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ABSTRACT

The classification of students in state-owned institutions of higher learning for the purpose of tuition differential involves a number of different legal problems. In an effort to shed some light on the problems involved, five questions are posed and answers attempted. These questions are: (1) Is it constitutionally permissible for a state to charge higher tuition for nonresidents than for residents? (2) Can a state have an arbitrary period of nonresidency? (3) What of a provision that a student can obtain residency classification only by becoming a nonstudent for a period of time? (4) What of a provision that a student, once classified as a nonresident, can never gain residency classification? (5) Assuming that a state can classify according to residency, what factors can be considered in making that determination? The author concludes that the classification of resident and nonresident must be based upon some logical criteria; the classification cannot be arbitrary. (Author/MJM)

RESIDENCY CLASSIFICATION OF STUDENTS FOR TUITION DIFFERENTIAL*

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The classification of students in state-owned institutions of higher learning, for the purpose of tuition differential, involves a number of different legal problems.[1/] Overriding state-created rights and limitations is the United States Constitution and its possible impact on classification of students. Students can be classified using some criteria, for some purposes, and there may be no constitutional problem. However, when students are classified in terms of residency for the purpose of a tuition differential then constitutional questions arise.[2/] In order to shed some light on the problems involved, five questions are posed and answers attempted.

1. Is it constitutionally permissible for a state to charge higher tuition for non-residents than for residents?

2. Can a state have an arbitrary period of non-residency?

3. What of a provision that a student can obtain residency classification only by becoming a non-student for a period of time?

4. What of a provision that a student, once classified as a non-resident, can never gain residency classification?

5. Assuming that a state can classify according to residency, what

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*This memorandum was prepared by Professor Vestal for the American Association of State Colleges and Universities and the National Association of State Universities and Land-Grant Colleges to assist lay persons in understanding the constitutional issues involved in the out-of-state tuition controversy.

factors can be considered in making that determination?

These questions will be considered in turn.

1. Is it constitutionally permissible for a state to charge higher tuition for non-residents than for residents?

It must be stated initially that the United States Supreme Court has not spoken on this particular point and, in view of the litigation which is occurring in the field, it is probable that some litigant will press the Court to consider the matter. Since the litigation can be posed in terms of a constitutional attack on a state statute or regulation of state-wide application, requesting an injunction, it will be relatively easy to get to the Supreme Court. See 28 U.S.C. sec. 2281 and 1253.

Most recently the high court has faced a related problem in Starns v. Malkerson, 91 S.Ct. 1231 (1971) which was an action brought by students at the University of Minnesota challenging classifications made by the University in fixing tuition. The University had a regulation which stated:

> No student is eligible for residence classification. . . unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto.[3]

The University regulation did not preclude one being a bona fide domiciliary even though a student.[4] The three-judge district court in a lengthy opinion concluded:

> . . .we hold that the regulation requiring a one-year domicile within the State to acquire resident classification for tuition purposes at the University is constitutionally valid. . .[5]

Since this was a three-judge district court, there was an appeal as a matter of right to the Supreme Court. That Court in a very brief opinion affirmed the judgment. Mr. Justice White was of the opinion "that probably jurisdiction should be noted and case set for oral argument."

This case did not squarely face the fundamental question of whether a

state can classify. The trial court in its opinion stated:

> . . .it is important to note what is not at issue in this case. Plaintiffs do not challenge the right of the University to charge non-resident students higher tuition than is paid by residents. This issue was raised in Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), /Cert. den. 396 U.S. 853/ and Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), and the courts therein held that the distinction between residents and non-residents for tuition purposes is reasonable and constitutional.[6]

It must be recognized that in the Starns case the United States Supreme Court did affirm a judgment that it was constitutionally permissible "for a state to create an irrebuttable presumption that any person who has not continuously resided in Minnesota for one year immediately before his entrance to the University is a non-resident for tuition purposes."[7]

The constitutional validity of residency-nonresidency classification for tuition purposes has not been successfully challenged in the past. However, the matter is now being re-examined because classification by residency has been attacked successfully in other areas of the law. The striking down of residency requirements for voting[8] and for relief[9] are classic examples. Litigants are now questioning whether the rationale of the Supreme Court in these two areas will be carried over into the matter of tuition.

