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Education at a Discount: Qualifying for Resident Tuition at State Universities

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EDUCATION AT A DISCOUNT: QUALIFYING FOR RESIDENT TUITION AT STATE UNIVERSITIES

I. INTRODUCTION

After the Supreme Court's decision in *Shapiro v. Thompson*[1] invalidated welfare residency requirements as an impermissible infringement on the right to travel interstate, students who were challenging residency requirements for in-state tuition assumed their cause had been greatly aided. They contended that if residency requirements were impermissible for welfare, they were also impermissible for other state benefits, particularly higher education.[2] Hopes for the death of the nonresident tuition fee proved unwarranted, however, for the students' contention was rejected.

In *Twist v. Redeker*,[3] a student at the State University of Iowa appealed a trial court's dismissal of his complaint which had alleged that higher nonresident tuition violated the equal protection clause of the fourteenth amendment. The Court of Appeals for the Eighth Circuit affirmed. Holding that a reasonable additional fee for nonresident students which distributes more evenly the cost of operating the institution between residents and nonresidents does not constitute an unreasonable and arbitrary classification violative of equal protection,[4] the court relied heavily on *Clarke v. Redeker*,[5] an earlier challenge to the same nonresident tuition fee decided before the Supreme Court's decision in *Shapiro v. Thompson*. The plaintiff in *Clarke* was a law student at the State University of Iowa who had resided in Illinois prior to his

[1] Shapiro v. Thompson, 394 U.S. 618 (1969). The statutory provisions held invalid made residence in the state for one year a condition for receiving welfare benefits. The Court held that the one-year residency requirement infringed upon the right to travel interstate, a fundamental right, though the Court refused to define the source of this basic constitutional right. Since a fundamental right was infringed, the Court applied the stricter compelling state interest test in finding that the statutes violated the equal protection clause. But the Court noted that "even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional." 394 U.S. at 638.

[2] For an extensive argument that nonresident tuition charges violate the interstate privileges and immunities clause of article IV, § 2 of the Constitution, *see* Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immunities Clause*, 50 NEB. L. REV. 31 (1970).

[3] Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), *cert. denied sub nom.*, Twist v. Redeker, 396 U.S. 853 (1969).

[4] *Id.* at 883.

[5] 259 F. Supp. 117 (S.D. Iowa 1966).

enrollment and had married a lifelong resident of Iowa. Conceding the impossibility of determining the extent of cost-equalization provided by the difference in tuition charges between residents and nonresidents, the court nevertheless upheld the classification on the ground that it had a "rational relation to Iowa's object and purpose of financing, operating, and maintaining its educational institutions."[6]

Both the *Twist* and *Clarke* opinions assumed that the classification between residents and nonresidents for tuition purposes was to be judged according to the traditional test for equal protection, which accords validity to a legislative classification as long as it is not arbitrary or capricious and bears a rational relationship to a legitimate legislative objective.[7] The issue of whether *Shapiro*'s more stringent compelling state interest test was applicable to tuition fee cases was not determined until 1971, when the Supreme Court finally ruled specifically on the constitutional issues raised by nonresident tuition charges and the equal protection clause.[8] In *Starns v. Malkerson*[9] the Court affirmed in a

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[6] *Id.* at 123. For an earlier case upholding the validity of nonresident tuition, *see* Landwehr v. Regents of the University of Colorado, 156 Colo. 1, 396 P.2d 451 (1964) (classification of students into two groups for tuition purposes held a matter of legislative determination which is neither arbitrary nor unreasonable).

[7] The "traditional" test for equal protection is most often applied to the general areas of tax and police power legislation. By applying the traditional test, the Court exercises minimal review in these areas. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (statute prohibiting the pumping from wells of certain mineral waters upheld as valid exercise of state police power); American Commuters Ass'n v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967) (nonresidents held to lack standing to challenge denial of tuition-free university education, welfare, and medicaid).

[8] Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *dismissed on appeal*, 396 U.S. 554 (1970), was the first case to reach the Supreme Court which squarely raised the issue whether the more stringent compelling state interest test of *Shapiro* was applicable to tuition fee cases. An Ohio woman who married a resident of California sought to invalidate California's requirement that in order to attain residency status for tuition purposes she must live in the state one year before enrolling in college. Relying on *Shapiro*, she contended that the residency requirement infringed the fundamental right to interstate travel in violation of the equal protection clause. The Supreme Court nevertheless dismissed the case for lack of a substantial federal question. 396 U.S. 554 (1970).

