sustaining a household.[76] In *Dunn,* the statutes imposing durational residence requirements denied persons their "fundamental political right" to vote.[77] The Court in *Memorial Hospital v. Maricopa County*[78] acknowledged its propensity to couple the right to interstate travel with other "fundamental rights" or "necessities" and in fact appeared to establish a two-part inquiry to determine whether strict scrutiny should apply to a durational residence requirement. First, the line or classification must be drawn on the basis of the exercise of the right of interstate travel.[79] Second, there must be a significant penalty on persons exercising that right.[80] That is, the exercise of the right to interstate travel must affect a basic necessity such as the need for welfare, or medical treatment.[81] The Court, finding that the right to medical treatment was indeed such a necessity, struck down the Arizona statute requiring one year of residency as a prerequisite to free non-emergency medical treatment for indigents.[82]

As this analysis suggests, the Court in *Maricopa County* adopted a narrower reading of *Shapiro* than did the Court in *Dunn.* The Court recognized the possibility that some durational residence requirements might not substantially penalize the right to travel to the extent necessary to invoke strict scrutiny.[83] In fact, the Court indicated in a footnote that tuition residence requirements do not deny students the basic necessities of life.[84] The Court thus made explicit that which it had foreshadowed five years earlier in *Shapiro;* namely, that tuition residence requirements might not constitute a *penalty* on interstate travel.[85] The Court nevertheless reaffirmed the notion that neither intent to deter nor actual deterrence of interstate travel was necessary to invoke strict scrutiny.[86] Rather, as it had in *Shapiro* and sub-

75. *Id.* at 342.
76. 394 U.S. at 627.
77. 405 U.S. at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).
78. 415 U.S. 250 (1974).
79. *Id.* at 253.
80. *Id.* at 259.
81. *Id.*
82. *Id.* at 269.
83. *Id.* at 258-59.
84. *Id.* at 260 n.15.
85. *Shapiro,* 394 U.S. at 638 n.21. *See supra* text accompanying note 69.
86. *Maricopa County,* 415 U.S. at 257-58.

sequent cases, the Court looked to the penalization of the right to travel, albeit now requiring a more substantial penalty.[87]

In *Sosna v. Iowa,*[88] the Court appeared to retract a bit from the penalty analysis outlined in *Shapiro* and its progeny and began to erode the doctrine which it later abandoned with its decisions in *Zobel* and *Martinez.* The statute challenged in *Sosna* imposed a one-year waiting period on new residents before they could obtain a divorce.[89] The Court did not address the issue of whether the statute constituted a penalty on plaintiff's right to travel or consider whether the statute deprived plaintiff of a basic necessity or a fundamental right as required by *Maricopa County.* Instead, the Court applied a balancing test, weighing that state's purposes against the inconvenience placed on the individual.[90] The Court decided that the durational residence requirement could "reasonably be justified" to ensure that a person seeking a divorce had a modicum of attachment to the state and that the state's divorce decrees remained free from successful collateral attack.[91]

By using what Justice Marshall in his dissent labeled "an *ad hoc* balancing test,"[92] the Court deviated sharply from the path plotted in *Shapiro* for dealing with residence requirements. The Court's failure to enunciate its rationale for departing from *Shapiro,* either by denouncing the penalty analysis or by distinguishing *Sosna* as a unique case in which the test is inapplicable,[93] left its approach to durational residence requirements in a very uncertain state. The Court did not further clarify this condition until many years later in *Zobel* and *Martinez.*

D. The More Recent Tuition Residence Requirement Cases

In the midst of the uncertainty generated by these cases, and prior to the beginning of the erosion of the *Shapiro* penalty doctrine, courts decided three of the most influential cases in the specific area of tuition residence requirements. The first case to analyze tutition residence requirements in light of the Court's holding in *Shapiro* was *Kirk v. Board of Regents.*[94] The statute challenged in *Kirk* defined a resident student as "any person who has been a bona fide resident of the [s]tate for more than one year imme-

87. *Id.* at 257-59.
88. 419 U.S. 393 (1975).
89. *Id.* at 395.
90. *Id.* at 406-09.
91. *Id.* at 407.
92. *Id.* at 419 (Marshall, J., dissenting).
93. Divorce is arguably not a "fundamental right" or a "necessity" as required by *Maricopa County,* and is therefore distinguishable. *See* Recent Developments, *supra* note 60, at 545. *But cf.* Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry is fundamental); Boddie v. Connecticut, 401 U.S. 371 (1971) (filing fees for divorce must be waived for indigents).
94. 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970).

diately preceding the opening day of a semester during which he proposes to attend the university."[95] Plaintiff was the wife of a California resident and therefore presumed she would be classified as a resident for tuition purposes.[96] When she enrolled at the University of California, however, the University classified her as a nonresident since she had not met the one-year residence requirement.[97] Plaintiff contended, relying on *Shapiro,* that the one-year durational residence requirement unconstitutionally infringed on her constitutional right to travel.[98] She further alleged that the statute violated the equal protection clause because the infringement was not justified by a compelling state interest.[99]

