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Constitutional Law - Permanent Irrebuttable Presumption of Nonresidency upon Students Is Unconstitutional

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CONSTITUTIONAL LAW—PERMANENT IRREBUTTABLE PRESUMPTION OF NONRESIDENCY UPON STUDENTS IS UNCONSTITUTIONAL

States have long permitted bona fide residents to attend state supported colleges and universities on a preferential tuition basis. That is, the tuition and fees required of in-state students are less than those required of out-of-state students. In fact, it has recently been reported that nonresidents are required to pay sixty-one per cent more for tuition and required fees than residents.[1] The *difference* in tuition rates between these two classes of persons has often been attacked in the state and federal courts and has many times been a topic for discussion in legal literature.[2]

The United States Supreme Court recently handed down a decision concerning this problem. It was the first time that the Court rendered a full written opinion considering the right of a state to distinguish between residents and nonresidents when assessing tuition and fees for attendance at their institutions of higher education. In this case, two students at the University of Connecticut challenged the constitutionality of a statute adopted by the State of Connecticut permanently denying resident student status for tuition purposes to its residents and imposing a permanent irrebuttable presumption of nonresidency based upon recent interstate travel.

The appellee, Margaret Marsh Kline, while attending school in California as a resident of that state, applied for admission to the University of Connecticut. Because she was to marry Peter Kline, a resident of Connecticut, she was informed that she was to be classified as a resident for tuition purposes and, hence, receive the usual resident tuition discount.[3] She moved to Connecticut with her husband, established a per-

1. The Chronicle of Higher Education, Oct. 9, 1973, at 3, col. 3.

2. See, e.g., Bornstein, *Residency Laws and the College Student*, 1 J.L. & ED. 349 (1972); Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immunities Clause*, 50 NEB. L. REV. 31 (1970); Hendrickson & Jones, *Nonresident Tuition: Student Rights v. State Fiscal Integrity*, 2 J.L. & ED. 443 (1973); Katkin, *Residence Requirements: The Unresolved Issues*, 36 ALBANY L. REV. 35 (1971); Longo & Schroeck, *College Residency Requirements*, 20 CLEVELAND ST. L. REV. 492 (1971); Morris, *Domicil In General and Of Students in Particular*, 12 ME. L. REV. 112 (1919); Spencer, *The Legal Aspects of the Nonresident Tuition Fee*, 6 ORE. L. REV. 332 (1927).

3. Connecticut law provided that "the board of trustees of the University of Connectituct shall fix fees for tuition of not less than three hundred fifty dollars

manent home, acquired a Connecticut driver's license, registered her car in Connecticut, and also registered to vote in Connecticut. Thereafter, the appellant, John W. Vlandis, Director of Admissions at the University of Connecticut, irreversibly classified Mrs. Kline as an out-of-state student, pursuant to a new Connecticut law,[4] and required her as a nonresident to pay additional tuition and fees which were not required of residents.

The appellee, Patricia Catapano, applied for admission to the University of Connecticut while living in Ohio. She was accepted and moved to Connecticut to become a full-time student there. She, too, had a Connecticut driver's license, registered her car in Connecticut, and registered to vote in Connecticut. She was not married to a resident, however. She was also classified as an out-of-state student by the appellant and required to pay the additional tuition and fees.

Believing that they were bona fide residents of the State of Connecticut and should have been classified as such, they brought suit in a United States District Court alleging that the law established in Conn. Gen. Stat. § 10-329(b), as amended by Public Act No. 5, § 126, which permanently classified them as nonresidents for tuition purposes, infringed upon their right to due process and equal protection of the laws as granted in the fourteenth amendment of the United States Constitution.[5] The district court found for the plaintiffs. The court ruled that the plaintiffs were bona fide residents of the state and entitled to resident tuition rates after their first semester of attendance. The court stated that the law was unconstitutional as being violative of the fourteenth amendment.[6]

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for tuition for residents of this state and not less than eight hundred fifty dollars for nonresidents . . . ." CONN. GEN. STAT. REV. § 10-329(b) (Supp. 1969), *as amended by* Public Act No. 5, § 122 (June Spec. Sess. 1971). In addition, nonresidents were required to pay a two hundred dollar nonresident fee.

4. CONN. GEN. STAT. REV. § 10-329(b) (Supp. 1969), *as amended by* Public Act No. 5, § 126 (June Spec. Sess. 1971). Section 126 defined a nonresident as follows:

> [A]n "out-of-state student," if single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut. . . . An "out-of-state student," if married and living with his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut. . . . The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status *for the entire period* of his attendance at such constituent unit. [Emphasis added].

5. Note that the students only attacked the validity of Section 126 which created *permanent* classifications; they did not attack the validity of Section 122 which created a distinction between residents and nonresidents for tuition purposes.