The same argument had also not persuaded the California Court of Appeals in the preceding litigation. That court attached great significance to a footnote in the *Shapiro* opinion which purported to disavow any view of the validity of residence requirements for state benefits other than welfare payments. 394 U.S. 618, 638 n.21 (1969). Interpreting the footnote to mean that the same standards did not necessarily apply to other residency requirements, the court rejected the compelling state interest test for tuition residence requirements since it found that the California residency requirement does not infringe upon the right to marry or the right to travel. 273 Cal. App. 2d 430, 439, 78 Cal. Rptr. 260, 266 (1969). Using the traditional "rational basis" test, the California court upheld the residency requirement as a legitimate manifestation of the legislature's desire to provide lower tuition to those persons who have already contributed to the cost of their education by paying state taxes.

[9] 401 U.S. 985 (1971).

memorandum opinion the lower court decision upholding the validity of Minnesota's statutory requirement that a person reside in the state for at least one year in order to qualify for resident tuition.[10] Distinguishing *Shapiro,* the district court held the compelling state interest test inapplicable since the one year waiting period "does not deter any appreciable number of persons from moving into the state"; that is, the waiting period does not infringe upon the right to travel.[11] Thus, in affirming the district court in two brief sentences, the Supreme Court quashed the hopes for the demise of the nonresident tuition fee generated by *Shapiro* only three years earlier.[12]

Although the *Starns* decision forecloses debate on the constitutionality of residence requirements for tuition at state universities, it by no means resolves all constitutional questions raised by the application of the nonresident tuition fee. One recurring problem is the reclassification of those students initially classified as nonresidents who have thereafter decided to become residents of the state[13] and thereby seek to take advantage of the lower tuition offered to residents.[14] This article identifies the major difficulties in changing classification and analyzes some of the constitutional questions concerning the application of the nonresident tuition fee subsequent to *Starns.* Additionally, the article examines the extent to which proposed model legislation on tuition residency solves the existing objections to the application of the nonresident tuition fee at state universities.

II. THE CONCLUSIVE PRESUMPTION AGAINST RESIDENCY FOR TUITION PURPOSES

Current state regulations governing nonresident tuition defy precise categorization. While fifteen states prescribe the rules for residency by statute, about half the states delegate the responsibility for promulgating these rules to state higher education governing boards or to the boards of trustees of individual in-

[10] 326 F. Supp. 234 (D. Minn. 1970).

[11] *Id.* at 237-38.

[12] The *Starns* decision has already had an effect on the lower courts. Finding that case controlling, the Supreme Court of Nebraska upheld Nebraska's waiting period which required residence in the state for at least four months without attending school. Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

[13] The general problem of reclassification, with particular application to Texas regulations, is discussed in Note, *Residency, Tuition, and the Twelve Month Dilemma,* 7 HOUSTON L. REV. 241, 249-55 (1969).

[14] For the requisities of changing domicile or permanent residence, *see* note 37 and accompanying text *infra.*

stitutions.[15] In a few states each institution's administrators and faculty or state education coordinating agencies have the power to formulate the rules.[16] Still other states' rules are an amalgam of statutory policy and administrative regulation.[17] Although the substance of the residence rules varies widely, the regulations almost uniformly provide that in order to qualify for resident tuition the nonresident student must live in the state for periods of up to one year prior to enrolling in the educational institution.[18] The waiting period presents a formidable barrier for those students who wish to attain resident status while attending school.[19] Indeed, an implicit legislative objective in some states is apparently to increase the difficulty of attaining resident status.

