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MANY STATE COLLEGES AND UNIVERSITIES differentially classify students as "residents" or "nonresidents." [1] Such institutional classifications have no legal effect regarding the students' legal domicile for other purposes, yet a classification of "nonresident" generally imposes the correlative of paying a substantially higher rate of tuition.

Students, in many instances, unwittingly bind themselves for the duration of their college life to a nonresident classification merely by filling out the initial application for admission. The classification of "nonresident" may automatically be assigned by the university after receiving the student's application and, in most cases, remains an impregnable brand dissipated only upon graduation.

University classifications tend to be "computer-permanent" after initial programmed consummation. Thereafter, only administrative or judicial proceedings can realign a student's classification. Most universities have residency review committees, usually comprised of administrators who are not legally oriented, who apply the rules or guidelines promulgated by state residency boards or university trustees. Such regulations are generally applied unquestioningly and without flexibility by the committee as the ruling criteria.[2]

Typical of such rules or guidelines are the criteria promulgated by the *Ohio Board of Regents Residency Standards.* Those regulations provide in part:

> D. *State Resident*
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> In determining whether or not an enrolled student is an Ohio resident for appropriation subsidy purposes, each state-assigned institution will make a determination of fact in accordance with these standards:
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> . . . .
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> 2. An adult student over 21 years of age is considered to be an Ohio resident if he has resided in the state for 12 consecutive months or more immediately preceding enrollment, or if he is gainfully employed on a full-time basis and is residing in Ohio,

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[1] The term "resident" has no set definition. Its exact meaning is left to construction, to be determined from the context and apparent object to be attained from the legislative enactment. 18 OHIO JUR. 2d *Domicil* § 4 (1956). Whether a probate, divorce or tax case, the question of residence is a nebulous one, to be answered only from the specifics of each case. *See* Reese and Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953); see State *ex rel.* Kaplan v. Kuhn, 11 Ohio Dec. 321, 8 Ohio N.P. 197 (C.P. Hamilton County Ct. 1901); Board of Educ. v. Dille, 109 Ohio App. 344, 165 N.E.2d 807 (1959).

[2] *See generally* Note, *Residency, Tuition, and the Twelve-Month Dilemma,* 7 HOUST. L. REV. 241 (1969); McClean, *The Meaning of Residence,* 11 INT'L. & COMP. L. Q. 1153 (1962); Comment, *Nonresident Tuition Charged by State Universities in Review,* 38 U.M.K.C. 341 (1970); Spencer, *The Legal Aspects of the Nonresident Tuition Fee,* 6 ORE. L. REV. 332 (1927).

and is pursuing a part-time program of instruction, and if there is reason to believe that he did not enter Ohio primarily in order to enroll in an Ohio institution of higher education.

. . . .

4. A student who enters the State of Ohio from another state for the primary purpose of enrolling in an Ohio institution of higher education shall be considered to be a nonresident student, and shall continue to be considered a nonresident student during the period of continuous full-time enrollment in an Ohio institution of higher education.
5. A student classified as a nonresident student may be reclassified as a resident of Ohio if:
   a) The parents of a student under 21 years of age take up residence in Ohio and one of the parents is gainfully employed on a full-time basis in Ohio.
   b) The student over 21 years of age presents clear and convincing evidence to an administrative officer or administrative panel of the institution and there is finding of exceptional circumstances justifying a change in classification because of having established a separate residence in Ohio for 12 months or more preceding the request for reclassification and because of having made definite commitments to enter into gainful employment in Ohio upon completion of a degree program.[3]

The right to enact such rules is beyond question, since public universities and colleges are subject to the control of the legislature and, as such, are invested with the duty of promoting the public welfare.[4] Such delegated power to college and university authorities implies the implementation of all necessary and proper rules and regulations for the orderly management of educational institutions. *A priori*, the rules exercised under the power so delegated by statute is of the same force as would be an enactment of the legislature, and the official interpretation by the university officials would be a part thereof. Whether the rules or regulations are wise or expedient or their aims worthy is a matter left solely to the discretion of the authorities, and with the exercise of such discretion of the authorities the courts will not interfere, in the absence of a clear showing that the authority vested in them.[5]

Ohio, for example, empowers its higher educational institutions with the necessary authority to exact nonresident tuition fees: "The board of trustees of a state university . . . may charge reasonable tuition for attendance of pupils who are nonresidents of Ohio." [6]

Frequently a student may find himself legally domiciled in his university state under the color of both state and federal law, but still held by the university to a nonresident status and thereby required to pay a higher tuition than his fellow students.

