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Privileged for Being Stationary: Why the Practice of Differentiating Between In-State and Out-Of-State Tuition Rates are Unconstitutional

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PRIVILEGED FOR BEING STATIONARY: WHY THE PRACTICE OF DIFFERENTIATING BETWEEN IN-STATE AND OUT-OF-STATE TUITION RATES IS UNCONSTITUTIONAL

BY HANNAH McCANN*

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INTRODUCTION

Receiving an acceptance letter from a university is a thrilling milestone in the life of an American student, because it opens up to the door to new possibilities and new paths, oftentimes with those paths leading into new states. However, the excitement fades quite a bit when the student receives the follow-up letter with a tuition price tag stamped on it. The tuition price tag particularly hits hard the student who chooses to attend a university in a state where the student does not live, regardless of whether that student wants to stay in that new state post-graduation. Suddenly, that milestone of going to college seems a little less thrilling.

People often move to a new state for reasons other than education, such as for a new job, to be closer to family, or to establish a comfortable life for themselves and their spouses and children. As a result of moving to the new state, people can become interested in pursuing a new academic degree from a university within that state. However, if the student attempts to attend a university in that new state too quickly after moving there, the student is penalized with an out-of-state tuition price tag. On the other end of the spectrum, people often attend a university in their home states with every intention of moving to a new state post-graduation. Those students get the benefit of in-state tuition rates prior to leaving the state altogether.

State universities charging out-of-state tuition prices through the use of durational residency requirements is unconstitutional in violation of the Privileges and Immunities Clause of Article IV for students who come into a state in order to attend school there because the practice hinders the operation of a system of higher education within the nation as a whole by allowing states to confer the privilege of in-state tuition upon residents that people coming into the state from other states do not receive. Additionally, the practice of using durational residency requirements in determining who is eligible for in-state tuition violates the right to travel as protected under the Privileges and Immunities Clause of the Fourteenth Amendment. The right to travel is violated because the requirements create discriminatory classifications among newer residents and long-term residents that penalize the right of a citizen to be treated the same in his new state of residence as those who have already lived there for the period of time specified by the durational residency requirement. Furthermore, the practice of charging out-of-state tuition rates to students who come into the state from external states poses serious policy concerns through unfair application of durational residency requirements. This practice places a significant obstacle in the way of students who wish to obtain a higher education at a university in another state in the form of exponentially higher tuition rates.

In Section I, this Note first looks at residency as states define it for tuition purposes and how states use durational residency requirements to determine whether a student qualifies for in-state tuition rates or not. In Section II, this Note discusses the history of the Privileges and Immunities

Clause of Article IV in order to provide a background for how this issue fits within the protections of the clause, taking a look at its origins and its evolution. In Section III, this Note discusses the constitutional implications of a state conferring the benefit of in-state tuition on its residents to the detriment of students coming from out of state under the purview of the Privileges and Immunities Clause of Article IV. In Section IV, this Note discusses the Privileges and Immunities Clause of the Fourteenth Amendment to see how these protections apply to the states and, more specifically, how out-of-state tuition prices infringe upon the right to travel as protected under this clause. In Section V, this Note's primary argument outlines how the practice of imposing durational residency requirements for in-state tuition purposes violates the right to travel under the Privileges and Immunities Clause of the Fourteenth Amendment.

I. RESIDENCY REQUIREMENTS: HOW AND WHY STATES IMPOSE THEM

In order to qualify for in-state tuition, generally a student must classify as a resident of that state. Before discussing why these residency requirements raise constitutional concerns, this Note will address how a citizen establishes residency, how states define what a resident is for purposes of in-state tuition, and why states impose these residency requirements on in-state tuition. In general, there are two requirements that a citizen must meet in order to establish residency in a given state.¹ The first requirement is that the person must be physically present in the state in which he or she seeks to establish residency, and the second requirement is that the person is in that state with the intent to remain there indefinitely.² The term "residency" is often referred to as "domicile," and the two are used interchangeably.³

States maintain the power to classify students on the basis of residency for purposes of in-state versus out-of-state tuition.⁴ Further, states may, and sometimes do, define what a resident is for purposes of tuition differently than how they define what a resident is for other purposes.⁵ Most universities will follow the two requirements noted above and require that students be residents, or legally domiciled, in the state in which the university is located.⁶ Typically, universities will attempt to ensure that a

1. *Martinez v. Bynum*, 461 U.S. 321, 330 (1983).

2. *Id.* at 331.