By establishing a conclusive presumption that a person is not a resident for tuition purposes until he has lived in the state for a stated period of time, the states seek to further two major policies. First, the waiting period is often justified as a means of allocating the cost of higher education between residents and nonresidents of the state. As the California Court of Appeals explained in *Kirk v. Board of Regents,*[20] charging lower tuition fees to those persons who have lived in the state for at least one year is a "reasonable attempt to achieve a partial cost equalization," because these persons "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. . . ."[21]

Second, the waiting period is often justified on the ground that it provides lower tuition only to those persons who intend to remain in the state permanently and thereby prove their domiciliary intent. Intention to remain permanently, of course, is closely related to the cost equalization objective, since a resident who intends to reside in the state permanently will contribute his share of the cost of higher education by paying state taxes to the same, if not greater, extent than those persons who have lived in the state in the past. Thus the California Supreme Court replied to

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[15] R. CARBONE, RESIDENT OR NONRESIDENT? TUITION CLASSIFICATION IN HIGHER EDUCATION IN THE STATES 11-12 (Education Commission of the States 1970). Typical statutes delegating authority to set nonresident tuition fees are OHIO REV. CODE ANN. § 3345.01 (1967) and MICH. COMP. LAWS ANN. § 390.554 (1968).

[16] R. CARBONE, *supra* note 15, at 11-12.

[17] *Id.* at 12.

[18] *Id.* at 14-15.

[19] For those aggrieved by the regulations an internal appeals mechanism is usually available, though the procedure for appeals of reclassification decisions is by no means always apparent from the regulations. *Id.* at 30.

[20] 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969). *See* note 8 and accompanying text *supra.*

[21] *Id.* at 444, 78 Cal. Rptr. at 269. *See also* Johns v. Redeker, 406 F.2d 878 (8th Cir.), *cert. denied sub nom.,* Twist v. Redeker, 396 U.S. 853 (1969).

an early challenge to the state's tuition residence requirement under the privileges and immunities clause of the Constitution by explaining that the expenditures for education are a "heavy burden upon the taxpayers of the State."[22] The court went on to uphold the residence requirement by stating:

> Taxes are payable annually and the requirement that a student shall maintain a residence in the state of California during one taxation period as 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, cannot be held to be an unreasonable exercise of discretion by the legislature. . . .[23]

Since the only way to qualify for resident status in some states is to live in the state for a period of time before enrollment,[24] the student who enters one of the state's institutions of higher education is forced to retain his nonresident classification despite his desire to remain in the state permanently. In other states that permit residency to be established by living in the state while not attending an educational institution, the student must disrupt his education if he wishes to qualify for resident status; otherwise, he must retain his nonresident classification and continue paying substantially higher tuition fees.

In effect, then, many states' regulations preclude students from becoming residents for tuition purposes once they have been classified as nonresidents. This situation suggests an analogy to other "closed classifications" which have been invalidated under the equal protection clause of the fourteenth amendment.[25] In

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[22] Bryan v. Regents of the University of California, 188 Cal. 559, 561, 205 P. 1071, 1072 (1922).

[23] *Id.* at 561-62, 205 P. at 1072.

[24] For example, Oklahoma's regulations state: "Attendance at an educational institution is interpreted as temporary residence: therefore, a student neither gains nor loses residence status solely by such attendance." R. CARBONE, *supra* note 15, at 18.

[25] The Court has adhered to the theory that a legislative classification which is so restrictively written as to deny persons the opportunity to come under its terms denies equal protection of the laws. Thus, a statute which exempted one company from a general licensing requirement was held invalid under the equal protection clause because it created a closed classification into which others similarly situated could not enter. Morey v. Doud, 354 U.S. 457 (1957). This approach has been applied particularly to legislative classifications on the basis of race. Such classifications are inherently discriminatory since they are based on a factor that cannot be changed. The traditional rational basis test does not apply to racial classifications which will be upheld only upon a clear showing of necessity to further a valid legislative objective. *See* McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidated criminal statute making cohabitation of interracial couples an offense), and Strauder v. West Virginia, 100 U.S. 303 (1880) (state exclusion of Blacks from jury panels held violative of equal protection).

Carrington v. Rash,[26] for example, the Supreme Court struck down as a denial of equal protection a provision of the Texas constitution which prohibited a member of the armed services who moved to Texas during his military duty from ever establishing residence for voting purposes. No other group of persons in the state was similarly prevented from changing its nonresident for voting purposes. The Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment."[27] Admittedly, *Carrington* involved the fundamental right to vote which the Court has repeatedly held demands close judicial protection,[28] and it is indeed doubtful in light of *Starns*[29] that the right to attend a state university as a resident of the state stands on a parallel constitutional footing. Yet, insofar as *Carrington* renders conclusive presumptions against residency suspect, it cannot be viewed as totally inapplicable to the problem of residency for tuition purposes. Since the Minnesota regulations involved in *Starns* afforded an opportunity for reclassification, the Supreme Court has not yet squarely ruled on the validity of regulations which deny students the means of changing their tuition status.[30] While the issue could be distinguished from the voting question in *Carrington*, the more compelling view, and certainly the more "popular" one, is that a conclusive presumption against change of residency for tuition purposes is invalid.