In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court of the United States was faced with an attack on residency requirements to obtain welfare assistance. In holding such requirements unconstitutional, the Court stated that the interests supposedly promoted by the non-residency classification "either may not constitutionally be promoted by government or are not compelling governmental interests."[10] The Court recognized the right to travel as a constitutionally protected right and held that the non-residency classification was impermissible as a restriction upon this right.

The language which the Court used, although not a holding of the Court, does suggest an argument on the classification for tuition purposes. In holding that it was unconstitutional to restrict benefits to residence of at least a year, the Court stated:

> . . .we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better education facilities. /emphasis supplied/.[11]

The Court concluded on this point:

> . . .neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible State objective.[12]

The crucial language of the Court is that which follows:

> . . .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. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.[13]

In a footnote the Court did attempt to limit the impact of the decision by stating:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[14]

In Dunn v. Blumstein, 92 S.Ct. 995 (1972), the Supreme Court recognized

that durational residence laws concerning voting penalize those who choose to travel. The Court indicated that the test it would apply regarding voting is whether "the exclusions are necessary to promote a compelling state interest."[15/] The strict "compelling state interest" would be the applied test because the constitutionally protected right to travel is involved.

When the tuition matter is viewed against this background it is possible to see the arguments which can be made. First, the right to travel is involved. Second, higher tuitions are imposed on persons because they have exercised the constitutionally protected right to travel. Third, it may be claimed that there is no compelling state interest which requires this distinction.

If the total picture is examined, however, it is possible to argue that there is a difference, perhaps only in degree but a difference nonetheless, between the right to vote and the right to welfare on one hand and, on the other, the right to attend an institution of higher learning at a lower tuition rate. The first two involve participation in government and the necessities of life. The third involves a benefit but not an essential.

In the recently decided Covell v. Douglas, (discussed infra. at p. 10) the Supreme Court of Colorado went out of its way to state:

> . . .we adhere to that ruling, that the classification of students applying for admission to the tax-supported universities of Colorado to in-state and out-of-state groups is not arbitrary or unreasonable and is not so lacking in foundation as to contravene the constitutional provisions on which /the earlier challenger/ relied.

It should be understood that the Equal Protection Clause does not prevent different treatment of different people. A classification "must be

reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

If the state action impinges upon "fundamental freedoms"[16/] then the state action must be more than just rationally related to a valid public purpose. The Supreme Court has indicated that the state action must be "necessary to the achievement of a compelling state interest."

So that when the Equal Protection Clause is being relied on a court will consider the nature of the right being infringed by the state vis-a-vis the interests of the state. On one side is placed the right and the impact on that right of the state action. On the other is placed the interest of the state and the method used to promote that state interest compared with other methods which might be used to reach the same goal.

Considering all of these, weighing the factors, the Court will decide whether to strike down the state action as violative of the Equal Protection Clause.

Using this analysis it is possible to suggest how the Supreme Court might view the matter of tuition differential. On the one hand is the right to travel, which is a constitutionally protected right, and the impact on that right which occurs because of the state's tuition differential. The impact, of course, will vary according to the size of the differential and the period for which the differential exists. On the other hand is the question of whether the differential is "necessary" to achieve "a compelling state interest." The "compelling state interest" would seem to be the providing of a reasonable educational system for the people of the state. The state seemingly has the right to make a determination about the educational scheme it wishes to provide. For example, a state might well decide that it wishes to provide one level of education institutions to handle 10% of the

state's university-age population which has been projected to attend institutions of higher learning. A second level of institutions might be provided to handle an additional 20% of that population. Community colleges might be provided to handle an additional 20%, while private colleges may be expected to handle the other 50%. As part of the educational policy the state might decide to accept a number of students from outside the state to provide a heterogeneous experience for the students from within the state. The formulation of this sort of educational policy would seem to be reasonable on the part of a state. The state then might have a compelling state interest in seeing that this policy is not destroyed by an uncontrolled influx of out-of-state students which would skew or destroy the state's plans -- a great influx of persons from out of the state which would either overcrowd the institutions or alternatively deprive some in-state students of the projected opportunity to attend state institutions of higher learning.