Modern transportation and communications provide easy means for one to live away from his familial home at an age of 18 or 19. Statistics

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[3] Ohio Bd. of Regents Residency Standards, § D, II 2, 4, 5a, 5b (Approved Jan. 16, 1970).

[4] State *ex rel.* Public Serv. Comm. v. Brannon, 86 Mont. 200, 283 P. 202 (1929).

[5] Spencer, *supra* note 2.

[6] OHIO REV. CODE § 3345.01 (SUPP. 1970).

frequently depict this tendency as rising rather than subsiding.[7] The law has also adjusted itself to this situation, leaving only the university residency review committee behind to fend for itself.

Acquiring a domicile of one's own choice essentially requires 1) physical or bodily presence in the new locality; 2) an intent to abandon the old domicile; and 3) a concurrent intent to adopt another domicile in the new location.[8] Despite the fact a student may change his domicile to that of his college or university state, and that courts will recognize the change as legal, this very often will not affect the student's university classification as nonresident.

The explanation for this paradox lies with university durational residency requirements, *i.e.*, a student is considered to be a state resident ". . . if he has resided in the state for 12 consecutive months or more immediately preceding enrollment. . . ." [9]

Such rules discriminatorily create classifications among citizen students of the same state. Though discriminatory, they are far less objectionable than the rule which generally accompanies residency requirements, which holds that any student who enters the state "for the primary purpose of enrolling in an Ohio [state] institution of higher education shall be considered a nonresident student during the period of continuous full-time enrollment. . . ." [10]

The cases where students have turned to the courts for redress are few. However, a review of those cases, the theories sued on, and the results attained, seems appropriate at this point.

One of Ohio's earliest residency cases, still in effect today, held it necessary for each court to weigh all of the facts of each particular case before rendering any decision. These facts, along with the attendant intention of each student, must control. Neither the state nor federal constitutions impose barriers on the travel and domiciles of its citizens. If a court is shown that an individual, at least if he is an adult, traveled to another state for self betterment in occupational or educational areas, the courts must recognize such intent, along with external manifestations of such intent, as binding on the court in forming a decision. That an individual student has familial ties or property interests in another state is merely one fact to be considered; by no means should it hold predominance.[11]

The courts have also taken a stand as to the determination of whether aliens qualify as residents for purposes of university classification. In *Halaby v. Board of Directors,* the court held that an alien resident was entitled to the same privileges as other residents of the city, in that he and his parents were bona fide residents and taxpayers of the city, even though they were not U. S. citizens.[12]

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[7] Oboler, *Higher Education—Ideas and the State University,* 95 SCH. & SOC. 78 (1967).
[8] Hadnot v. Amos, 320 F. Supp. 107 (N.D. Ala. 1970).
[9] Ohio Bd. of Regents Residency Standards, § D, II(2), (Approved Jan. 16, 1970).
[10] *Id.* at II(4).
[11] State *ex rel.* Kaplan v. Kuhn, 11 Ohio Dec. 321, 8 Ohio N.P. 197 (C.P. Hamilton County Ct. 1901).
[12] Halaby v. Board of Directors, 162 Ohio St. 290, 123 N.E.2d 3 (1964).

In *Newman v. Graham,* the State Board of Education, acting as trustees for Idaho State College, had promulgated a regulation which read in part, ". . . any person who is properly classified as a nonresident student retains that status throughout continuous regular term attendance at any institution of higher learning in Idaho." [13] At first glance this rule would seem to effectively preclude consideration of reclassification even if intent to establish domicile could be legally proven.

The Supreme Court of Idaho, after recognizing the Board of Education's delegated authority from the legislature to make such rules stated:

> Under the interpretation placed upon the foregoing quoted regulation by the Board it would necessarily follow that a student who is a nonresident of the State at the time of initial enrollment at the College would, if he attends each regular term, retain such status throughout his entire college career irrespective of the fact that he may have become a bona fide resident and domiciled more than six months in the State during the intervening time. Under such an interpretation it does not afford any opportunity to show a change of residence or domiciliary status and does in effect deny equality of opportunity to persons of the same class who are similarly situated and for that reason it is an unreasonable regulation.[14]

The Board's authority to inquire as to residency requirements was unquestioned. Yet the regulation's denial of the applicant's opportunity to be heard in the consideration of the matter was most objectionable. For this reason the regulation was held to be arbitrary, capricious and unreasonable.