At least one court has held that such a presumption violates the equal protection clause. In *Newman v. Graham*[31] an Idaho stat-

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[26] 380 U.S. 89 (1965).

[27] *Id.* at 96.

[28] *See* Reynolds v. Sims, 377 U.S. 533, *reh. denied*, 379 U.S. 870 (1964), where the Court stated that

> the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

377 U.S. at 561-62.

See also Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (provision of New York law requiring voter in school election to own or lease taxable property or to have a child enrolled in school held invalid under equal protection clause).

[29] 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970).

[30] The plaintiffs in *Starns* relied on *Carrington* to argue that since the language of Minnesota's statute required a year's residence before enrollment, it set up an unconstitutional "closed classification." The district court met this contention by interpreting the statute as creating only a rebuttable presumption which "can be overcome if the student provides sufficient evidence to show bona fide domicilary within the state, one element of which is proof that he has resided within the state for a period of one year." 326 F. Supp. at 240.

[31] 82 Idaho 90, 349 P.2d 716 (1960).

ute which provided that a student retained his initial nonresident status throughout his college career was held unconstitutional since it did "not afford any opportunity to show a change of residential or domiciliary status."[32] On the other hand, the Supreme Court of Colorado thought that the state's conclusive presumption against change of residency by students was neither arbitrary nor unreasonable, though the reasons for the court's conclusion were not explained.[33]

Even in states that afford the opportunity to be reclassified, the student bears the heavy burden of proving that he qualifies for classification as a resident of the state. Although the question of a student's residency for tuition purposes essentially involves a factual determination in each case, the current tuition statutes and regulations contain few, if any, guidelines for making this determination. In most states minors, unless married or emancipated, have the residence of their parents.[34] In all other cases, intent is the determinative factor for establishing residency.[35] The student must demonstrate to the appropriate administrative official that he regards the state as his permanent home, not merely a temporary home during his student years.[36] Inevitably, in order to prove his intention to remain in the state the student must establish connections with the state apart from his education.[37] As one writer has said:

> The general principle followed by most states seems to be that—while ownership of property, payment of taxes, registration of an automobile, voting registration and similar factors are to be considered in residency determination—they are in themselves insufficient to support a claim of resident status.[38]

The ultimate determination necessarily leaves much to the dis-

[32] *Id.*

[33] Landwehr v. Regents of the Univ. of Colorado, 156 Colo. 1, 396 P.2d 451 (1964). The Colorado statute attacked was COLO. REV. STAT. ANN. § 124-18-3(3) (1964), which provides:

> An unemancipated minor or adult student who has registered for more than 5 hours per term shall not qualify for change in his classification for tuition purposes unless he shall have completed 12 continuous months of residence while not attending an institution of higher learning in the state or while in the armed forces.

[34] R. CARBONE, *supra* note 15, at 14.

[35] People v. Osborn, 170 Mich. 143, 135 N.W. 921 (1912) (adult student who regarded college community as his permanent residence held entitled to vote in college town).

[36] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971).

[37] *See, e.g.*, Kaplan v. Kuhn, 8 Ohio N.P. 197 (1901) (student who had adopted university city as his permanent residence held entitled to lower tuition fee). *See also* Annot., 83 A.L.R.2d 497 (1962).