The California Supreme Court held that the residence reqirement did not infringe on plaintiff's constitutional right to travel and should therefore be judged by ordinary equal protection standards.[100] The Court distinguished *Shapiro,* pointing out that, unlike *Shapiro,* this case did not involve the "immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children."[101] The Court also distinguished a line of cases that held statutes creating irrebuttable presumptions of nonresidence to be unconstitutional. The Court held that these cases granted states the unquestioned power to impose "reasonable" residence restrictions.[102] After distinguishing these cases, the Court applied rational basis scrutiny and found that the regulation was reasonably related to the state's *legitimate* objective of achieving partial cost equalization.[103] The Court noted that although *Shapiro* rejected such an interest as not *compelling,* the Court's holding was limited to cases like *Shapiro* which involved benefits essential to life and health.[104] The Court concluded that such an interest may well be a *legitimate* state interest for the purpose of the rational basis test.[105]

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95. *Id.* at 433, 78 Cal. Rptr. at 261.
96. *Id.*
97. *Id.*
98. *Id.* at 437, 78 Cal. Rptr. at 265.
99. *Id.*
100. *Id.* at 438-39, 78 Cal. Rptr. at 267.
101. *Id.*
102. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965); Heiner v. Donnan, 285 U.S. 312 (1932); Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960).
103. The court found the regulation reasonably related to the state's objective of:

> [achieving partial cost equalization by] collecting lower tuition fees from those persons who, directly or indirectly, have recently made some contribution to the economy of the state through having been employed, having paid taxes, or having spent money in the state for the brief period of one year prior to their attendance at a publicly financed institution of higher education.

Kirk, 273 Cal. App. 2d at 444, 78 Cal. Rptr. at 269.
104. *Id.*
105. *Id.*

The Supreme Court added its approval to the California court's reasoning when it summarily affirmed the decision of a federal district court in Minnesota in the case of *Starns v. Malkerson.*[106] The statute challenged in *Starns* was very similar to that challenged in *Kirk.* The statute specified:

> No student is eligible for resident classification in the University, in any college thereof, unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto. This requirement does not prejudice the right of a student admitted on a nonresident basis to be placed thereafter on a resident basis provided he has acquired a bona fide domicile of a year's duration within the state. Attendance at the University neither constitutes nor necessarily precludes the acquisition of such a domicile. For University purposes, a student does not acquire a domicile in Minnesota until he has been here for at least a year primarily as a permanent resident and not merely as a student; this involves the probability of his remaining in Minnesota beyond his completion of school.[107]

The district court stated the sole issue to be whether it was "constitutionally permissible for a state to create an *irrebuttable presumption* that any person who has not continuously resided in Minnesota for one year before entering the University is a nonresident for tuition purposes."[108]

Plaintiffs, again relying on *Shapiro,* asserted that the statute infringed upon their constitutional right to interstate travel and should therefore be scrutinized under the stricter "compelling state interest" test.[109] The court, however, refused to apply strict scrutiny and distinguished *Shapiro* in two ways. First, the court pointed out that the statute challenged in *Shapiro,* imposing a one-year waiting period for welfare benefits, had the specific objective of excluding from the jurisdiction the poor who needed or might need relief.[110] The statute imposing a one-year waiting period for tuition preference at issue in *Starns,* however, did not have the specific objective of excluding or even deterring out-of-state students from attending the university and thus did not chill a person's right to travel.[111] The second distinction pointed out by the court was similar to that made by the California court in *Kirk.* The statute in *Shapiro* had the effect of denying the basic necessities of life to needy residents. The tuition statute in *Starns,* on the other hand, was not shown to have any dire effects on nonresident students and therefore would be less likely to make a person hesitate when deciding to establish residence in Minnesota and apply to the university.[112]

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106. 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971).
107. *Id.* at 235-36 (emphasis added). Again, the statute is set out at length because of the importance of the language for later analysis.
108. *Id.* at 236-37 (emphasis added).
109. *Id.* at 237.
110. *Id.*
111. *Id.* at 237-38.
112. *Id.* at 238.

The court recognized that the regulation discriminated against the class of residents who had established bona fide residence in the state but who had been in the state for less than one year.[113] But, having distinguished *Shapiro* and decided there was no infringement upon the constitutional right to interstate travel, the court upheld the regulation under the rational basis standard of scrutiny.[114] The court found that it was reasonable to presume that a person who had not resided within the state for one year was a nonresident student.[115] Furthermore, it was reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the state for one year.[116]

In addition to finding the above presumptions reasonable, the court held that the regulatory classification was reasonably related to a *legitimate objective* of the State of Minnesota.[117] The *primary* justification the defendants offered was that the one-year waiting period was a rational attempt by the state to equalize the cost of a college education for those individuals not recently contributing to the state's economy through employment, tax payments, and expenditures therein.[118] The court again relied on the reasoning in *Kirk,* stating:

> as we read *Shapiro v. Thompson,* while the payment of taxes, fiscal integrity and budgetary planning are expressly rejected either as "traditional equal protection tests" or as "compelling state interests" that justify the imposition of benefits essential to life and health, they may well be reasonably related to legitimate objectives of the State . . . for the purpose of imposing residence conditions on attendance at a University or state college.[119]

The court in *Starns* thus believed that the state had the right to say that new residents of the state shall make some contribution, tangible or intangible, toward the state's welfare for a period of twelve months before becoming entitled to enjoy the same privileges that long-term residents possess to attend the university at a reduced fee.[120]

The United States Supreme Court finally considered a tuition residence requirement in *Vlandis v. Kline.*[121] The Connecticut statute challenged in

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113. *Id.* at 238-39.
114. *Id.* at 239.
115. *Id.* at 240. The court also distinguished *Carrington v. Rash* and its application of the irrebuttable presumption doctrine. The presumption in the Minnesota statute, unlike that in *Carrington,* could be overcome if the student provided sufficient evidence to show he was a bona fide domiciliary of the state, one element of which is proof that he resided within the state for a period of one year. *Id.*
116. *Id.*
117. *Id.* at 241.
118. *Id.* at 240.
119. *Id.* at 241 (emphasis added).
120. *Id.*
121. 412 U.S. 441 (1973).