6. Kline v. Vlandis, 346 F. Supp. 526 (D. Conn. 1972).

On appeal, the United States Supreme Court in its opinion stated that although the state has a valid purpose in classifying students as residents or nonresidents and permitting bona fide residents to attend state colleges and universities on a preferential tuition basis, a state may not use a permanent and irrebuttable presumption as a basis for determining residency and deny an individual the opportunity to controvert that presumption, so as to deprive him of his rights as granted under the due process clause of the fourteenth amendment of the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441 (1973).

The significance of the case can best be seen and understood when taken in light of the developments that preceded it. Therefore, the purposes of this casenote are to present and critique the prior law and, then, to discuss the issues before the Supreme Court and its resulting decision. In order to make more apparent the rationale behind the decision rendered in this landmark case, a brief historical review of the law in two areas will be presented. These two areas are (1) presumptions and (2) nonresident tuition.

PRESUMPTIONS

A presumption is an inference of one fact which is uncertain from another fact which is known or proved. It is a rule of evidence which places the burden of proof on the individual who refutes the presumption; he must show that the nonexistence of the presumed fact is more probable than its existence.[7] The United States Supreme Court has stated that presumptions, which are created by government action, are not a denial of due process or equal protection as guaranteed by the fifth and fourteenth amendments of the Constitution if (1) a rational connection exists in common experience between the fact proved and the ultimate fact presumed, (2) the presumption is not so unreasonable so as to be merely arbitrary, and (3) the presumption is not conclusive or irrebuttable, *i.e.*, it does not deny a party the right to introduce other evidence relating to the issue in order to controvert the fact presumed.[8]

Presumptions cannot be judicially sustained if no reasonable or rational connection exists between the proved and presumed facts.[9] The pre-

7. *See* PROP. FED. R. EVID. 301.

8. *See* Western & A.R.R. v. Henderson, 279 U.S. 639 (1929); Manley v. Georgia, 279 U.S. 1 (1928); Luria v. United States, 231 U.S. 9 (1913); Bailey v. Alabama, 219 U.S. 219 (1910); Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910).

9. A presumption will not be sustained if its validity is based solely on its convenience in comparison to the production of evidence proving the ultimate fact. Tot

sumption must not be so strained or arbitrary that it lacks a reasonable or rational relationship with the circumstances or experiences of life.[10] In order for a presumption to be constitutional, it must "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend."[11] A presumption which constituted an attempt, by legislative fiat, to enact a fact which does not, and cannot be made, to exist in actuality is invalid.[12]

Presumptions may not go so far as to deny due process or equal protection.[13] The courts will allow the use of rebuttable presumptions—those that a party is free to overcome by the introduction of other evidence on the particular point to which the presumption relates.[14] Conclusive or irrebuttable presumptions deny due process or equal protection and, hence, are constitutionally invalid.[15] Forbidding the exercise of the right to controvert a presumption is so arbitrary and unreasonable that the pre-

v. United States, 319 U.S. 463 (1943). *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

10. *See* United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463 (1942); United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968).

11. Leary v. United States, 395 U.S. 6, 36 (1969). "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67 (1965). But, "an irrational or arbitrary 'presumption' could not stand no matter what legislators might be thought to have believed. . . ." United States v. Adams, 293 F. Supp. 776, 781 (S.D.N.Y. 1968). "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." Manley v. Georgia, 279 U.S. 1, 6 (1929). *See also* Western & A.R.R. v. Henderson, 279 U.S. 639 (1929); Ducharme v. City of Putnam, 161 Conn. 135, 285 A.2d 318 (1971).

12. *See* Heiner v. Donnan, 285 U.S. 312 (1932).

13. *See, e.g.*, Morrison v. California, 291 U.S. 82 (1934).

14. *See* Manley v. Georgia, 279 U.S. 1 (1929); Luria v. United States, 231 U.S. 9 (1913); Reitler v. Harris, 223 U.S. 437 (1912); Adams v. New York, 192 U.S. 585 (1904).

15. *See* Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). *Cf.* Turner v. United States, 396 U.S. 398 (1970).

Note that Carrington v. Rash, 380 U.S. 89 (1965), laid down the rule that a conclusive or irrebuttable presumption may not be used to classify a person as a nonresident if he is a bona fide resident. *Carrington* has often been cited in nonresident tuition cases which have succeeded it. The Supreme Court ruled unconstitutional a portion of the Texas Constitution which denied a member of the armed forces residency status for *voting* purposes as long as he remained in the service if he first moved to Texas during his military service. The Court said that "[b]y forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96.

sumption cannot stand.[16] Due process requires that one has the right to overcome any presumption or inference with adequate and sufficient proof of actualities. Proof of the most positive character should be sufficient to overcome any encompassing legislative dictate. In short, presumptions which are purely arbitrary without regard to facts or actualities or are irrebuttable are constitutionally barred.[17]

NONRESIDENT TUITION

Perhaps the first case to involve the question of residency and tuition was *State ex rel. Kaplan v. Kuhn.*[18] Here, the Ohio court stated that residence or citizenship is a question of fact and intention. The court stated that the residence of a student is usually temporary and, hence, there may be a presumption made that the residence of any particular student is temporary. Thus, it is necessary for the student to overcome this presumption by suitable evidence that he intends to make a place his domicile and that he should be entitled to the same privileges as bona fide residents.[19] The court made a distinction between residence and citizenship (or domicile). Residence requires only bodily presence, but citizenship or domicile is a matter of intent to remain as well as actual presence. Mere residence will not qualify a student to be treated as a true resident of the state or city.[20]

The court in *Kaplan* did not consider the constitutionality of the state distinguishing between true residents and nonresidents. However, in *Bryan v. Regents of the University of California,*[21] the California court

16. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Heiner v. Donnan, 285 U.S. 312 (1932).