[38] R. CARBONE, *supra* note 15, at 16.

cretion of an administrative official whose decision is subject to a limited scope of judicial review.[39]

III. EFFECT OF THE TWENTY-SIXTH AMENDMENT ON RECLASSIFICATION

The twenty-sixth amendment's extension of the franchise to persons eighteen years of age or older[40] and the attendant problem of students' establishing voting residence in their college towns have great significance in establishing residence for tuition purposes. For example, shortly after the passage of the amendment five students in Kentucky challenged that state's presumption that a person who lists his occupation as "student" has not met the domiciliary requirement of the voting regulations. The Federal District Court for the Eastern District of Kentucky held that this presumption against student residency could not withstand scrutiny under the equal protection clause: "Simply put there are no salient reasons to treat registering students differently from other people merely because they are students."[41] Earlier, the Michigan Supreme Court reached the same conclusion in *Wilkins v. Ann Arbor City Clerk.*[42] In response to the contention that students lacked sufficient connection with the university community to be considered residents, the court pointed out "numerous interrelationships between students, their local communities, and the State of Michigan."[43] Some of the connections with the state and college community cited by the Michigan court bear directly on the establishment of student residency in general:

> Students pay state tax, city income tax (if any), gasoline, sales and use taxes . . . As the United States Supreme Court has recognized, property taxes are ultimately paid by renters such as some of the appellants. In addition, Michigan explicitly

[39] In Clarke v. Redeker, 259 F. Supp. 117, 124 (S.D. Iowa 1966), the court states: "In reviewing a determination of an administrative body, a Court is normally limited to ascertaining whether the administrative action was arbitrary, unreasonable, or capricious or unlawful."

[40] The twenty-sixth amendment to the Constitution provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age."

[41] Bright v. Baesler, 336 F. Supp. 527, 533 (E.D. Ky. 1971).

[42] 385 Mich. 670, 189 N.W.2d 423 (1971). *See also* Jolicoeur v. Mihaly, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971), where the California Supreme Court held that the twenty-sixth amendment prohibits voting officials from requiring that young people who consider their university residence to be their domicile register and vote in their parent's district. The court said: "[T]he twenty-sixth Amendment is intended to compel adult treatment of minors for voting purposes. . . ." *Id.* at 572, 488 P.2d at 5, 96 Cal. Rptr. at 701.

[43] 385 Mich. 670, 690, 189 N.W.2d 423, 432 (1971).

> recognizes this fact by allowing all renters a 17% exemption on rent paid in lieu of the exemption that property owners receive for payment of property taxes. Students with children can and do enroll them in the public school system, and, therefore, have more than a passing interest in educational standards of the community.[44]

Since the Kentucky and Michigan opinions involve infringements of the fundamental right to vote,[45] they can be distinguished from the tuition residency situation. Yet much of the reasoning of these cases is applicable to proof of residency for tuition purposes. Indeed, one court has bridged the gap between establishing residence for voting and for tuition payments.[46] The Judge of the Seventeenth Judicial District of Kansas held that the enfranchisement of eighteen year olds by the twenty-sixth amendment means that they are no longer dependent on their parents for residence.[47] The court specifically ruled that the college had the burden of proof to show that the student claimant who registered to vote in the town in which he attended a state junior college was not a resident of the junior college district.[48] Although the facts of this case applied to charging nonresident tuition to students outside the junior college district, though not necessarily outside the state of Kansas, the decision could easily be extended to include students from out of state seeking residency status.[49]

If the reasoning of the Kansas court is followed, the twenty-sixth amendment may have supplied students with a new legal argument to attack out-of-state tuition. Rebuffed in their efforts to challenge the nonresident tuition fee on a constitutional basis in *Starns* and similar cases, student opponents of the nonresident tuition fee may ultimately succeed by attacking the application of the nonresident classification.

IV. EFFECT OF MARRIAGE ON RESIDENCE STATUS

A frequent problem in the administration of nonresident tuition regulations is the effect of marriage on the nonresident's

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[44] *Id.* at 689-90, 189 N.W.2d at 431-32.

[45] *See* note 28 *supra*.

[46] Board of Trustees of Colby Community Junior College v. Benton, No. 5258 (17th Judicial District of Kansas, Jan. 3, 1972). *See also* news reports of this unpublished opinion: N.Y. Times, Jan. 10, 1972, at 16, col. 3; N.Y. Times, Jan. 16, 1972, § 4, at 11, col. 4.

[47] Board of Trustees of Colby Community Junior College v. Benton, No. 5258 (17th Judicial District of Kansas, Jan. 3, 1972).

[48] *Id.* at 5.