Vlandis presumed that, for tuition purposes, the status of state university students as nonresidents at the time of application for admission conclusively and irrebuttably continued for the entire period of attendance.[122] The Court characterized the issue as being whether a conclusive and unchallengeable presumption of nonresidence was unconstitutional in that it denied an opportunity to rebut the presumption.[123] The Court held that the due process clause of the fourteenth amendment did not permit a state to deny an individual the opportunity to present evidence that he was a bona fide resident entitled to in-state status on the basis of a permanent and irrebuttable presumption of nonresidence.[124] When that presumption is not necessarily or universally true in fact and when the state has reasonable alternative means for making the crucial determination, such a conclusive presumption is unconstitutional.[125]

In striking down the statute, the Court observed that it had long disfavored such irrebuttable presumptions under the due process clause of the fifth and fourteenth amendments, and that the Court previously found such presumptions unconstitutional.[126] The state proffered three reasons in justification of the permanent irrebuttable presumption, each of which the Supreme Court rejected. First, the state suggested that it had a valid interest in equalizing the cost of a college education between residents and nonresidents and that freezing a student's residential status ensures that bona fide in-state students will receive their full subsidy.[127] The Court found that, although such an interest may well be legitimate, the state used a criterion wholly unrelated to that objective.[128] Second, the state argued that even if a student applying from out of state might at some point become a bona fide resident of Connecticut, the state could nevertheless reasonably decide to favor only its established residents whose past tax contributions to the state were higher.[129] The Court refused to even countenance this justification since Connecticut's scheme made no distinction on its face between established and new residents.[130] Finally, the Court rejected the state's argument that the presumption

122. *Id.* at 442-43.
123. *Id.* at 443.
124. *Id.* at 452.
125. *Id.*
126. *Id.* at 446. *See* cases cited *supra* note 102.
127. *Id.* at 448.
128. *Id.* at 448-49. Instead of ensuring that only its bona fide residents receive their full subsidy, the statute ensures that certain of its bona fide residents do *not* receive their full subsidy.
129. *Id.* at 449. *Zobel* later held this justification to be not even *legitimate,* thereby undermining much of the logic relied on in these tuition residence cases. Zobel v. Williams, 457 U.S. 55, 63 (1982).
130. *Vlandis,* 412 U.S. at 449. The refusal of these justifications indicates that the Court may have been applying something more than rational basis scrutiny since these justifications were held to be at least "legitimate" in *Kirk* and *Starns.*

provided administrative ease because administrative ease alone did not save the conclusive presumption from invalidity under the due process clause when other reasonable alternative means for determining bona fide residence were available.[131]

The real importance of this case lies in the additional guidance the Court provided for future cases by qualifying the above holding. The Court recognized that special problems exist in determining the bona fide residence of out-of-state college students.[132] For this reason, the Court suggested that its decision 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 residence requirement, *which can be met while in student status.*"[133] The Court added 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 who have come there solely for educational purposes, cannot take advantage of in-state rates."[134] Moreover, the Court drew from the Connecticut Attorney General's opinion which recognized that, in reviewing a claim of in-state status, the issue becomes essentially one of domicile, and suggested certain criteria to use in determining the intent element of domicile.[135] These criteria included year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, and marital status.[136]

In addition to qualifying its holding in this manner, the Court distinguished *Starns* by pointing out that, under the statute attacked in *Starns,* a student could rebut the presumption of nonresidence after having lived in the state for one year by presenting other evidence sufficient to show bona fide domicile within Minnesota.[137] Thus, "residence within the state for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile."[138] Under Connecticut's scheme, a student applying from out of state could never quaify as a resident so long as he retained student status.[139]

Two Justices, although concurring with the result in *Vlandis,* refused to go along with this distinction and openly questioned the result in *Starns.*[140] Justice Marshall, with whom Justice Brennan joined, explicitly asserted that he joined the opinion of the Court "except insofar as it suggests that a State

131. *Id.* at 451.
132. *Id.* at 452.
133. *Id.* (emphasis added).
134. *Id.* at 453-54.
135. *Id.* at 454.
136. *Id.*
137. *Id.* at 452 n.9.
138. *Id.*
139. *Id.*
140. *Id.* at 454 (Marshall, J., concurring).

may impose a one-year residency requirement as a prerequisite to qualifying for in-state tuition benefits."[141] He noted that because the Court found sufficient basis in the due process clause to dispose of the constitutionality of the statute in question it had no occasion to address the serious equal protection questions raised by this and other tuition residence laws.[142] Justice White, writing a separate concurring opinion, likewise expressed uneasiness about even a one-year conclusive presumption.[143] His uneasiness stemmed from his difficulty in distinguishing, on due process grounds, between the Minnesota one-year requirement and the Connecticut law which did not permit a person to acquire Connecticut residency while attending Connecticut schools.[144]