17. *See* Guinzburg v. Anderson, 51 F.2d 592 (S.D.N.Y. 1931). *See also* Schlesinger v. Wisconsin, 270 U.S. 230 (1926).

18. 8 Ohio N.P. 197, 11 Ohio Dec. 321 (Hamilton County Pleas 1901).

19. Such evidence includes, but is not limited to, the individual's intent, his personal presence within the state, his competency to change his domicile, his financial arrangements, his place of employment, his family ties, the state in which he resides while not attending school, his housing facilities, his ownership or leasing of real estate, the state in which he votes, pays taxes, or serves jury duty, the state which issued his driver's license, the state in which his car is registered, the existence of business permits, and his social life (club memberships, church affiliation, etc.). *See, e.g.*, District of Columbia, v. Murphy, 314 U.S. 441 (1941); Note, *The Constitutionality of Resident/Non-resident Tuition Differentials,* 24 S.C.L. REV. 398 (1972).

20. Note that the terms of "residence" and "domicile" are often used interchangeably. In this casenote, "residence," "domicile," "bona fide residence," "true residence," and "in-state" will all have the same meaning. "Nonresidence" and "out-of-state" will have a meaning contrary to those terms listed in the preceding sentence.

21. 188 Cal. 559, 205 P. 1071 (1922).

upheld a regulation which required the payment of a nonresident admission fee and tuition not required of residents. A nonresident was defined as one who had not been a bona fide resident of the state for one year before entrance into the university.[22] The regulation was attacked on the grounds that it violated the privileges and immunities clauses of the California Constitution, which had stated that privileges and immunities shall be granted on the same terms to all citizens or class of citizens. The court said that the legislature had the power to create a classification and, in this case, properly did so by basing the classification on a one-year residency requirement. Thus, the entire class was treated equally. The court went on to add:

> [T]he requirement that a student shall maintain a residence in the state of California during one taxation period [*i.e.*, one year] 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 or by the [regents].[23]

Hence, the court ruled that a nonresident classification was not unreasonable or arbitrary and that there was a reasonable basis for the classification.

The next case to be litigated in the area of nonresident tuition occurred in 1960.[24] The state court in *Newman v. Graham*[25] struck down an Idaho regulation which when interpreted by the Board of Trustees classified a student as a nonresident for tuition purposes, if he had not been domiciled in the state for more than six months preceding his admission,[26] and required him to retain that classification throughout college if he attended continuously each regular term, irrespective of the fact that he may have been domiciled in the state for a six-month period and become a bona fide resident. The court said the regulation as interpreted

> does not afford any opportunity to show a change of residential or domiciliary status and does in effect deny equality of opportunity to persons

22. This type of regulation is often referred to as a waiting period requirement and is distinguishable from a durational residency requirement. The latter can be fulfilled while attending school, but the former cannot.

23. 188 Cal. at 561, 205 P. at 1072.

24. However, a closely related decision in this area was rendered in Halaby v. Board of Directors of Univ. of Cincinnati, 162 Ohio St. 290, 55 Ohio Op. 171 (1954). The court stated that "the fact that the [student], as well as the other residents of the city, must be a citizen of the municipality in order to qualify for free tuition to the academic department of the university can not disqualify him because he is not a citizen of the United States." *Id.* at 298, 55 Ohio Op. at 175.

25. 82 Idaho 90, 349 P.2d 716 (1960).

26. This was a six-month waiting period requirement.

> of the same class who are similarly situated and for that reason it is an unreasonable regulation . . . . It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation . . . . We conclude that the regulation as interpreted by the Board is arbitrary, capricious and unreasonable.[27]

Thus, as a result of this decision, a nonresident tuition law was first held unconstitutional by a court of law; the conclusion, of course, being that a student could become a resident for tuition purposes while attending school, if he could present sufficient evidence to prove a change in his residence and his intent to remain. The result was slightly contrary to the result in *Bryan*. The *Bryan* court had stated this type of classification was permissible, but it also had impliedly indorsed the use of the irreversible nonresident classification throughout continuous college attendance. *Newman* rejected that implication.