3. John W. Anderson, *Strangers in Their Own Land: Durational Residency Requirements for Tuition Purposes, Though Illegal, are Here to Stay*, 85 NEB. L. REV. 1058, 1060 (2007).

4. *Thompson v. Bd. of Regents of Univ. of Neb.*, 188 N.W.2d 840, 843 (Neb. 1971).

5. *Id.*

6. Thomas B. Parent, *Tuition Residence Requirements: A Second Look in Light of Zobel and Martinez*, 61 IND. L.J. 287, 289 (1985).

student is a resident of the state in which the university is located by imposing a durational residency requirement.⁷

How do states impose these durational residency requirements? To begin with, the requirements usually include actual presence in the state for six months to one year prior to enrollment in the university.⁸ Students will have to prove that they have resided in the state for a specified period of time and that they intend to remain in the state indefinitely.⁹ Different requirements for showing residency in the state are often put in state statutes and vary from state to state.¹⁰ Some states delegate the responsibility of establishing these requirements to the state board of higher education, and the board can further delegate to the individual universities.¹¹ Students generally have to show residency using government-issued IDs, and at least one ID must have a date on it showing that the student has been a resident for the specified period of time.¹²

Some states (California, for example) ask that the student demonstrate that they have been both self-supporting and actually present in the state for the specified period of time.¹³ States can also impose an age requirement on whether a student is eligible for in-state tuition benefits on top of the durational residency requirement.¹⁴ The individual will have to demonstrate a stronger connection to the state in which the university is located than any connection that the individual may have with other states.¹⁵ Continued involvement in civic or community organizations is one way that a student can show a connection to the state and actual presence in the state.¹⁶ Owning a home within the state is helpful for, but not conclusive of, establishing residency because some students have vacation homes that are not where they actually reside.¹⁷

For states that do impose a durational residency requirement, determining what is a “reasonable” requirement is unclear,¹⁸ and states enforce them differently. For instance, some states will not count any of the time that a student spends in the state prior to enrollment in the university for the purpose of attending that university towards the waiting time required by the durational residency requirement.¹⁹ Regardless of the length

7. *Id.*

8. *Id.*

9. Lawrence J. Conlan, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389, 1390 (2002).

10. *In-State Tuition and State Residency Requirements*, FINAID PAGE, LLC, <http://www.finaid.org/otheraid/stateresidency.phtml> (last visited Nov. 12, 2016).

11. *Id.*

12. *Id.*

13. Conlan, *supra* note 9, at 1390.

14. *In-State Tuition and State Residency Requirements*, *supra* note 10.

15. *Id.*

16. *Id.*

17. *Id.*

18. Conlan, *supra* note 9, at 1390.

19. Parent, *supra* note 6, at 289.

of the waiting period, durational residency requirements specify that a student must reside within the state for a certain period of time before they can claim that they have been deprived of the privileges of the residents in that state.²⁰ Due to these durational residency requirements, the thought of having to pay out-of-state tuition rates is often a deterrent to prospective students who currently live in one state but are looking to attend a university in another state.²¹

States impose durational residency requirements for a variety of the benefits that they confer upon their citizens, far beyond just imposing them through their colleges and universities for their residents to obtain the benefit of in-state tuition rates. States have offered a number of reasons for imposing these requirements. Oftentimes, states impose them in order to ensure that the students paying in-state tuition intend to stay in the state indefinitely and are not just coming to the state solely for the purpose of securing benefits of the state's higher education institutions.²² In the context of in-state versus out-of-state tuition, these durational residency requirements are, in effect, used as a measure to determine whether or not the student is a bona fide resident.²³

Case law on the subject of durational residency requirements for the purposes of in-state tuition offers insight into other reasons that a state will impose them upon nonresidents who want to attend its public universities. In *Vlandis v. Kline*, the state of Connecticut offered three different reasons for imposing durational residency requirements on students who come into the state to obtain a higher education from a public university.²⁴ The first reason offered by Connecticut was that the state has an interest in equalizing the cost of public higher education between its residents and nonresidents, and that by freezing the student's residency status as of the time the student applied to attend the university, the state is ensuring that its bona fide residents will receive their full subsidies.²⁵ This is likely the most often-cited reason for states imposing durational residency requirements.²⁶ The second reason offered by Connecticut in *Vlandis* was that a state should favor its residents with a lower tuition price because residents have contributed a higher tax contribution to the state than nonresidents.²⁷ The third reason offered by Connecticut was administrative certainty, because the durational residency requirements prevent students from coming from out of state solely for in-state tuition purposes and then claiming resident status.²⁸ This Note will later discuss in

20. *Id.*

21. Conlan, *supra* note 9, at 1389.

22. Parent, *supra* note 6, at 289.

23. *Id.*

24. *Vlandis v. Kline*, 412 U.S. 442, 448-52 (1973).