[49] The portion of the opinion dealing with residence is being appealed to the Supreme Court of the State of Kansas.

domiciliary status. Normally, a woman acquires her husband's residence upon marriage, since residence in such circumstances is considered derivative.[50] But for purposes of assessing nonresident tuition different rules have been applied. Here, as in other areas of the application of the nonresident tuition charge, the governing rules vary from state to state, and even from institution to institution. In *Clarke v. Redeker*[51] the court held that a state-supported university may reasonably classify a nonresident student and his resident spouse as residents of the same state. However, the court continued: "This does not mean that it is required to do so. Such classifications should be left to the sound discretion of the appropriate University officials."[52] Marriage itself is not determinative of the question of residency for tuition purposes in the court's view, but "should merely be a factor in determining residency classification."[53]

Other courts have taken the more extreme position that marriage does not alter the residency status of a nonresident for tuition purposes. Thus, when an Ohio resident argued in *Kirk v. Board of Regents*[54] that by marrying a California resident she acquired California residence, the court agreed, but nevertheless ruled that she must pay the nonresident tuition fee until she had completed the one year waiting period required by California regulations:

> [I]t does not logically follow from this fact [that petitioner became a resident of the state upon marriage] that for tuition purposes, petitioner should be allowed to retroactively take advantage of the period of her husband's residence prior to the marriage, and be classified as a resident student.[55]

One curious characteristic of most rules in this area is that they discriminate against males. In most states it is easier for females to attain resident status by virtue of marriage than for males.[56] In a recent Supreme Court decision which invalidated a state statute discriminating against women,[57] the Court viewed sex as a clas-

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[50] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (Proposed Official Draft No. 5, 1969): "A wife who lives with her husband has the same domicile as his unless the special circumstances of the wife make such a result unreasonable."

[51] 259 F. Supp. 117 (S.D. Iowa 1966).

[52] *Id.* at 124.

[53] *Id.*

[54] 273 Cal. App. 2d 430, 78 Cal. Rptr. 263 (1969).

[55] *Id.* at 436, 78 Cal. Rptr. at 264 (1969).

[56] R. CARBONE, *supra* note 15, at 20.

[57] Reed v. Reed, 404 U.S. 71 (1971). A mandatory provision of the Idaho probate code gave preference to men over women for appointment as administrators of decedents' estates. It was argued that the statute served a legitimate state purpose of reducing the

sification requiring a greater showing of state interest in order to withstand constitutional scrutiny under the equal protection clause. While this decision might supply nonresident males with a ground for challenging tuition regulations that discriminate against men, the issue would more likely be resolved without reaching the constitutional questions. Courts might well adopt the approach that the *Clarke* court used to construe a tuition residency regulation which by its terms dealt only with reclassification of nonresident females and omitted any reference to nonresident males in similar situations.[58] The *Clarke* court attributed little significance to the omission, explaining that "[t]he fact that there is not a similar guideline for male students involved in such a marriage does not prevent the appropriate University officials from considering his marriage when he is attempting to overcome the rebuttable presumption of nonresidency."[59] Presumably, the court's reasoning would apply to a regulation which specifically treated nonresident men and women differently; nevertheless, the issue has not been directly confronted.

V. MODEL LEGISLATION ON STUDENT RESIDENCY

Recognizing the need for reform in the area of the reclassification of students for residency purposes, the Education Commission of the States, an independent association of governors, chief state school officials, and legislators in forty-seven states, has drafted model legislation to deal with this problem.[60] While the

workload of the probate courts, since the statute operated to eliminate hearings on the merits of potential administrators of opposite sex. The Supreme Court disagreed.

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.
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> . . . By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.

Id. at 76-77. By striking down the Idaho statute on traditional equal protection grounds, the Court avoided deciding whether sex is a suspect classification to which the compelling state interest test is applicable.

[58] The regulation contested in *Clarke* provided:

> The residence of a wife is that of her husband. A nonresident female student may attain residence through marriage, and correspondingly, a resident female may lose residence by marrying a nonresident. Proof of marriage should be furnished to the Registrar at the time change of status is requested.

259 F. Supp. 117, 124 (S.D. Iowa 1966).

[59] *Id.*

[60] EDUCATION COMMISSION OF THE STATES, MODEL ACT FOR CLASSIFICATION OF STUDENTS FOR TUITION PURPOSES AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION [hereinafter cited as MODEL ACT].