In *Landwehr v. Regents of the University of Colorado*,[28] which was decided in 1964, a student who clearly was not a resident challenged the nonresident classification on the grounds that the regulation was unconstitutional in that it violated the equal protection, the due process, the privileges and immunities, and the commerce clauses of the United States Constitution and the due process clause of the Colorado Constitution. The basic *and only* contention of Landwehr was that the classification itself was improper. The state court simply held that the classification of students of the tax-supported university into "in-state" and "out-of-state" groups is a matter of legislative determination and "is not arbitrary or unreasonable and is not so lacking in a foundation as to contravene [any] constitutional provisions. . . ."[29] The court added that all that was required was "equality and uniformity between the persons in the separate classes."[30] Thus, this court, as did the *Bryan* court, specifically sanctioned the classifications which were challenged. Note that the court here did not consider the question of whether a student had the right to later be reclassified as a resident, because Landwehr did not raise an argument on that particular point.

In *Clarke v. Redeker*,[31] which was decided two years later, a student brought suit charging that his classification as a nonresident was violative of the equal protection and privileges and immunities clauses of the four-

27. 82 Idaho at 95, 349 P.2d at 719.

28. 156 Colo. 1, 396 P.2d 451 (1964).

29. *Id.* at 6, 396 P.2d at 453.

30. *Id.* *See also* People ex rel. Dunbar v. Schaefer, 129 Colo. 215, 268 P.2d 420 (1954).

31. 259 F. Supp. 117 (S.D. Iowa 1966).

teenth amendment. The Iowa statute being contested not only established resident and nonresident classifications, but also made the presumption that a student from another state was a nonresident. While recognizing that the fourteenth amendment of the Constitution prohibits a state from denying the equal protection of the law to any person within the state, the federal court stated that equal protection does not prohibit classifications by the states which are not "palpably arbitrary and [are] reasonably based on a substantial difference or distinction . . . so long as the classification is rationally related to [some] legitimate state object or purpose."[32] In continuing, the court pointed out that

> the students at SUI who are classified as nonresidents are charged a higher tuition than resident students. The [state justifies] the discrimination primarily on the basis that resident students or their parents pay taxes to the State of Iowa which, in turn, supports and maintains SUI. The higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting SUI between residents and nonresidents attending the University. Although there is no way for this court to determine the degree to which the higher tuition charge equalizes the educational cost of residents and nonresidents, it appears to be a reasonable attempt to achieve a partial cost equalization. The regulation classifying students as residents or nonresidents for tuition payment purposes is not arbitrary or unreasonable and bears a rational relation to Iowa's object and purpose of financing, operating, and maintaining its educational institutions.[33]

Clearly, the court ruled that such a classification was not a denial of equal protection. The court also stated that the presumption of nonresidency upon an out-of-state student did not violate the constitutional rights of the student. The court submitted that the presumption was neither con-

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32. *Id.* at 122. Equal protection only requires that a statute cannot be so arbitrary, capricious, or invidious that it discriminates between persons who are similarly situated. Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). All statutes and regulations create classifications of persons; equal protection requires that classifications must have a rational and reasonable relationship to a valid state objective. Using this rational basis test, a statute will be deemed constitutional if *any* state of facts will sustain the classification. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Gulf, C. & S.F.R.R. v. Ellis, 165 U.S. 150 (1897); Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, if a statute penalizes the exercise of a fundamental right or is based on some suspect criteria, the courts will use a compelling interest test and require the state to show that the classification promotes a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Brown v. Bd. of Election, 347 U.S. 483 (1954).

33. 259 F. Supp. at 123 (footnotes omitted).

clusive nor permanent and that if proper proof of residence was submitted, a student from without the state could be reclassified as a resident.[34] Hence, the presumption did not violate the rule laid down in *Carrington v. Rash*.[35] Further, the court followed the basic rules outlined in *Newman* and *Landwehr*, but it did not cite to them.[36]

At about the same time the *Clarke* cases were decided, the *Johns v. Redeker*[37] decision was rendered. The federal circuit court supported the reasoning of the district court in the first *Clarke* case and added that

> [a] substantial portion of the funds needed to operate the Regents' schools are provided by legislative appropriation of funds raised by taxation of Iowa residents and property. Nonresidents and their families generally make no similar contribution to the support of the schools. A reasonable additional tuition charge against nonresident students which tends to make the tuition charged more nearly approximate the cost per pupil of the operation of the schools does not constitute an unreasonable and arbitrary classification violative of the equal protection.[38]

While entering this judgment, the court also used *Bryan* and *Landwehr* as support.

The *Clarke* cases and the *Johns* case in 1969 marked the end of an extended era of suits challenging the constitutionality of a number of the states' resident/nonresident tuition regulations. However, a new era resulting in an increasing number of suits against these regulations was about to begin because of the decision rendered by the United State Supreme Court in *Shapiro v. Thompson*.[39] This case became the prime support for new attacks on nonresident tuition, since the Court ruled that the denial of state welfare benefits to residents who had resided in the state for less than a year discriminated invidiously between new and old residents. The Court held that because the classification *penalized the fundamental right to interstate travel without serving a compelling state interest*, it was an unconstitutional denial of equal protection, even though the classification may have reasonably been related to a valid state objec-

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34. *Id.* at 125.