It is thus apparent that, while the Supreme Court dealt explicitly with tuition residence requirements in *Vlandis,* the Court is reluctant to paint with a broad brush in the area of tuition residence requirements and remains somewhat uncertain as to the underlying themes which should direct its decisions. Nevertheless, it is reasonable to infer from the cases analyzing tuition residence requirements in light of *Shapiro* that the Court's decision in *Shapiro* had little net effect on the results courts would reach in scrutinizing such statutes or regulations. Courts appear to shun the idea of applying strict scrutiny to tuition residence requirements, and distinguish *Shapiro* and its progeny as either dealing with necessities, or as dealing with statutes having the specific objective of discouraging the exercise of the right to travel.[145] Moreover, the primary justification for such statutes—rewarding citizens for past contributions—although not *compelling,* may at least be *legitimate* in the area of tuition residence requirements.[146] When courts are willing to strike down tuition residence requirements, they will apparently limit themselves to statutes which create an irrebuttable presumption of nonresidence for the duration of the student's academic career.[147]

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141. *Id.* at 454-55.

142. *Id.* at 455. The due process basis referred to was, of course, the fact that the statute created an irrebuttable presumption.

143. *Id.* at 456 (White, J., concurring).

144. *Id.* A commentator has suggested that a reasonable extension of the *Vlandis* decision should profess that any university requirement that does not allow a student to demonstrate prior to the start of any semester that he has become a resident of the state and thereby qualifies for lower tuition is subject to a successful due process and equal protection attack. *Recent Decisions, Constitutional Law,* 51 J. URB. LAW 757, 763 (1974). Although this might provide challengers a possible line of attack, given the alignment of the Justices in *Vlandis,* the attack would not appear likely to succeed. Furthermore, the Court's subsequent decisions in *Zobel* and *Martinez* provide a more plausible argument. *See also* Podger v. Indiana Univ., 178 Ind. App. 245, 381 N.E.2d 1274 (1978) (rejecting a similar attack). It is also worth noting that *some* bona fide residence requirements are invalid under the privileges and immunities clause. *See, e.g.,* Supreme Court of N.H. v. Piper, 105 S. Ct. 1272 (1985) (invalidating New Hampshire residence requirement for eligibility to take state bar exam).

145. *See supra* notes 101-05, 109-16 and accompanying text.

146. *See supra* notes 104-05, 117-19 and accompanying text.

147. *See Vlandis,* 412 U.S. 441.

Shapiro thus never bore the fruit tuition residence requirement challengers hoped for. Courts refused to apply strict scrutiny to such residence requirements. Rather, courts reached results strongly paralleling those reached in early cases decided before the recognition of a possible link between durational residence requirements and the right to interstate travel. Despite the limited success of challengers, several questions remained unanswered in the area of durational residence requirements, especially in light of the Court's apparent erosion of the *Shapiro* analysis in areas other than tuition residence requirements. In short, the legal community obviously still needed an additional word regarding durational residence requirements in general, and tuition residence requirements specifically.[148]

II. *ZOBEL* AND *MARTINEZ*

The Supreme Court provided additional clarification in these areas with its decisions in *Zobel v. Williams*[149] and *Martinez v. Bynum*.[150] These two cases shed considerable doubt on the validity of *Shapiro* as applied to durational residence requirements, and in so doing, call into question the decisions made following *Shapiro* in the area of tuition residence requirements. *Zobel* and *Martinez* hold that *durational residence requirements* are unconstitutional, except to the extent that they serve merely as a test of bona fide residence. Put differently, these cases imply that anything other than a *bona fide residence requirement* may amount to an unconstitutional deprivation of the right of freedom to travel.

As discussed previously,[151] durational residence requirements, such as the one upheld in *Starns,* require that a student be a bona fide resident of a state for a certain period of time before demanding privileges restricted to that state's residents. Bona fide residence requirements, on the other hand, merely require that a person *does* establish residence before demanding resident privileges. Establishing bona fide residence necessitates meeting essentially the same requirements required to establish domicile. That is, a person must be present in the state with the intention of remaining indefinitely.[152] It is precisely this distinction between bona fide and durational residence requirements which the Court went to great lengths to articulate in *Zobel* and *Martinez.* In so doing, the Court apparently recharacterized *Shapiro* and its progeny as also emphasizing the distinction between durational and bona fide residence requirements. The crucial element in those cases, therefore, is no longer the penalty analysis but the distinction between

148. *Recent Decisions, supra* note 143, at 765.
149. 457 U.S. 55 (1982).
150. 461 U.S. 321 (1983).
151. *See supra* notes 18-23 and accompanying text.
152. *Id.*

bona fide and durational residence requirements. In abandoning the rationale underlying the tuition cases decided in light of *Shapiro,* the Court rekindled the possibility of successful challenges to certain tuition residence requirements.

A. Zobel v. Williams: *The Erosion Begins*

In response to a unique situation, namely the discovery of large oil reserves on state-owned lands,[153] Alaska "took steps to assure that its current good fortune [would] bring long-range benefits."[154] To accomplish this, Alaska in 1976 adopted a constitutional amendment establishing a permanent fund into which the state was required to deposit at least 25 percent of its mineral income each year.[155] In 1980 the Alaska legislature enacted a dividend scheme to distribute a portion of the fund's earnings directly to the state's adult residents.[156] The plan required that a person be 18 years old and an Alaska resident to receive the available dividend.[157] Although there was no durational residence requirement, the law provided *ranging* benefits depending on the *length* of residency in Alaska since 1959,[158] thereby disadvantaging new arrivals as compared to longer-term residents.