In a similar case, the plaintiff student commenced action against the university on the grounds of unjust enrichment, challenging the constitutionality of a statute which held that a student who had registered could not qualify for a change in his classification for tuition purposes unless he had completed 12 continuous months of residence while not attending an institution of higher learning in the state, or while serving in the armed forces.[15]

The petitioner argued that the statute was unconstitutional in that it violated the fourteenth amendment of the U.S. Constitution. But the Supreme Court of Colorado did not agree, and instead ruled upon language in *Driverless Car Co. v. Armstrong,*[16] to the effect that ". . . to constitute class legislation within the constitutional prohibition, the classification must be unreasonable. The question of classification is primarily for the Legislature." [17]

In *Clark v. Radeker,*[18] a U. S. district court confronted a similar case and held the one year residency requirement constitutional, applying the classical equal protection test of *Lindsley v. Natural Carbonic Gas Co.*[19]

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[13] Newman v. Graham, 82 Idaho 90, 92, 349 P.2d 716, 717 (1960).

[14] *Id.* at 95, 349 P.2d at 719.

[15] Landwehr v. Regents of the Univ. of Colo., 156 Colo. 1, 396 P.2d 451 (1964).

[16] 91 Colo. 334, 336, 14 P.2d 1098, 1100 (1932).

[17] 156 Colo. 1, 4, 396 P.2d 451, 453 (1964).

[18] Clark v. Redeker, 259 F. Supp. 117 (S.D. Iowa, 1966).

[19] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); *See* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

The court, speaking of the regulation in general, said, ". . . any determination in conformity with them which is not unreasonable or arbitrary must be upheld by the courts. As previously discussed, a student from another state attending SUI is presumed to be a nonresident. The presumption is by no means conclusive. If a proper showing is made, a student originally from out of state should be reclassified as a resident." [20] The burden was placed upon the student to present a substantial basis, from facts, for the committee to review in such a reclassification procedure.

The classical test for determining the constitutionality of statutory classifications as found in the above cases was promulgated by the U. S. Supreme Court in the *Lindsley* case.[21] The four rather broad rules stated therein have been referred to and quoted innumerously by the courts in similar cases. They are as follows:

1. The equal protection clause of the fourteenth amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[22]

A vast area of administrative law which affects thousands of individuals yearly is the welfare residency law. The same basic requirements for welfare applicants are applied to students. At least this was so until April 1969, when the U. S. Supreme Court affirmed three federal district court decisions[23] holding that, absent a compelling state interest, statutory provisions requiring a one year residency for state welfare assistance were violative of the equal protection clause of the fourteenth amendment by imposing a classification on welfare applicants which impinged upon their constitutional right to travel freely from state to state.[24]

The Court, speaking of the bureaucratic arguments advanced to justify the residency requirements stated:

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[20] Clark v. Redeker, 259 F. Supp. 117, 125 (S.D. Iowa 1966).

[21] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[22] *Id.* at 78, 79.

[23] Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), *aff'd sub nom.* Shapiro v. Thompson, 394 U.S. 618 (1969); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), *aff'd sub nom.* Shapiro v. Thompson, 394 U.S. 618 (1969); Thompson v. Shapiro, 270 F. Supp. 333 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969).

[24] Shapiro v. Thompson, 394 U.S. 618 (1969); *See also* Note, *Residency Requirements*, 21 WEST. RES. L. REV. 571 (1970); Note, *Residence Waiting Period*, 6 TULSA L. J. 268 (1970).

> . . . 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 [footnote omitted]. 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.[25]

Yet, prior to the Court's conclusion, it is pointed out that no implication should be drawn hereafter that the case overturned the validity of waiting periods or residence requirements determining the eligibility to vote, *for tuition-free education,* to obtain a driver's license, to practice a profession, to hunt or fish, *et cetera.* Such requirements, the Court held, may promote a compelling state interest on the exercise of the constitutional right of interstate travel.[26]

Mr. Chief Justice Warren seemed to feel that the keystone to toppling other state statutory residency requirements had been dangerously dislodged when he observed in his dissent, joined by Justice Black:

> Nor can I understand the Court's implication . . . that other state residence requirements such as those employed in the determining eligibility to vote do not present constitutional questions. . . . If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote.
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> . . . .
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> The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored.[27]

What the court did in *Shapiro* was to extend the use of the "compelling governmental interest" test by applying it to state welfare durational residency requirements and finding they served no "compelling state interest." [28]

After *Shapiro,* a student at the University of California, who had been classified as a nonresident for several years, petitioned the court for

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[25] Shapiro v. Thompson, 394 U.S. 618, 638. Those administrative and related governmental objectives supposedly served by the residency requirements were: that it (1) facilitated planning of the welfare budget, (2) provided an objective test of residency, (3) minimized the opportunity for recipients to fraudulently receive payments from more than one jurisidiction, (4) encouraged early entry of new residents into the labor force. *See also* McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); Flemming v. Mestor, 363 U.S. 603 (1960).

[26] Shapiro v. Thompson, 394 U.S. 618, 638.

[27] *Id.* at 654, 655.

[28] For other applications of the *compelling* state interest test, see Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958).

a writ of mandate demanding her reclassification from nonresident to that of resident.[29] The Superior Court entered judgment for the Board of Regents and the student appealed.

On appeal the petitioner alleged that she qualified as a resident student because in the fall of 1967, she was charged a nonresident fee, due to a requirement that a person must have been a bona fide resident of the state for more than one year immediately preceding the opening day of the semester. She alleged that the regulation was an unconstitutional interference with her fundamental right of interstate travel, and that no compelling government interest justified it. She argued that all of these questions have been conclusively determined in her favor by *Shapiro.*

In its decision, the California Court of Appeals interpreted *Shapiro* to mean that no intent could be drawn from that case which would supply the same standard of residency requirements to those in question. The compelling state interest test was not applied by the court and the durational residency requirement was upheld under the traditional test, the court holding the nonresident classification was rationally related to legitimate state objectives.

In *Kirk,* the court demonstrated an attitude of not wishing to extend the trend of *Shapiro* into other less vital areas of state classification. The court did not equate college residency requirements to the immediate and pressing need for preservation of life and health of persons unable to live without public assistance. Thus, the residency requirements passed on by the court in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning did not involve such risks. Yet the logical conclusion seems to have been overlooked. That is, if a residency requirement proved unconstitutional to one group because of the right to travel to seek employment, it should follow that student residency should be subject to the same juristic conclusion.

More recently, in *Harper v. Arizona Board of Regents,* an Arizona trial court found that Arizona's one year durational residency rule adopted by the Board was unconstitutional.[30] The court's decision relied on *Shapiro v. Thompson* and expressly rejected the reasoning in *Kirk v. Board of Regents* in finding that the Board's adoption of the one year residency rule was an infringement on interstate movement, an unreasonable and invidious discrimination violating the fourteeth amendment of the U. S. Constitution, and a denial of due process violating the fourteenth amendment.

The court stated that the status of "resident" could not be denied, there being no reasonable or "magical" relation to the "one yearism" so

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[29] Kirk v. Board of Regents of the Univ. of Cal., 273 Cal. App. 2d 430, 78 Cal. Rptr. 260, *appeal dismissed,* 396 U.S. 554, *cert. denied* (1970). *See also,* Case Comments, *The Equal Protection Clause and Durational Residency Requirements for Tuition Purposes at State Universities,* J. PUB. LAW 139 (1969).

[30] Harper v. Arizona Board of Regents (Ariz. Super. Ct. Pima County, May 9, 1970).

frequently applied by administrative or legislative bodies arbitrarily designating such a time period as being a requirement to fulfill before *full* rights of residents be accorded.[31]

In another recent case, *Thompson v. Board of Regents of the University of Nebraska,* a Nebraska lower court found a Nebraska law setting state residence standards for the purpose of nonresident tuition partially unconstitutional.[32]

The first portion of the Nebraska law requiring actual residence in the state for a period of four months with the intention of permanent residence before a person is eligible for exemption from nonresident tuition was found to be constitutional.