25. *Id.* at 448.

26. Anderson, *supra* note 3, at 1082-83.

27. *Vlandis*, 412 U.S. at 449.

28. *Id.* at 451.

Section V-D whether these reasons are sufficient to overcome the discrimination between residents and nonresidents.

Durational residency requirements place pressure on newer residents to stay in the state for a longer period of time before obtaining certain state benefits.²⁹ States have imposed these durational residency requirements in other areas, such as the receipt of welfare benefits, and often do so to reduce the possibility of the fraudulent receipt of state benefits.³⁰ States could do this in the same way with residency requirements, so as to ensure that actual residents receive the benefit of in-state tuition. States also often use durational residency requirements for voting eligibility, because those who have more established residency will often be more informed and care more about the local government, so they will make more informed decisions when voting.³¹ Durational residency requirements could incentivize students to become actual residents and further contribute to the state economy, which is a major reason that states impose them.³² In the context of higher education, states often impose these requirements to prevent students from becoming incidental residents as a result of their education.³³

States have offered various other reasons why imposing durational residency requirements is justified in the context of higher education. Higher education is not a fundamental right at the federal level, so state universities are not infringing a fundamental right to higher education for nonresidents by charging higher tuition prices for residing in the state for a lesser period of time.³⁴ States impose them because they do not feel as though nonresidents or newer residents are suffering a great harm by having to pay a higher price to attend the state's universities.³⁵ States broadly cite tax purposes as justification because residents or their parents pay taxes to the state.³⁶ These tax payments ultimately support the state universities, so the residents should receive a lower tuition rate.³⁷ In *Hooban v. Boling*, the state of Tennessee offered the reason that the durational residency requirements provide a period of time in which the state will assuredly receive some benefit for the student's presence within its borders.³⁸

Durational residency requirements seem to be a standard method of differentiating between bona fide residents of a state and those who come

29. Erika K. Nelson, *Unanswered Questions: The Implications of Saenz v. Roe for Durational Residency Requirements*, 49 U. KAN. L. REV. 193, 196 (2000).

30. Bryce Nixon, "Rational Basis with a Bite": A Retreat from the Constitutional Right to Travel, 18 LAW & INEQ. 209, 214 (2000).

31. Nelson, *supra* note 29, at 199.

32. Conlan, *supra* note 9, at 1399.

33. *In-State Tuition and State Residency Requirements*, *supra* note 10.

34. *Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970).

35. *Id.*

36. *Clarke v. Redeker*, 259 F. Supp. 117, 123 (S.D. Iowa 1966).

37. *Id.*

38. *Hooban v. Boling*, 503 F.2d 648, 651 (6th Cir. 1974).

into the state to attend a public university. They impose further restrictions upon whether a student coming from out of state can receive in-state tuition than just a typical residency analysis would, because the student has to show more than just physical presence and the intent to remain indefinitely; the student has to further show that they have been a resident of that state for a specified period of time prior to enrollment in the university. In-state tuition rates alone are unconstitutional, as discussed in Section III of this Note, but the durational residency requirements present an added constitutional concern. States may have offered a multitude of reasons justifying these types of requirements as necessary, but are these reasons sufficient? This Note will answer this question in the negative and analyze the constitutional implications of these requirements in Section V.

II. HISTORY AND SCOPE OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

In order to determine why durational residency requirements and in-state tuition rates violate the Privileges and Immunities Clause of Article IV, it is necessary to analyze how this issue fits within the realm of the rights protected and granted by the clause. There are two Privileges and Immunities Clauses in the United States Constitution, found in Article IV³⁹ and the Fourteenth Amendment.⁴⁰ Since they are separate clauses, it is necessary to distinguish the two and discuss both for the purposes of this Note. In order to do so, this Section will first examine the history, scope, and policy of the Privileges and Immunities Clause of Article IV to explain the roots of the privileges and immunities to which the citizens of the United States are entitled, what the clause protects, and how it has been interpreted. This Note will discuss the Privileges and Immunities Clause of the Fourteenth Amendment in Section IV to examine how the clause applies to the states. An examination of the history of the Privileges and Immunities Clause of Article IV and the impact of the clause will demonstrate how residency requirements for in-state tuition raises constitutional concerns within the realm of rights protected and granted as privileges and immunities.