Had the Court analyzed this distribution scheme under the doctrines enunciated in *Shapiro* and its progeny, the Court would likely have applied the rational basis level of scrutiny and upheld the statute. In order to trigger strict scrutiny under *Shapiro,* especially as clarified in *Maricopa County,* a statute had to draw a line based on a person's exercise of the right to travel and impose a substantial penalty on that exercise.[159] In *Zobel,* although the statute drew a line on the basis of the exercise of the right to move to Alaska, the classification did not impose a penalty on the exercise of that right. That is, it did not deprive someone of a basic necessity. In fact, as Justice Rehnquist noted in dissent, if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska.[160] Thus, under the penalty analysis of *Shapiro,* the statute should have been subject to rational basis scrutiny.

Rather than take this approach, however, the majority opinion by Chief Justice Burger failed to refer to the penalty analysis. In fact, the majority opinion did not even articulate the level of scrutiny necessary to evaluate the statute in question. Instead, the Court struck down the statute without

153. *Zobel,* 457 U.S. at 56.
154. *Id.* at 57.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See supra* notes 78-81 and accompanying text.
160. *Zobel,* 457 U.S. at 83 (Rehnquist, J., dissenting).

deciding what level of scrutiny applied because it found that the statute failed to meet even the minimum rationality tests.[161]

The most important aspect of the Court's opinion was its explicit effort to distinguish the statute in question from those analyzed in *Shapiro* and its progeny.[162] The Court pointed out that the statute in question did not purport to establish a test of bona fide residence like the statutes in *Shapiro* and the other cases.[163] Rather, the statute created permanent distinctions between classes of concededly bona fide residents based on the length of residence in the state.[164] This distinction, in effect, recharacterized the holdings of *Shapiro* and subsequent cases because the Court now apparently viewed the durational residence requirements in those cases as merely assuring that a person was a bona fide resident of the state. In actuality, the durational residence requirements involved in *Shapiro* and later residence requirement cases had other purposes, such as discouraging indigents from immigrating, and benefitting longer-term residents.[165] These requirements were never justified solely as a test of bona fide residence. Nevertheless, in making the distinction, the Court chose to recharacterize the cases as distinguishing between bona fide and durational residence requirements. This distinction, however, revealed only the tip of the iceberg.

The remainder of the Court's opinion unveils some of the further implications of its decision. The state advanced three purposes justifying the distribution made by the dividend program: "(a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent management of the Permanent Fund; and (c) apportionment of benefits in recognition of undefined 'contributions of various kinds, both tangible and intangible, which residents made during their years of residency.' "[166] The Court held that the first two justifications were not rationally related to the distinctions Alaska sought to make between newer and longer-term residents.[167] First, a differential between new and old residents was not necessary to create an incentive for individuals to establish and maintain residency.[168] Similarly, the Court found that the purpose of encouraging prudent management of the fund was not rationally furthered by increasing the dividend for each year of residency since statehood.[169] This was not a typical application of the rational basis test which generally entails deferring to the legislature's decision as to how much of a problem to confront,

161. *Id.* at 60-61.
162. *Id.* at 63.
163. *Id.* at 58-59.
164. *Id.* at 59.
165. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
166. *Zobel,* 457 U.S. at 61.
167. *Id.*
168. *Id.*
169. *Id.*

and thus permits a statute to be substantially over- or underinclusive.[170]

The Court found that the last of the state's objectives, rewarding citizens for past contributions, was not even a *legitimate* state purpose.[171] The Court relied on *Shapiro* which held that such an interest was not a *compelling* state interest, though in the very different context dealing with necessities.[172] Previous tuition cases had relied primarily on the fact that such an interest was at least *legitimate* in distinguishing *Shapiro* and upholding the statutes.[173] By relying on *Shapiro* for the notion that rewarding citizens for past contributions was not even a *legitimate* state interest, the Court in *Zobel* abandoned much of the logic supporting decisions in tuition cases. The Court reasoned:

> If the States can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could States impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits and services according to the length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.[174]

The Court, citing *Vlandis,* emphasized that the equal protection clause prohibits such an apportionment of services.[175] Moreover, recognizing the implications of its holding and logic, the Court explicitly called into question the reasoning, though not the result, in *Starns.*[176] The Court stated in a footnote:

> *Starns v. Malkerson* . . . cannot be read as a contrary decision of this Court. First, summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgement under review. . . . *Moreover . . . we considered the Minnesota one-year residency requirement [for in-*

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170. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). Perhaps the stricter than usual scrutiny employed by the Court can be explained by the "right to travel" implications in this case. As noted previously, the right to interstate travel is recognized as a full-fledged constitutional right. *See supra* note 60 and accompanying text. This appears to be part of a recent trend in Supreme Court analysis to apply rational basis scrutiny with more than the traditional amount of "bite." *See, e.g.,* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (invalidating zoning ordinance prohibiting group home for the mentally retarded under rational basis test).

171. *Zobel,* 457 U.S. at 63.