Although this compelling state interest may involve some fiscal considerations, it is more than just a desire to maintain the "fiscal integrity" of the system. It is an attempt to maintain the educational integrity of the system as a program for the university-age population of the state which would normally attend institutions of higher learning.

The effect of a ruling that residency could not be considered in admission regulations should be examined. If a state were required to admit without giving any consideration to residency or nonresidency, then there would be complete mobility of persons wishing to attend such institutions. This would mean, for example, that the state system in California would not be able to classify in terms of residency. Should a great number of highly qualified out-of-state students apply, then less qualified residents of the state would be excluded although the state had designed a system which

would provide an educational opportunity for this latter group. The educational plans of the state would be destroyed to the detriment of the residents of the state.

The additional consideration involving the state's action is that of the choice of method of implementing the "compelling state interest." A state might use several devices to protect the integrity of the educational scheme it has established for its residents. It might totally exclude all nonresidents. It might assess high tuitions which would have the effect of excluding. It might apply a tuition differential somewhat related to the cost of the education. It might attempt to assess a cost differential to the state of origin of the nonresident student. It might try to arrange student exchanges so that its system would not be overburdened by nonresidents. When all of these possibilities are considered, a court might conclude that a state could reasonably select the tuition differential related to cost as a method of implementing its "compelling state interest."[17/]

The now pending case of Sturgis v. State of Washington, Civil Action 614-72C2 (U.S. Dist. Ct. W.D. Wash.), may ultimately involve a determination of the right of a state to discriminate between residents and nonresidents for tuition purposes. The plaintiffs in their complaint alleged:

> The practice of charging higher tuition to nonresidents of the State, and the law, R.C.W. Chapter 288.15, which authorizes such practice, is clearly unconstitutional and violates the rights of plaintiffs herein, including but not liminted to the right to travel, the right to due process, and the right of equal protection of the laws.

The plaintiffs allege that they all are residents of Washington. In the answer the defendants "specifically deny that all said plaintiffs are residents of the state of Washington and have been residents at all times

that they have been enrolled at the University of Washington." Should it be determined ultimately that some or all plaintiffs are not or were not residents of the state of Washington, then it is possible that the constitutionality of discriminatory treatment of nonresidents may be faced. There is no assurance that the litigation will develop to this point. It should be noted that the federal district court judge hearing this case has decided to stay proceedings until the United States Supreme Court decides Vlandis v. Kline. (For a discussion of this latter case, see p. 12-13 , infra.)

It must be remembered that this discussion concerns only the right to classify in terms of residency and nonresidency. It does not involve the question of a nonresident becoming a resident. This latter is protected by the constitution and a state cannot prevent such a change.

2. Can a state have an arbitrary period of non-residency?

Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd, 91 S.Ct. 1231 (1971), involved a Minnesota statute which provided:

> No student is eligible for residence classification in the University. . .unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto.[18/]

This provision was upheld by the three-judge District Court and the United States Supreme Court affirmed in a memorandum opinion.

In Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (Ariz. 1972), the Arizona regulation under attack provided:

> If over 21 years of Age -- that legal residence in the state has been established (independently of the circumstance of attendance at an Arizona institution of learning) for at least one year next preceding the last day of registration for credit, and that he is eligible to become a registered voter. . .[19/]

The plaintiffs claimed and the trial court found that the situation was controlled by Shapiro v. Thompson (discussed on p. 3-4). On appeal

to the Supreme Court it was held that the right to welfare payments and the right to vote (see Dunn v. Blumstein discussed on p. 4-5) are distinguishable from the right to residence tuition. Apparently, the Court felt that the first two might have some significant impact on the right to travel; however, the impact of non-resident tuition was viewed as less significant. Applying a clear-and-convincing evidence test, the Court held that none of the plaintiffs had established that he was a resident of the state entitled to resident tuition.

Pending at the present time is Sturgis v. State of Washington, Civil Action 614-72C2 (U.S. Dist. Ct. W.D.Wash.), in which an attack is being made on the one-year durational residency requirement found in the Washington statute. The plaintiffs in the Sturgis case view their case, in part at least, as being a direct attack on the Starns decision. Apparently the federal district is going to stay proceedings in the Sturgis case until the Supreme Court of the United States has decided the Vlandis v. Kline. (For a discussion of this latter case, see p. 12-13 , infra.)