35. *See* note 15 *supra*.

36. The final result of the Clarke case was that the student was deemed by the court to be a resident for tuition purposes since he fulfilled the requirements for bona fide residency. But because Clarke failed in his first suit to enter a plea for the return of the excess tuition he had paid as a result of his unjust classification, he brought a second suit. Clarke v. Redeker, 406 F.2d 883 (8th Cir. 1969). However, relief was denied on the grounds of res judicata. One cannot split a cause of action. *Id.* at 885.

37. 406 F.2d 878 (8th Cir. 1969), *cert. denied*, 396 U.S. 853 (1969).

38. *Id.* at 883.

39. 394 U.S. 618 (1969). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972).

tive. Many felt then that *any* distinction for *any* purpose between new and established residents was a denial of equal protection and, hence, unconstitutional.

Thus, in *Kirk v. Board of Regents of the University of California*,[40] the student appellant, citing *Shapiro*, challenged the constitutionality of the one-year durational residency requirement[41] on the grounds that

> the requirement was an unconstitutional interference with her fundamental constitutional right of interstate travel; no compelling governmental interest justifies this clear violation of the equal protection clause; and the requirement is unconstitutionally vague and uncertain.[42]

The state court, however, did not agree with the assertions put forth by the student. It reasoned that the Supreme Court in *Shapiro* had no intention of making its rule applicable to other residence requirements such as those that relate to benefits which bear no relation to basic human necessities. The court stated that the requirement did not have an unconstitutional "chilling effect" on interstate travel, because the requirement did not preclude one from obtaining the benefit of higher education, but merely required the payment of the higher nonresident tuition for a maximum period of one year. Hence, this did not significantly deter persons from moving into the state so as to be violative of the constitutional right to travel interstate.[43]

Since the requirement did not infringe on the fundamental right to travel, the regulatory requirement need only be tested for constitutionality in light of "ordinary equal protection standards."[44] If the requirement did not involve a fundamental right, then the state need not show a compelling state interest but only a rational relationship between the requirement and a legitimate state objective or purpose. The court said:

> [A]ny classification by a state that is not palpably arbitrary and is reasonably based on a substantial difference or distinction is not a violation of the equal protection clause so long as the classification is rationally related to a legitimate state objective or purpose.[45]

Clearly, this is the same language as used in reaching the decision in the first *Clarke* case upon which this court relied. The court considered California's purpose of financing, operating, and maintaining its public institutions of higher education. It stated that the attempt of the state to

40. 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).

41. The residency requirement here could be met while attending school.

42. *Id.* at 437, 78 Cal. Rptr. at 265.

43. *Id.* at 439-41, 78 Cal. Rptr. at 266-67.

44. *Id.* at 441, 78 Cal. Rptr. at 267.

45. *Id.*

equalize the contribution of support between residents and nonresidents by charging nonresidents higher tuition aided in the achievement of that goal. Requiring persons, who declare that they have become bona fide residents of the state and intend to remain, to make some contribution to the economy of the state for a period of one year before allowing them to take advantage of the benefits of lower tuition is a reasonable attempt to achieve the goal of cost equalization.[46] The court cited *Bryan* and *Clarke* for support of this position.

Finally, the court concluded by stating that residents and nonresidents may be treated differently if there are valid reasons for doing so without violating the privileges and immunities clause.[47] Further, the court here stated that the one-year residence requirement was neither vague nor uncertain on its face or in its application.

After *Kirk*, the next logical step in nonresident tuition litigation was to determine whether it was constitutionally permissible under equal protection doctrines for a state to create an irrebuttable presumption that *any* person who had not continuously resided in the state for one year immediately before his entrance to a state college or university was a nonresident for tuition purposes until such time that he had actually been within the state for one year. The issue, then, simply was whether a state could claim a person to be a nonresident for tuition purposes for a year even if that person could prove that he had become a true resident and intended to remain before that time. This issue, which was very similar to the one considered in *Kirk*, was considered in *Starns v. Malkerson.*[48] The plaintiffs in this action contended that this presumption discriminated against persons who had exercised the constitutional right to travel while others similarly situated who had not exercised that right were *not* presumed to be nonresidents.[49] The question was not whether there could legally be a difference in tuition, but whether the State of Minnesota could make a presumption of nonresidency against new bona fide residents while not making the presumption against established bona fide residents.

For the same reasons as given in *Kirk, i.e.*, (1) the one-year durational residency requirement has no unconstitutional "chilling effect" on the assertion of the constitutional right to travel by students, and (2) higher education is not a basic necessity of life, this federal court declared that there was no infringement of a fundamental right such that the *Shapiro*

46. *Id.* at 444, 78 Cal. Rptr. at 269.

47. *See also* Toomer v. Witsell, 334 U.S. 385 (1948).