172. *Id.*

173. *See* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 437-39, 78 Cal. Rptr. 260, 264-66 (1969), *appeal dismissed,* 396 U.S. 554 (1970).

174. *Zobel,* 457 U.S. at 64.

175. *Id.* at 63.

176. *Id.* at 64 n.13.

state tuition benefits] examined in Starns *a test of bona fide residence, not a return on prior contributions to the commonweal.*[177]

The Court thus explicitly recharacterized the reasoning of the decision in *Starns*—tuition residence requirements may serve as a test of bona fide residence, but not a return on past contributions.

Four concurring Justices were more forceful in their rejection of durational residence requirements.[178] Justice Brennan, with whom Justices Marshall, Blackmun, and Powell joined in concurring, stated that he found it difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence one almost invariably finds the "unstated premise that some citizens are more equal than others."[179] Justice Brennan felt that most forms of discrimination based upon length of residency were rejected with the adoption of the equal protection clause.[180] He too, however, recognized that "length of residence may, for example, be used to test the *bona fides* of citizenship."[181]

Based upon the logic enunciated in this case, both in the majority and the concurring opinions, one could plausibly maintain that any durational tuition residence requirement is invalid unless it is designed *solely* to insure that a person is a bona fide resident of the state (i.e. is present in the state and intends to remain indefinitely).[182] Brennan states this explicitly,[183] while Burger more tacitly suggests a disapproval of the *reasoning* in *Starns.*[184] *Zobel* thus represents an erosion of the logic employed in *Shapiro* and its progeny. The situation involved in *Zobel* was, however, unique in that the statute discriminated retrospectively between classes of admittedly bona fide residents. For this reason, arguing for an extension of its logic to other types of durational residence requirements might not meet with guaranteed success.[185] One commentator did, in fact, suggest that these considerations require that the *Zobel* holding be limited to its facts.[186]

B. Martinez v. Bynum: *Erosion Completed*

The Court chose, however, not to limit *Zobel* to its facts. Rather, with its decision in *Martinez v. Bynum,*[187] the Court explicitly adopted the rule

177. *Id.* (citations omitted) (emphasis added).
178. *Id.* at 65 (Brennan, J., concurring).
179. *Id.* at 71.
180. *Id.*
181. *Id.* at 70.
182. *See supra* notes 16-20 and accompanying text.
183. *Zobel,* 457 U.S. at 70 (Brennan, J., concurring).
184. *Id.* at 64 n.13.
185. *See* Comment, *Splitting Up Alaska's Oil Wealth Pie: The Constitutionality of Accumulative Residency Requirements After Zobel v. Williams,* 12 [UCLA]-ALASKA L. REV. 119 (1983).
186. *Id.* at 132-35.
187. 461 U.S. 321 (1983).

that any durational residence requirement is invalid unless designed solely to assure that a person is a bona fide resident of the state.[188] In so doing, the Court in *Martinez* completed its erosion and recharacterization of the *Shapiro* penalty analysis in the area of durational residence requirements and opened the door to possibly successful challenges of tuition residence requirements in at least some circumstances.

The *Martinez* case arose in response to a much more conventional state of affairs than *Zobel.* The Texas Educational Code provision challenged in *Martinez* denied tuition-free admission to the Texas public schools to a minor who lived apart from a parent or guardian if his presence in the school district was for the primary purpose of attending free public schools.[189] Roberto Morales, a young child born in the United States and thus a United States citizen by birth, left his parents, both Mexican citizens, to live with his sister in the United States for the primary purpose of attending school.[190] His sister, Oralia Martinez, was his custodian, but she did not wish to become his legal guardian.[191] Because he did not reside with his parents or guardian in the school district, and because he was in Texas for the primary purpose of attending school, the statute denied Morales tuition-free admission to the Texas schools.[192] Martinez made a facial challenge to the constitutionality of the statute that denied her brother tuition-free access to the public schools.[193]

The Court upheld the statute against the petitioner's challenge.[194] The Court began, as it had in *Zobel,* by emphasizing that it was always careful to distinguish *durational* residence requirements from *bona fide* residence requirements.[195] The Court referred again to language in *Shapiro* which stressed that "the residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance" and pointed out that the Court in *Shapiro* carefully "implied no view of the validity of waiting-period *or* residence requirements determining . . . eligibility for tuition-free education . . . ."[196] The Court thus held again, in a much broader context than it had in *Zobel,* that a bona fide residence requirement, as opposed to a durational residence requirement, was valid. The Court found that such a requirement furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by its

188. *Id.* at 329.
189. *Id.* at 323.
190. *Id.* at 322-23.
191. *Id.* at 323.
192. *Id.*
193. *Id.* at 325.
194. *Id.* at 333.
195. *Id.* at 325.
196. *Id.* at 326 (quoting Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969) (emphasis in original)).

residents.[197] Furthermore, a bona fide residence requirement does not burden the constitutional right of interstate travel since a person is free to move to a state and establish residence there.[198] Rather, "[a] bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents."[199] This reasoning reinforces the conclusion suggested by *Zobel* that the Court has abandoned the rationale for its holdings in *Shapiro* and subsequent cases.