A second portion of the section provided that no person could be deemed to have established residency in the state during the time of attendance at a state institution, no matter how genuine and long-continued the actual residence in the state may be. The court found this section unconstitutional on five grounds: 1) denial of equal protection of the law; 2) deprivation of property without due process; 3) discrimination between citizens with respect to acquisition, ownership, possession and enjoyment of property; 4) establishment of a conclusive presumption contrary to and in disregard of the facts; and 5) absence of a rational basis and legitimate purpose or function.[33]

The constitutional issues involving college residency requirements may ultimately be decided by the Supreme Court in the case of *Starns v. Malkerson.*[34] In *Starns* the Supreme Court noted probable jurisdiction in a case in which a three-judge federal court held constitutional a regulation requiring a one year domicile within the state of Minnesota before being able to acquire resident classification for tuition purposes at state-supported universities.[35]

The petitioners in *Starns* married their husbands in Chicago and in June 1969, obtained employment in and moved to Minnesota. They enrolled as full-time students at the University of Minnesota for the 1969-1970 school year and were classified nonresidents by the University Board of Review on Student Status effective until the 1970 sum-

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[31] *Id.*

[32] Thompson v. Board of Regents of the Univ. of Neb. (Neb. Dist. Ct. Lancaster County, Nov. 25, 1970), reported in 3 COL. L. BUL. 49 (Feb. 1970).

[33] *Id.*

[34] Starns v. Malkerson, ___ F. Supp. ___ (D. Minn. 1970), 39 U.S.L.W. 3406 (1971), *prob. juris. noted,* 39 U.S.L.W. 3423 (1971).

[35] *Id.* The regulation in question was made pursuant to the Board of Regents' tuition regulations, as found on the University of Minnesota's "Application for Resident Classification." It provides:

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

mer session, at which time they would attain a resident classification. The 1970 summer session coincided with the first anniversary of their continued presence in Minnesota.

The petitioners claimed that their physical presence in Minnesota, and their intention to make Minnesota their permanent home, established them as bona fide domiciliaries of the state. They also claimed that the one-year durational residency requirement was unreasonable and violated the equal protection clause of the fourteenth amendment because it discriminates among persons whose situations are otherwise identical solely on the basis of the exercise of a constitutionally protected liberty—freedom of interstate movement.

In deciding the case, the district court primarily concerned itself with the issue as to whether or not the state could create an irrebuttable presumption that a person who has not resided continuously within the state for one year prior to registration is a nonresident for tuition purposes.

The court rejected the petitioner's reliance on *Shapiro v. Thompson* which was argued in support of the contention that the regulation deterred persons from moving into the state. The court stated that there were no facts to prove that the specific objective of the regulation was exclusion or deterrence of nonresident students, and that there was no showing that the durational residence requirement involved immediate and pressing needs for life and health similar to *Shapiro.*

The petitioners also contended that the regulation was arbitrary and unreasonable because it established an irrebuttable presumption that a person is a nonresident for tuition purposes if he has not lived in the state for one year preceding registration. The court also rejected this argument stating that "This presumption can be overcome if the student provides sufficient evidence to show bona fide domiciliary within the State, one element which is proof that he has resided within the State for a period of one year." [36]

As to the final question of whether or not the nonresident classification was reasonably related to a legitimate objective of the state, the court accepted the reasoning of the holdings in *Clark v. Redeker*[37] and *Kirk v. Board of Regents of the University of Colorado.*[38] The reasoning in *Clark* and *Kirk* held that the state does have a legitimate interest in attempting to achieve partial cost equalization between those who have and those who have not recently contributed to the state's economy through employment, tax payments and expenditures.

Conclusion

The practice of many state colleges and universities in classifying bona fide residents of the state as nonresidents simply because they have not resided in the state for a year prior to entering the university, or because they entered the state primarily for educational purposes

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[36] Starns v. Malkerson, ____ F. Supp. ____ (D. Minn. 1970).

[37] 259 F. Supp. 117 (S.D. Iowa 1956).

[38] 273 Cal. App. 2d 430, 78 Cal. Rptr. 260.

and therefore must retain a nonresident status, even though they have chosen the university state as their domicile, violates the equal protection clause of the fourteenth amendment.

If a state would provide resident classification for all students actually domiciled in the state, without regard to the length of time spent within the state, there would be neither financial hardship imposed upon the state, nor would the administrative requirement of hearing student requests for reclassification be overburdensome.

Whether or not the necessity for higher education has become increasingly important or fundamental so as to be considered by the Supreme Court in *Starns* remains to be seen. In any event, it is submitted that in time the majority spirit of *Shapiro* will meet favorable prevailing judicial winds which will carry "equal protection" out to the provincial colonies of state higher education.