Model Act is not designed to meet each state's individual needs, it is offered as a general guide to state legislatures considering revision of their student residency rules. The heart of the Model Act is the broad governing rule that "every person having his domicile in this State shall be entitled to classification as an instate student for tuition pruposes."[61] Domicile is defined by the Act as "a person's true, fixed, and permanent home and place of habitation. It is the place where he intends to remain, and to which he expects to return when he leaves without intending to establish a new domicile elsewhere."[62] Who qualifies under this definition is, of course, the crucial consideration under the Model Act, as well as under all other student residency legislation.

The Model Act establishes two categories of persons for purposes of tuition classification: those who are emancipated from their parents and those who are unemancipated. An "emancipated" person is one "who has attained the age of 18 years, and whose parents have entirely surrendered the right to care, custody, and earnings of such person and who no longer are under any legal obligation to support or maintain such person."[63] Emancipated persons coming from another state to attend an institution in the state for the first time are presumed not to have acquired domicile in the state unless, before the opening day of school, they have resided in the state for the period of time required to vote for state officials.[64] By making domicile for nonresident tuition purposes dependent upon acquisition of voting residence, the Model Act has made a novel compromise. It has implicitly retained the much maligned waiting period requirement, but has tied this period to the state's voting laws. In many ways, the effect of the Model Act would be to reduce the waiting period substantially.[65]

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[61] MODEL ACT § 3(1).

[62] *Id.* § 2(3).

[63] *Id.* § 2(4). Since the Model Act does not specify when a parent's legal obligation toward his child terminates, resort must be made presumably to state law. Generally the parental obligation ends when the child attains the age of majority, though the duty may continue when necessary. *See, e.g.*, Commonwealth v. O'Malley, 105 Pa. Super. 232, 161 A. 883 (1932), where a father was required to support his adult daughter because she was an invalid incapable of self-sufficiency. A parent's legal obligation may be terminated earlier in many states if the minor, having attained "years of discretion," maintains a way of life separate from his parents, as for instance by marrying. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22, comment *f* (Proposed Official Draft No. 5, 1969).

[64] MODEL ACT § 4(1).

[65] In Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. March 22, 1972), the Supreme Court struck down Tennessee's three month county residency requirement for voting as a violation of the equal protection clause since the state was unable to show a compelling state interest for the length of the residence period. The Court suggested that a thirty day period would be a more appropriate residence requirement for voting purposes, although it did not specifically hold that a longer period would be constitutionally proscribed. In light

For those emancipated students who do not qualify for resident tuition upon enrollment, either because they cannot attain voting residence or because they were unemancipated minors at that time, the Model Act permits subsequent reclassification upon a "clear demonstration" that they have established domicile in the state.[66] But in making reclassification decisions, the appropriate administrative official must apply the Model Act's rebuttable presumption that the domicile of an emancipated person receiving regular financial assistance from his parents or whose parents' income was taken into account in furnishing scholarships or loans is that of his parents.[67] Apparently, the extent of financial assistance is not a relevant factor in these decisions. The Model Act by this provision adds a significant barrier to reclassification, since many students are to some degree financially dependent upon their parents. Ironically, a higher nonresident tuition fee may be the factor that necessitates parental aid since it significantly increases the cost of the student's education. Under the Model Act the student who cannot assume these costs alone must bear a greater burden of proof in demonstrating that he intends to reside in the state permanently. Arguably, a student's financial self-sufficiency bears little or no relationship to his domiciliary intent, and the Model Act may therefore be introducing an extraneous factor into the reclassification process.

The Model Act's most notable feature is that it attempts to relate qualifications for tuition residency to other state residency requirements. Unfortunately, the drafters chose to restrict this as well as other reclassification provisions to "emancipated" individuals, while treating quite differently persons whose parents' legal obligation toward them still exists. The domicile for tuition purposes of these "unemancipated" students is that of their parents;[68] therefore, an unemancipated student who initially comes from another state will in all instances be classified a nonresident and will be subject to the out-of-state tuition charge of the publicly assisted educational institution.[69] This result is unaffected by

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of the Supreme Court's preference for relatively brief residency requirements for voting, the drafters of the Model Act may wish to reconsider the provision of the Act which ties the tuition residency period with voting residency requirements, since they may feel that a brief period such as thirty days may not be sufficient to manifest a student's domiciliary intent.