The Privileges and Immunities Clause found in Article IV, Section II, Clause I of the United States Constitution plainly states, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁴¹ The Privileges and Immunities Clause does not necessarily protect an already-existing right, but instead grants an affirmative right to the people of the United States.⁴² It grants citizens the

39. U.S. CONST. art. IV, § 2, cl. 1.

40. U.S. CONST. amend. XIV, § 1.

41. U.S. CONST. art. IV, § 2, cl. 1.

42. Michael J. Distel, *Constitutional Law—Privileges and Immunities Clause—The privileges and immunities clause of the United States Constitution protects nonresidents*

right to the privileges and immunities of the several states, even in the absence of commercial activity.⁴³ It is found in the so-called “States’ Relations Article” of the Constitution, along with other clauses that grant affirmative rights, such as the Full Faith and Credit Clause, the Extradition Clause, provisions for the admission of new states, the Territory and Property Clause, and the Guarantee Clause.⁴⁴ The Privileges and Immunities Clause, in essence, makes it unconstitutional for a state to discriminate against nonresidents by treating them as lesser than its own residents or not allowing the nonresident to exercise his or her right to the privileges and immunities granted to the residents of that particular state.⁴⁵

The generally-accepted rationale of the Privileges and Immunities Clause is to foster the functioning of a single nation so that citizens will be treated the same in each of the several states across the country, regardless of their home states.⁴⁶ The clause does so by balancing “the needs of a mobile citizenry” while ensuring that residents of a particular State receive what they are entitled to.⁴⁷ As Justice Field articulated in *Paul v. State of Virginia*, “It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”⁴⁸ Effectively, the Privileges and Immunities Clause acts as an Equal Protection Clause for nonresidents.⁴⁹ The Privileges and Immunities Clause does not give nonresidents within a state any greater privileges than the residents of the state enjoy, but it does serve to outlaw many statutory classifications solely based upon the classification of nonresident status within a state.⁵⁰ The Supreme Court has articulated the purpose of the Privileges and Immunities Clause to be “to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a particular source of evil at which the statute is aimed.”⁵¹

The Supreme Court has not definitively articulated the scope of the Privileges and Immunities Clause, but courts tend to interpret the clause

from state actions that discriminate against them unless 1) the protection sought by the nonresident is not a guaranteed fundamental right, or 2) the state shows a substantial interest justifying different treatment of nonresidents. Supreme Court of Virginia v. Friedman, 108 S. Ct. 2260 (1988), 66 U. DET. L. REV. 517, 520 (1989).

43. *Id.*

44. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978).

45. Elizabeth Ann Gillis, *Constitutional Law—The Privileges and Immunities Clause: A Strengthened Standard with a Clarified Analysis*—Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1985), 20 SUFFOLK U. L. REV. 93, 93 (1986).

46. Dorean Marguerite Koenig, *One Nation Undivided . . .*, 22 U. TOL. L. REV. 737, 740 (1991).

47. *Id.* at 742.

48. *Paul v. Virginia*, 75 U.S. 168, 180 (1868).

49. 16B AM. JUR. 2D *Constitutional Law* § 794 (2009).

50. *Id.* at 239-40.

51. *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

broadly.⁵² The scope of the Privileges and Immunities Clause has been interpreted both as a blanket form of protection for the fundamental rights of all citizens and a case-by-case analysis of whether there has been an infringement of a particular right that the plaintiff asserts.⁵³ Although the scope of the Privileges and Immunities Clause is often construed broadly, the Supreme Court has articulated some restrictions on the scope of the clause. The clause only protects the privileges and immunities that affect the vitality of the United States as a single nation for residents and nonresidents.⁵⁴ Furthermore, the Supreme Court has consistently held that the Privileges and Immunities Clause does not protect any actions that the courts find are related to the political operation of the sovereign state.⁵⁵

In determining what fits within the realm of the rights afforded and protected by the Privileges and Immunities Clause, the Supreme Court oftentimes must determine what is best for the nation as a single entity by balancing both unity interests at a federal level as well as state interests.⁵⁶ Once the Supreme Court determines that a particular right or privilege falls within the scope of the protections afforded by the Privileges and Immunities Clause, that right or privilege is protected under the clause in future cases.⁵⁷ The activity or classification in question must be “sufficiently basic to the livelihood in the Nation . . . as to fall within the purview of the Privileges and Immunities Clause[.]”⁵⁸ This ties into the clause’s generally-accepted rationale being the fostering of a single nation, because if the questioned activity or classification does not relate to this goal, it does not fall within the purview of the Privileges and Immunities Clause. The Supreme Court will invalidate a restriction that deprives nonresidents of a protected privilege only if it determines that the restriction does not advance a substantial state interest.⁵⁹