48. 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

49. *Id.* at 236.

doctrine would apply and, hence, the state need not show a compelling interest.[50] Thus, like *Kirk*, the court ruled that one year of contribution to the state was a valid requirement and was rationally related to a valid state objective. However, the court distinguished this result from *Carrington*, which had stated that there could not be an irrebuttable presumption of nonresidency. Here, the court stated that this was not really an irrebuttable presumption, because it was simply a presumption which could be overcome after one year. The court further stated that the presumption was neither arbitrary nor permanent. Hence, it was not inconsistent with *Carrington*. The court added that the one-year requirement was simply one element of the evidence to be offered to prove one's bona fide domicile. The court said in summary:

> We believe it reasonable to presume that a person who has not resided within the State for a year is a nonresident student, and that it is reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the State for one year.[51]

It can be seen then that a student here need be a resident for at least a year before he can attempt to prove his change in residency and become eligible for lower tuition rates. However, this requirement can be met while attending school. It did not create a *permanent irrebuttable* presumption of nonresidency, so as to contravene all prior court decisions.

In 1971, the Supreme Court of Nebraska reversed a lower court and ruled in *Thompson v. Board of Regents of the University of Nebraska*[52] that a statute requiring four months of continuous residence in the state *independent* of attendance at a school of higher education before a student may be classified as a resident for tuition purposes was a valid exercise of legislative power and not violative of the state constitution or the fourteenth amendment of the United States Constitution. Hence, residency could not be established while a student. The majority had supposedly followed the reasoning of the prior significant cases, but it arrived at an entirely different result.[53] The court said that residence for other purposes than tuition was a matter of intent, but the legislature *here* in order to protect valid state interests may compel that such residency requirements be met in order to secure the *true* bona fides of a student's intent to become a resident, especially when it is not clear that a person

50. *Id.* at 237-38.

51. *Id.* at 240.

52. 187 Neb. 252, 188 N.W.2d 840 (1971).

53. Judge McCown in his dissent pointed out correctly that the result here was inconsistent with all previous decisions especially Newman. The court had misinterpreted the prior law in this area. *Id.* at 260-01, 188 N.W.2d at 845.

coming from out of state has other purposes than the immediate purpose of using the state's educational facilities.

Beginning at this point in time, court litigation of the nonresident classification became much more intense.[54] A case which directly followed the result in *Starns* was *Arizona Board of Regents v. Harper*.[55] The state court held that a rule requiring a student to maintain legal residence in the state for at least one year before becoming eligible for the lower resident tuition rate would not violate due process, equal protection, or privileges and immunities clauses of the State or Federal Constitutions, or the commerce clause of the Federal Constitution, because the requirement could be met while attending school.

After the *Harper* decision, *Kline v. Vlandis*[56] was decided in a federal court. Here, the rule of *Newman* was adopted in the federal courts; however, the court made no mention of the *Newman* decision in its opinion. The resulting appeal of this case to the Supreme Court will be discussed later in this casenote.

Meanwhile, *Glusman v. Trustees of the University of North Carolina*[57] was decided. The court reversed a lower court decision and rendered one which followed the result of *Thompson*. The court found (1) that it was reasonable for a state to require that a student, in addition to having true domiciliary in the state, be so domiciled for a six-month period while *not* in attendance at an institution of higher learning before he qualified for in-state tuition and (2) that such a requirement was not violative of equal protection as guaranteed by the fourteenth amendment of the Constitution. Thus, the decision was out of step with the trend of case law in other courts.[58] The rationale behind this result was that the state

54. Two related cases were decided in Colorado at this time. Although they were not really significant, they do shed some light on the requirements for obtaining resident status. In Seren v. Douglas, 30 Colo. App. 110, 489 P.2d 601 (1971), the court held that while a student may not be a United States citizen but had been granted an immigrant visa, he could have with adequate proof shown that he had formed the necessary intent to establish domicile in the state so as to be classified as an in-state student for tuition purposes. In Kirk v. Douglas, 176 Colo. 104, 489 P.2d 201 (1971), the court held that married women who had in-state domicile were entitled to resident tuition rates even though their husbands were not residents for tuition purposes. Note that the law required women to be deemed to have the same residence as their husbands. Here, the husbands were residents for all purposes except for tuition purposes which was the result of their failure to remain out of school for the required year.

55. 108 Ariz. 223, 495 P.2d 453 (1972).

56. 346 F. Supp. 526 (D. Conn. 1972).

57. 281 N.C. 629, 190 S.E.2d 213 (1972).

58. Judge Higgins correctly dissented. He noted that a state may require nonresidents to pay higher tuition, but it may not distinguish between bona fide resi-

has a legitimate purpose to make sure that the person is not in the state primarily for educational purposes and to ascertain whether his true intention is to become a resident. The court took note of *Thompson*—although that case was, perhaps, decided wrongly—and *Clarke*, where the court stated that such a person is presumed to be in the state primarily for educational purposes. The court also misinterpreted the rule of law laid down in *Landwehr*. The *Landwehr* court only permitted the classification of students into resident and nonresident groups, it did not sanction statutory waiting periods independent of school attendance.