Because such bona fide residence requirements are indeed constitutional if appropriately defined and universally applied,[200] the central question in analyzing a residence requirement in light of *Zobel* and *Martinez* becomes whether the residence requirement is in fact a bona fide residence requirement.[201] In deciding whether a residence requirement is in fact a constitutional bona fide residence requirement, the Court in *Martinez* essentially equated residency with domicile.[202] A statute, therefore, which merely insures that a person is a domiciliary—is present in the state and intends to remain indefinitely—will be a bona fide residence requirement.[203] Thus, if a statute or regulation imposes a waiting period, that period acts solely as a test of bona fide residency. In terms of domicile, a waiting period will be constitutional only to the extent that it serves to insure that a person is present in the state with the intent to remain indefinitely.

In *Martinez,* the Court found that the Texas statute was even more generous than necessary to survive the above test.[204] The statute compelled a school district to permit a child to attend school tuition-free if he had a bona fide intention to remain indefinitely; that is, if he had a reason for being there other than his desire to attend school.[205] The statute went even further than this, however, and allowed some children to attend school without paying tuition even if they did not intend to remain in the school district indefinitely.[206] For example, if the child's parents went to Texas to work for only a year, the child, although not a domiciliary, would be eligible for tuition-free admission since he would be present in the school district with his parents.[207]

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197. *Id.* at 328.
198. *Id.* at 328-29.
199. *Id.* at 329 (emphasis in original).
200. *Id.* at 328.
201. *Id.* at 330.
202. *Id.* at 331.
203. *Id.* at 332.
204. *Id.*
205. *Id.* at 332-33.
206. *Id.* at 333.
207. *Id.* at 332 n.13.

III. IMPACT

The significance of the Court's reasoning to the analysis of tuition residence requirements is obvious. Because any statute that does more than merely ensure physical presence and intent to remain indefinitely discriminates against some bona fide residents by denying them the privileges they deserve as bona fide state residents, any tuition statute or regulation which imposes a waiting period for eligibility for in-state tuition is questionable. This is so because *any* waiting period creates two classes of "nonresidents": (1) those who are true nonresidents and have no intention of remaining in the state indefinitely, and (2) those who are bona fide residents and do intend to remain in the state indefinitely, but who have not yet lived in the state for the requisite time period. Thus, any waiting period, even if only one day, has some discriminatory impact.

The issue then becomes whether the waiting period can be justified as merely a test of bona fide residency. This will invariably entail some sort of precarious line-drawing by the Court, which will involve balancing two competing policies: the administrative convenience inherent in a generalized inflexible waiting period, and the opportunity for more accurate individualized determinations inherent in a case-by-case approach. Obviously the Court would tolerate some overinclusiveness in a tuition residence requirement since, as described above, *any* waiting period may serve to prevent some bona fide residents from qualifying for in-state tuition rates. The question is the extent of overinclusiveness the Court will tolerate in the area of tuition residence requirements.

Arguably, even a one-year waiting period such as that upheld in *Starns, Kirk,* and *Bryan* acts as more than a test of bona fide residence since it denies some bona fide residents in-state tuition. In fact, given the tendency of students to move into a state solely to attend college, the tuition context is markedly different from other "right-to-travel" contexts such as the voting, welfare, and Alaska cases which involve people moving when there is no real reason to suspect a merely temporary relocation. In other words, the reasonable suspicion of a merely temporary relocation by students suggests that *any* sort of waiting period is an unrealistic indicator of actual domicile since students with three years in-state may be no more domiciled in the state than other students with three months or less of residency.[208] This, arguably, makes any *particular* time limit such as three months, one year, or three years no more or less arbitrary than any other. If this is so, then perhaps individual determinations are the only meaningful test of actual *bona fide* residence since *any specific* waiting period is virtually meaningless

208. *See supra* text accompanying note 133.

and since we cannot constitutionally tolerate an indefinite waiting period.

Nevertheless, the Supreme Court provided some indication as to how much overinclusiveness it will tolerate in the area of tuition residence requirements when it stated in *Vlandis*:

> [a state's] legitimate interest in protecting and preserving the right of its own bona fide residents to attend college on a preferential tuition basis permits a State to establish such reasonable criteria for in-state status as to make virtually certain that students who are not bona fide residents of the State but who have come there solely for educational purposes cannot take advantage of the out-of-state rate.[209]

Since states may make "virtually certain"[210] that students are bona fide residents, it is clear that, in the area of tuition residence requirements, the Court will tolerate a fair amount of overinclusiveness. More importantly, this fact taken in conjunction with the Court's reaffirmance in *Zobel* of Minnesota's one-year waiting period which it recharacterized as "a test of bona fide residence,"[211] indicates that a one-year waiting period is a reasonable test of bona fide residence.

Beyond the one-year requirement which the Court clearly recharacterized and accepted as "a test of bona fide residence, not a return on prior contributions to the commonwealth"[212] lies a grey area of other requirements upon which the Court has yet to comment since *Zobel* and *Martinez*. The analysis in *Zobel* and *Martinez* suggests that one typical requirement lying in this zone of uncertainty may now be especially vulnerable as more than a test of bona fide residence. These tuition residence requirements contain two distinct provisions. First, they impose a waiting period, for example, one year. Second, they specify that physical presence in the state *for the predominant purpose of attending a college or university* or other institution of higher education shall not be counted towards the specified waiting period.[213]

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209. Vlandis v. Kline, 412 U.S. 441, 453-54 (1973).

210. *Id.* at 453.

211. Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982).