3. What of a provision that a student can obtain residency classification only by becoming a non-student for a period of time?

A provision of this sort is not unusual. Colorado, for example, had a provision reading :

> An emancipated minor or adult student who has registered as a full-time student for more than eight hours per term shall not qualify for a change in his classification for tuition purposes unless he shall have completed twelve continuous months of residence while not attending an institution of higher learning, public or private, in the state or while serving in the armed forces.[20]

This provision was held unconstitutional as violating the equal protection provision of the Constitution in Covell v. Douglas, Colo., _____ P.2d _____ (1972). The statutory provision was viewed as establishing a conclusive presumption which was impermissible. This conclusion was also

reached in Robertson v. Regents of the University of New Mexico, 350 F.Supp. 100 (D.N.M. 1972) which involved a restriction that residency could not be obtained unless the applicant had "maintained domicile in this state for a period of not less than one year during which entire period he had not been enrolled, for as many as six hours, in any quarter or semester, as a student in any such institution."[21] The irrebuttable presumption concerning residency was held to be "unreasonable, arbitrary, and violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article II, Sec. 18 of the Constitution of the State of New Mexico."[22]

The Nebraska Supreme Court, in Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971), was faced with an attack on a statutory provision stating:

> No such person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, . . .[23]

The trial court held this provision to be unconstitutional. When the matter was considered in the Supreme Court, it held the provision constitutional. It should be noted that the Nebraska legislature repealed the clause under consideration in the Thompson case and provided for an initial residency requirement of one year.[24]

A challenge to the North Carolina residency requirements concerning tuition is found in Glusman v. Trustees of the University of North Carolina, 190 S.E. 2d 213 (N.C. 1972). The trial court decreed:

> . . . that the tuition regulations which provide that the residence status of any student is forever to be determined as of the time of his first enrollment in an institution of higher education in North Carolina, and that residence status may not thereafter be changed if he continues re-enrollment without first having dropped out of school for at least a six-months' period, is declared unconstitutional,[25]

The Supreme Court of North Carolina reversed the decision of the trial court and held that the state could require six-months' presence in the state while not a student as a pre-requisite to attaining residency classification.

These four recent decisions show the uncertainty about the constitutionality of a provision precluding becoming a resident while a student. The two federal courts held such provisions invalid in Colorado and New Mexico. On the other hand the Supreme Court of Nebraska and North Carolina upheld such provisions.

4. What of a provision that a student, once classified as a non-resident, can never gain residency classification?

It is a provision of this nature which has been challenged in Kline v. Vlandis, 346 F.Supp. 526 (D. Conn. 1972). Public Act No. 5, sec. 126 (June Session 1971) provided in subsection (a)(3) that:

> 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;

Subsection (a)(2) provided that:

> an '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; . . .

Subsection (a)(5) provides:

> The status of a student, as established at the time of his application for admission at a constitutent 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.

Although there may be some uncertainty about this provision, apparently it means that once classified as a non-resident, a student cannot become a resident for tuition purposes even though there has been a break in his attendance at the constituent unit.

The trial court, assuming that it is permissible to charge non-residents higher tuition rates, stated:

> . . .the state may not classify as "out-of-state students" those who do not belong in that class. Whether the statute is construed as creating an irrebuttable presumption or as a rule of substantive law, that is what it does.[26]

The trial court held the statutory provisions to be unconstitutional. In a footnote the court noted that it was not required to decide whether the classification was valid as "necessary to the achievement of a compelling state interest."

This case is now to be reviewed by the United States Supreme Court, 41 L.Week 3305 (Dec. 4, 1972). A reasonable prediction would be that the Supreme Court will affirm the decision of the district court. It will be interesting to see if the Supreme Court goes beyond that which is necessary for the decision and speaks of the right to classify resident and non-resident for the purposes of tuition.

5. Assuming that a state can classify according to residency, what factors can be considered in making that determination?

If a state can constitutionally discriminate between residents and nonresidents for the purpose of tuition to be charged by state educational institutions, then it becomes important to determine what factors can be taken into consideration in making such classification. The matter of time in the state[27] and presence, solely as a student, have been considered.[28]

There are other factors which would seem to be relevant in deciding whether an individual is a resident of a state. These might be included by a state, for example, in rules promulgated by institutions of higher learning.[29]

(1) Payment of taxes to the state would seem to be a relevant factor to be considered in deciding whether an individual is a resident of a state. Payment of an income tax especially would seem to be of some significance in determining residency. The fact that the state is getting some quid pro quo may make this attractive as a determinant, but this is apart from the question of whether the individual is a resident.