[66] MODEL ACT § 4(2).

[67] *Id.* § 4(5).

[68] *Id.* § 3(2).

[69] An exception to the Act's general rule that the domicile of an unemancipated person is that of his parents is provided by § 3(4) which states: "Any person who remains in this State when his parents, having theretofore been domiciled in this State, removes from this State, shall be entitled to classification as an in-state student (until attainment of the degree

the student's qualification as a resident for voting purposes or acquisition of other significant connections with the state.

To declare that because a student is legally dependent upon his parents for support he cannot attain permanent residence apart from his parents' home state may be politically palatable, but it is not particularly equitable. Since domicile is a matter of intent, it is illogical to say only emancipated students can acquire permanent residence in the state. Intent does not turn upon age; nor should the distinction between residents and nonresidents for tuition purposes. In addition, the Model Act's position raises the spectre of an unconstitutional "closed classification," since the unemancipated student is denied the opportunity to qualify for lower tuition even though he may be able to prove intent to remain in the state permanently. The importance of the Act as an improvement of the current law is diminished to the extent that all members of the university community are not given an equal opportunity to achieve resident status.

The Model Act takes a liberal position on the issue of marriage and nonresident tuition by prescribing as a "rule" for determining tuition status the proposition that the "spouse of any person who is classified or is eligible for classification as an in-state student shall likewise be entitled to classification as an in-state student."[70] This position eliminates the waiting period requirement and the problems of proving domiciliary intent for persons who marry permant residents of the state. Furthermore, the language of the Act makes no distinction between the treatment of men and women, thereby avoiding objections to the Act as discriminatory on the basis of sex.

In order to prevent the unreasonable arbitrary exercise of the administrative official's discretion, the Model Act mandates that the state-wide agency concerned with higher education promulgate uniform criteria for determining tuition status and uniform procedures for appellate review of the official's decisions.[71] This feature of the Act obviates the necessity of resorting to judicial action in the first instance, yet it is not specific enough to guarantee that the appropriate values will be considered. The state education authority is free to provide an appellate process that satisfies the requirement of form but fails in substance. The composition of the review board is critical to the value of the appellate procedure. If students and faculty are not represented

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for which he is currently enrolled) so long as his attendance at a school or schools in this State shall be continuous."

[70] MODEL ACT § 3(5).

[71] *Id.* § 5.

on the board, the appellate process might result in little more than an administrative rubber stamp. Legislatures adopting the Model Act should therefore consider making the review provisions more explicit in order to ensure the infusion of broader representation into the administrative decision-making process.

Except for the provision which attaches tuition residency to voting residency,[72] there is little that is new or innovative in the Model Act. Yet the Act, merely by codifying some of the more equitable features of existing rules, is far superior to most states' current tuition regulations. Opponents of nonresident tuition fees may be chagrined by the Model Act, since it does not eliminate the nonresident fee; certainly, that is not one of its objectives. Nevertheless, the Model Act does provide a greater opportunity for a student who has decided to change his permanent residence to the state where he attends school to qualify for the lower resident tuition fees. The absence of the opportunity for reclassification remains the most fundamental objection to existing residency rules. By alleviating at least some of these objections, the Model Act presents a better alternative than most current residency regulations.

VI. CONCLUSION

Starns and its predecessors firmly established the right of a state to impose a residency requirement for lowered tuition fees at state-supported institutions of higher education. The assault on the nonresident tuition fee, long the object of scorn by students who come from other states, is likely to shift from focusing on the exaction of the fee to scrutinizing its application. Tuition regulations which create impenetrable barriers to reclassification or or discriminate on the basis of sex are vulnerable to constitutional attack. But even absent any constitutional infirmities, tuition regulations will continue to supply ground for combat in the legislatures and courtrooms. The concern of legislatures with the operating costs of the universities and the concern of students with liberalizing the qualifications for the lower tuition charge are in essential conflict. The extent to which these competing interests are accommodated is the measure of any legislation in this area. The Model Act attempts to reconcile these interests by expanding the opportunity for emancipated students to attain resident status, while denying similar opportunity to unemancipated students. The result is an adequate, though imperfect, document.

—Barry D. Glazer

[72] *Id.* § 4(1).