Almost simultaneously, *Robertson v. Regents of the University of New Mexico*[59] was decided. The result was consistent with that rendered in the district court for *Vlandis,* but contrary to the odd results in the *Thompson* and *Glusman* cases. The state had declared that a student who first enrolled as a nonresident student remained a nonresident for tuition purposes unless he enrolled in less than six hours of classes for a period of at least one year. The federal court stated that that created an irrebuttable presumption as well as an unreasonable and arbitrary burden of abandoning the major portion of a year's education. Thus, the residency requirement adopted by the state violated the due process and equal protection clauses of the United States Constitution and the Constitution of the State of New Mexico.

Covell v. Douglas[60] coincided with the result of *Vlandis* and *Robertson.* Relying on *Carrington*, the Colorado court struck down a rule which barred a student from changing his domiciliary status unless he abandoned his schooling for one year or reduced his attendance to less than eight hours in each term of that year. The court said that this rule had created a conclusive presumption which could not under most circumstances be controverted and, hence, imposed invidious discrimination violative of the fourteenth amendment of the Constitution.

While recognizing that it was neither unreasonable nor arbitrary to put a strong burden of proof on a student to show a change in residency and that a one-year residency requirement before application for resident status for tuition purposes was reasonable, the federal court in *Kelm v.*

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dents by requiring some to pay according to the nonresident tuition rate. He cited Newman as support. *Id.* at 642, 190 S.E.2d at 222. The case was appealed to the Supreme Court where the judgment was vacated and remanded to be considered in light of Vlandis v. Kline, 412 U.S. 441 (1973). Glusman v. Bd. of Trustees, 412 U.S. 947 (1973). Note that in light of this result, it is likely that if Thompson had been appealed, it would also have been reversed.

59. 350 F. Supp. 100 (D.N.M. 1972).

60. — Colo. —, 501 P.2d 1047 (1972).

Carlson[61] stated that to require proof that a student had acquired post-graduation employment within the state as a condition precedent to granting him resident status was unreasonable and, therefore, a violation of the equal protection clause of the Constitution.

The last case[62] to be decided before the decision of the Supreme Court in *Vlandis v. Kline* was *Weaver v. Kelton.*[63] The federal courts once again reached the same result as obtained in *Starns*. The court would not apply strict scrutiny because higher education was not a fundamental right that was protected by the Constitution. Hence, only some rational relationship to a legitimate state interest was needed, and the one-year wait as a part of the proof needed to change from nonresident status was reasonably related to such a state objective. Thus, the regulation was upheld.

THE DECISION IN VLANDIS V. KLINE

This then was the case law that preceded the Supreme Court decision in *Vlandis v. Kline.*[64] During the appeal, the appellees relied upon these prior rulings. The appellees did not challenge the right of the state to classify students as residents or nonresidents, nor did they challenge the constitutionality of higher tuition required of nonresidents, because it was clear that such distinctions were permissible. The appellees did attack, however, the state's right to make a permanent irreversible and irrebuttable presumption of nonresidency. Their claim, of course, was that they had a constitutional right to controvert that presumption by presenting evidence of their bona fide residency.[65]

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61. 473 F.2d 1267 (6th Cir. 1973).

62. Some cases during this time are significant enough to be mentioned here, even though they raise issues not precisely within the main discussion of this Note. The court in Samuel v. Univ. of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972), ruled that students could bring class actions in order to require a refund of tuition that was exacted unconstitutionally. In Fox v. Trustees of the Consol. Univ. of North Carolina, 16 N.C. App. 53, 190 S.E.2d 884 (1972), the state appellate court stated that the equal protection doctrine was not violated if the state required out-of-state students to remain out of school for one year in order to be considered upon the same standards for *admission* as residents. The state allowed residents to gain entrance to school on less stringent standards than out-of-state students. In Spatt v. New York, 361 F. Supp. 1048 (E.D.N.Y. 1973), it was held that limiting state scholarships to those residents attending colleges and universities within the state did not violate equal protection or burden interstate commerce and, therefore, was constitutional.

63. 357 F. Supp. 1106 (E.D. Tex. 1973).

64. 412 U.S. 441 (1973).

65. *Id.* at 445-46.

In their brief filed before the Court,[66] the appellees argued that the permanent classification of bona fide residents as nonresidents penalized the fundamental right to travel and, hence, the state was required to show a compelling state interest which was being protected by such a classification. They claimed that cost equalization or administrative certainty was not such a compelling interest. They also stated that the permanent irrebuttable presumption of nonresidency imposed on bona fide residents did not even bear a rational relationship to a legitimate state interest, because it did not rationally distinguish between residents and nonresidents, but rather distinguished between old and new residents. It was further contended that the use of a permanent irrebuttable presumption denied due process and equal protection as guaranteed by the fourteenth amendment.