(2) Registration of a motor vehicle is another factor which is relevant. The individual by registering a motor vehicle in the state has given some evidence, although by a self-serving act, of an intent to establish ties with the state.

(3) Obtaining a resident driver's license is another indication of the formation of ties with the state.

(4) Financial support by a nonresident, on the other hand, is some indication of a tie with another state which could be considered in making the residency determination.

(5) Marriage to a resident is a factor which would tend to show an attachment to the state. This, obviously, is only a factor to be considered, but it seems to be relevant.[30/]

(6) Emancipation of a minor is an element which can be considered in determining whether an individual is a resident. A person, formerly a non-resident, who is emancipated may more easily become a resident than can such a person who is still under the control of a non-resident.

(7) Voting within the jurisdiction is a factor which may be considered in determining whether an individual is a resident for tuition purposes. Voting may indicate an intent to establish permanent ties with the state, but it need not be considered as conclusive on the question of residency.

(8) Receiving welfare within the state would seem to be of only minimal value in determining residency. This would seem to be of little probative value on the question of intent to establish some sort of ties with the state. Getting welfare is probably motivated by need for support and has little if any significance in terms of ties to the state.

(9) Ownership of a residence within the state would seem to be significant evidence of residency. It would seem to indicate an intent to stay in the state for some period of time. A long-term lease would have a similar effect although not of the same impact.

These factors would seem to be of some probative value in determining whether an individual should be considered a resident of the state.

Conclusion

Although there is a possibility that some United States Supreme Court decision may change radically the validity of classification of students for tuition purposes, the present state of the law seems rather clear. Students can be classified as residents and nonresidents and treated differently. The classification as resident and nonresident must be based upon some logical criteria; the classification cannot be arbitrary. Under a recent Supreme Court case a state may use a conclusive presumption of nonresidency for a person coming into the state from out-of-state for a reasonable period of time such as a year. A conclusive presumption beyond that period would probably be unconstitutional as contrary to the equal protection clause of the Constitution. A state cannot require presence in the state for a period of time as a nonstudent as a prerequisite to becoming a resident. These legal principles may require changes in the practice of some state institutions, but they are principles with which these institutions can live.

Notes

1. Classification as a resident has legal significance in a number of different situations. Diversity jurisdiction of the federal court turns on citizenship of the litigants 28 U.S.C. 1332 and this turns on residency. U.S. Const. 14th Amend. Sec. 1, federal court venue turns on the place where parties reside. 28 U.S.C. 1391. The power to grant a divorce may turn on the residency of a party. Jurisdiction over individuals may be keyed to place of residency; substituted service may be allowed at last place of residency. Some taxes may be keyed to residence. Administration of estates as domiciliary or ancillary may turn on domicil or place of residency. Some statutes of limitations do not run while a defendant is a "nonresident" of the state. Iowa Code sec. 614.6. The right to attach property may turn on nonresidency. For example, Iowa Code sec. 639.3. The fee for a hunting license may depend upon residency.

All of these examples show legal consequence which may flow from residency. It should be understood, however, that the determination of residency for one purpose does not necessarily determine residency for another purpose. An individual, for example, may be a resident of a state for the granting of a divorce and not be a resident for tax purposes.

American Law Institute, Restatement of the Law, Conflicts, Second, 45-6, states:

> Statutes in the United States rarely speak in terms of domicil but use "residence" instead. Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case. Frequently it is used in a sense equivalent to domicil. On occasion it means something more than domicil, namely, a domicil at which a person actually dwells. On the other hand, it may mean something else than domicil, namely, a place where the individual has an abode or where he has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicil. The phrase "legal residence" is sometimes used as the equivalent of domicil.
>
> In the absence of evidence of a contrary legislative

Notes (cont'd.)