212. *Id.*

213. *See, e.g.*, INDIANA UNIVERSITY, INDIANA UNIVERSITY STUDENT HANDBOOK, Rules Determining Resident and Nonresident Student Status for Indiana University Fee Purposes (1984) providing:

> A person entering the state from another state or country does not at that time acquire residence . . . such person must be a resident for twelve (12) months in order to qualify as a resident student for fee purposes . . . . Physical presence in Indiana *for the predominant purpose* of attending a college, university, or other institution of higher education, shall not be counted in determining the twelve (12) month period of residence . . . .

Id. at 279 (emphasis in original). *See also supra* notes 48 and 107 and accompanying text.

At least one court upheld such a tuition residence requirement prior to *Zobel* and *Martinez*.[214] Again, however, *Zobel* and *Martinez* undermine the reasoning by which the court upheld the requirement. Residence requirements may no longer be justified as rewarding citizens for past contributions, the primary justification courts relied on in the area of tuition residence requirements.[215] Rather, such tuition residence requirements are acceptable only as a test of bona fide residence.[216]

As noted above, the Court appears willing to accept some overinclusiveness in the area of tuition residence requirements given its language in *Vlandis*.[217] If, however, the distinction between durational and bona fide residence requirements is to have any meaning at all in this area, a requirement which refuses to count physical presence for the predominant purpose of attending a university towards a specified waiting period must almost certainly be unconstitutional in light of *Zobel* and *Martinez*. Such a requirement does far more than act as a test of bona fide residence. In fact, such a requirement is so overinclusive as to effectively preclude *all* bona fide residents who applied from out of state from *ever* being considered bona fide residents during their academic careers, because the students' predominant purpose for being in the state, even if they are bona fide residents, is to attend a university. Such a requirement thus has the same effect as the irrebuttable presumption held unconstitutional in *Vlandis*.[218] If an individual's primary purpose for being in a state is to obtain an education, such a requirement renders the person a nonresident for tuition purposes regardless of her actual domicile. The argument that such a residence requirement is unconstitutional is further bolstered by the Court's statement in *Vlandis* that its decision 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*."[219] The

214. Podger v. Indiana Univ., 178 Ind. App. 245, 381 N.E.2d 1274 (1978). The court in *Podger* held that such a requirement did not impose a permanent and irrebuttable presumption of nonresidence as did the requirement in *Vlandis*. *Id.* at 264, 381 N.E.2d at 1286. Such a requirement may nevertheless be attacked on different grounds in light of *Zobel* and *Martinez*.

215. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234, 240-41 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

216. *See supra* notes 194-99 and accompanying text.

217. *Vlandis*, 412 U.S. at 453-54. "The State can establish such reasonable criteria for in-state status as to make virtually certain that certain students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." *Id.*

218. *Id.* at 442-43, 453-54. A statute or regulation providing that physical presence in the state "for the predominant purpose of attending a college" will not be counted towards a specified waiting period could be construed so as to avoid the constitutional problem. For example, the student's "primary purpose" could be viewed as being to live and remain in the state even though now in fact attending school. *Cf.* Martinez v. Bynum, 461 U.S. 321 (1983) (refusing to take this approach and instead reaching the constitutional issue).

219. 421 U.S. at 452 (emphasis added).

Court in *Vlandis* thus recognized the grave injustice that can be worked by prohibiting all out-of-state students from ever acquiring in-state status "while in student status."[220]

CONCLUSION

Courts have analyzed tuition residence requirements under numerous standards. Courts initially rejected most challenges under the rational basis test, holding that such requirements were reasonably related to the legitimate state interest of rewarding citizens for past contributions. Challengers later sought stricter judicial scrutiny under the *Shapiro* penalty analysis. Courts refused, however, to extend the *Shapiro* doctrine to the area of tuition residence requirements, apparently diminishing the hope of successful attacks on such requirements.

The Supreme Court's two recent decisions in *Zobel* and *Martinez* shed doubt on much of the reasoning underlying earlier decisions. More specifically, the Court abandoned the *Shapiro* penalty analysis, and now holds that rewarding citizens for past contirbutions is not even a legitimate interest sufficient to support a tuition residence requirement under the rational basis test. Rather, any durational residence requirement is justifiable *only* to the extent that it serves as a test of bona fide residence. Some tuition residence requirements—those which refuse to count time spent in the state for the predominant purpose of attending a university towards a specified waiting period—are more restrictive than necessary to serve solely as a test of bona fide residence. For this reason, such residence requirements would appear to be unconstitutional under the framework of *Zobel* and *Martinez*.

Whether courts will indeed reach the conclusion suggested by the Supreme Court's current analysis remains to be seen. What is clear is that at a bare minimum, the Court's decisions in *Zobel* and *Martinez* recharacterize the reasoning supporting the decisions in *Shapiro* and the tuition cases. Tuition residence requirements may no longer be justified as a reward to citizens for past contributions. Rather, such requirements are justifiable only to the extent that they truly test the bona fides of residency. Legislative and academic bodies must, therefore, be more cautious and draft tuition residence requirements which perform only the constitutionally permitted function of testing bona fide residence.

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220. *Id.* This analysis may have implications beyond the area of tuition residence requirements, since, as noted above, the Court has recharacterized the line of cases dealing with necessities and the right to travel as merely distinguishing between durational and bona fide residence requirements.