On the other hand, the appellant argued (1) that "the State has a valid interest in equalizing the cost of public education between Connecticut residents and nonresidents,"[67] (2) that "the State can . . . reasonably decide to favor with the lower rates only its established residents, whose past tax contributions to the State have been higher,"[68] and (3) that the use of the conclusive presumption "provides a degree of administrative certainty."[69]

The Supreme Court held that permanent irrebuttable presumptions are constitutionally disfavored, because they deny due process.[70] The Court stated that the statutory presumption of nonresidency in this case was not rationally related to the objective of equalizing the cost of higher education between residents and nonresidents, because certain bona fide residents were classified as nonresidents and required to pay according to nonresident tuition rates.[71] The Court also stated that the purpose of the statute was to distinguish between residents and nonresidents, not old and new residents, and that the provisions of the statute were so arbitrary that it did neither and, therefore, was a denial of due process.[72] The Court added that the equal protection doctrine denies the state the right to apportion state services on the basis of past tax contributions of its citizens.[73] The Court further stated that "[t]he State's interest in adminis-

66. Brief for Appellee at 11-58, Vlandis v. Kline, 412 U.S. 441 (1973).
67. 412 U.S. at 448.
68. *Id.* at 449.
69. *Id.* at 451.
70. *Id.* at 446.
71. *Id.* at 448-49.
72. *Id.* at 449-50.
73. *Id.* at 450, n.6.

trative ease and certainty" cannot be a valid reason by itself for allowing the use of an irrebuttable presumption when there are other more reasonable means of determining bona fide residency which do not deny due process.[74] The Court concluded by saying that

> standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since § 126 precluded the appellees from ever rebutting the presumption that they were nonresidents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law.[75]

Thus, the use of the permanent irrebuttable nonresidency classification for tuition purposes was struck down.

The decision in *Vlandis v. Kline* taken in light of the prior decisions by the other courts brings some degree of clarification to the law relating to the difference in resident and nonresident tuition rates. The Court stated:

> Our holding . . . should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.
>
> We hold only that a permanent irrebuttable presumption of nonresidence —the means adopted by Connecticut to preserve that legitimate interest— is violative of the Due Process Clause, because it provides no opportunity for students who have applied from out of State to demonstrate that they have become bona fide Connecticut residents. The 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 the in-state rates.[76]

Therefore, from this statement by the Court, the result is reconcilable with the rulings rendered by the courts in previous attacks upon the preferential tuition rates.

CONCLUSION

The law in this area then is very clear. The state may classify students either as residents or as nonresidents, and it may require nonresidents to

74. *Id.* at 451.

75. *Id.* at 452.

76. *Id.* at 452-54 (footnote omitted).

pay higher tuition and fees. The courts hold that this distinction does not violate the requirements of equal protection, because the classifications are rationally related to the legitimate state objective of equalizing the cost of higher education between residents and nonresidents.

Further, the courts will permit the use of a presumption that an out-of-state student is a nonresident and is primarily in the state for the purpose of seeking the benefits of the educational facilities of the state. However, the presumption must not be permanent and irrebuttable. The state must allow a student to change his status upon the presentation of sufficient evidence that he has become a bona fide resident of the state, so that he may receive the advantage of the lower tuition rates. The courts have stated that a student must be allowed to change from his nonresident status to resident status even while attending school and without the requirement of reducing his class load.

The courts have, however, held that the burden of overcoming this presumption rests upon the student. He must show that residency has been acquired and that he is no longer a nonresident. The state may also require that the student show the fulfillment of a durational residency requirement before the state will deem the student a resident for tuition purposes. The courts have held that the state must allow the durational residency requirement to be met *while* a student is in attendance at a school of higher education. If no durational residency requirement is created by the state, then the student may overcome the presumption and become a resident after his first term in school.

This is the state of the law immediately following the *Vlandis* decision. Already the rules laid down in this case have been applied to other situations.[77] It is very probable that litigation will nevertheless continue in this area as long as "nonresidents" seek a judicial determination of the right of a state to deny some of its services to nonresidents.

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77. For instance, the *Glusman* decision has been vacated and remanded. *See* note 58 *supra*. In Clark v. Hammer, 360 F. Supp. 476 (D. Conn. 1973), a federal court held that a Connecticut regulation which provided that no person may *gain* residency for student loan guarantee purposes while he is a student was unconstitutional. The court also held a one-year durational residency requirement valid. In Hayes v. Board of Regents of Kentucky State Univ., 362 F. Supp. 1172 (E.D. Ky. 1973), a class action, the federal court held that a classification system which deemed students to be nonresidents for tuition purposes even though they were residents for voting purposes was constitutionally permissible. The court held that the state does not have to use identical residency standards for *all* purposes. In Hasse v. Board of Regents of Univ. of Hawaii, 363 F. Supp. 677 (D. Hawaii 1973), a federal court held that a one-year durational residency requirement as a prerequisite to qualification as a resident for tuition and admission quota purposes was neither arbitrary nor unreasonable and, therefore, was not violative of equal protection.