> intent, "residence" in a statute is generally interpreted:
>
> As being the equivalent of domicil in statutes relating to judicial jurisdiction, voting, eligibility to hold office, exemptions (other than homestead) from the claims of creditors, liability for inheritance and poll taxes, and certain personal property taxes.
>
> As meaning a domicil at which the person in question actually dwells in statutes relating to the competence of a divorce court and homestead exemption laws.
>
> As meaning the place where a person dwells without regard to domicil in statutes relating to income taxation, attachment, school privileges and constructive service on nonresident motorists.
>
> With respect to statutes relating to venue, the cases are divided as to whether residence is the equivalent of domicil or means the place where the person in question dwells without regard to domicil. In statutes relating to gaining a settlement under the poor laws, residence may mean a domicil, or a domicil at which the person in question dwells, or the place where he dwells without regard to domicil.
>
> Interpretation of Residence in Iowa Law, See also Note, 20 Iowa L. Rev. 483 (1935).

2. The usual constitutional argument is the equal protection one under Amendment 14, sec. 1 of the United States Constitution; no state may deny "to any person within its jurisdiction the equal protection of the laws." A similar argument may be made under the privileges and immunities provision of that Amendment and the privileges and immunities provision of Article IV. The nature of the argument is similar to that which is urged under the equal protection clause; that is, whether the classification is a reasonable one. Toomer v. Witsell, 334 U.S. 385 (1948). For a discussion of these various clauses and the right to move, see Vestal, Freedom of Movement, 41 Iowa L.Rev. 6 (1955).

3. Harns v. Matherson, 326 F.Supp. 234, 235 (D. Minn. 1970).

4. See para. 1 of Board of Regents' tuition regulations, quoted 326 F. Supp. at 235-6.

5. 326 F. Supp. at 241.

6. 326 F. Supp. at 236.

Notes (cont'd

7. 326 F. Supp. at 237.

8. Dunn v. Blumstein, 92 S.Ct. 995 (1972) (discussed below).

9. Shapiro v. Thompson, 394 U.S. 618 (1969) (discussed below).

10. 394 U.S. at 627.

11. 394 U.S. at 632.

12. 394 U.S. at 633.

13. 394 U.S. at 638.

14. 394 U.S. at 638.

15. 92 S.Ct. at 1000.

16. A similar problem would arise if the state action involved racial discrimination which would make it "inherently suspect." Cf. McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. (1967). This is not involved in the usual tuition discrimination, although classification in terms of those exercising the constitutional right to travel might be viewed as a suspect classification.

17. The constitutionality of classification according to residency involves a very complicated question of the developing concept of equal protection under the United States Constitution. For an excellent discussion of the present state of the law and the probable course of development in the immediate future, see Gunther, The Supreme Court 1971 Term; Foreword; A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

It should be noted, in attempting to predict the decision which the Present Supreme Court would render on the propriety of classification -- resident and non-resident -- for tuition purposes that Mr. Justice Blackmun was a member of the Court of Appeals which upheld

Notes (cont'd

the Iowa Regents' rules in Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969) and Clarke v. Redeker, 206 F.2d 883 (8th Cir. 1969) (deciding that the plaintiff was barred because of claim preclusion).

18. 326 F.Supp. at 235.

19. 495 P.2d at 955.

20. Colo. Statute 124-18-3(3).

21. N.M. Session Laws, 1972, Chap. 98 Para. K.

22. 350 F.Supp. at 101-2

23. 188 N.W.2d at 842

24. 188 N.W.2d at 845-6 (dissenting opinion of Justice McCown).

25. 190 S.E.2d at 455.

26. 346 F.Supp. at 528.

27. See supra at p. .

28. See supra at p. .

29. See Colo. State 124-18-1 Et. Seq. For factors considered by a court, see Krasnov v. Dinan, 333 F.Supp. 751 (E.D. Pa. 1971).

30. On the propriety of classification of non-resident and resident in terms of a relationship to a resident of the state, for example, a non-resident woman marrying a resident man, see Glusman v. Trustees of the University of North Carolina, 190 S.E.2d 213 (N.C. 1972); Kirk v. Board of Regents, 273 Cal. App. 2d 439, 78 Cal. Rep. 260 (1st Dist. Ct. App. 1969), app. dismissed, 396 U.S. 554 (1970); Clarke v. Redeker, 259 F.Supp. 117 (S.D. Iowa 1966).