The modern interpretation of the Privileges and Immunities Clause that courts use in their analyses is rooted in the Supreme Court’s decision in *Toomer v. Witsell*.⁶⁰ At issue in that case were South Carolina statutes related to shrimping within a three-mile belt off of South Carolina’s coast.⁶¹ The Supreme Court struck down a statute that required nonresidents of the state of South Carolina to pay a higher license fee than what residents had to pay for each shrimp boat used within the three-mile belt.⁶² The Supreme

52. Distel, *supra* note 42, at 520.

53. Gillis, *supra* note 45, at 95.

54. Supreme Court of N.H. v. Piper, 470 U.S. 274, 279 (1985).

55. Gillis, *supra* note 45, at 95.

56. Koenig, *supra* note 46, at 745.

57. *Id.*

58. Supreme Court of Va. v. Friedman, 487 U.S. 59, 64-65 (1988) (quoting United Bldg. & Const. Trades Council v. City of Camden, 465 U.S. 208, 209 (1984)).

59. *Id.* at 65.

60. Distel, *supra* note 42, at 521.

61. *Toomer v. Witsell*, 334 U.S. 385, 389 (1948).

62. *Id.* at 403.

Court's decision in *Toomer* recognized that the Privileges and Immunities Clause is not absolute, however.⁶³ The Supreme Court determined that South Carolina had the power to regulate the three-mile belt because South Carolina had a legitimate state interest in the fishery within three miles off its coast, so it could exercise its police power to regulate it.⁶⁴ This decision showed that laws implemented due to state policy concerns, may, in the process of remedying those concerns, sometimes result in discrimination against nonresidents.⁶⁵ However, any discriminatory practices that occur as result of a change in laws must bear a close relationship to the state's objective in implementing the law.⁶⁶ The Supreme Court also articulated that the primary purpose of the Privileges and Immunities Clause is to help fuse the independent states into a collective nation,⁶⁷ which lends more credence to the notion that the clause only reaches those actions that have an effect on the nation as a single entity.

Baldwin v. Fish and Game Commission of Montana gave a further enumeration of rights protected by the Privileges and Immunities Clause, articulating that the clause protects fundamental rights.⁶⁸ Nonresidents had to pay higher hunting license fees, and the state placed limitations on the amount of elk and deer that the nonresidents could hunt.⁶⁹ The Supreme Court declined to extend the protection of the Privileges and Immunities Clause to recreational hunting.⁷⁰ Because the right to engage in recreational activities is not a fundamental right, it is not worthy of the clause's protection.⁷¹ The Supreme Court reasoned that the license fees did not deprive the nonresidents of a means of livelihood, and since access to Montana elk was not "basic to the maintenance or well-being of the Union," the claims were not within the purview of the Privileges and Immunities Clause.⁷² This decision in *Baldwin* further bolstered the notion that distinctions between residents and nonresidents will be prohibited when they hinder the "formation, the purpose, or the development of a single Union of [the] States."⁷³

In *Supreme Court of Virginia v. Friedman*, a nonresident was unable to practice law in a state in which she was not a resident.⁷⁴ The State of Virginia claimed that its ability to function as a sovereign political entity would be compromised if it could not exclude nonresidents from the state

63. Distel, *supra* note 42, at 521; *Toomer*, 334 U.S. at 396.

64. *Toomer*, 334 U.S. at 393.

65. Distel, *supra* note 42, at 521.

66. Gillis, *supra* note 45, at 96.

67. *Toomer*, 334 U.S. at 395.

68. Distel, *supra* note 42, at 522.

69. *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 373 (1978).

70. *Id.* at 388.

71. Gillis, *supra* note 45, at 97.

72. *Baldwin*, 436 U.S. at 388.

73. *Id.* at 383.

74. Distel, *supra* note 42, at 525.

bar.⁷⁵ The Supreme Court broadened the scope of the clause's protections by stating that nonresidents do not have to be entirely excluded from the state as a whole in order for the protections of the Privileges and Immunities Clause to apply.⁷⁶ The Supreme Court determined that the denial of the nonresident's right to practice law within the state of Virginia was within the purview of the protections afforded by the clause because the practice of law is basic enough to the national economy to be deemed a privilege that the clause protects.⁷⁷

The Privileges and Immunities Clause of Article IV affords invaluable rights to the citizens of the United States. It ensures that people will be treated as equals regardless of which state they are in, and it keeps the several states from being able to discriminate against someone who comes into the state from a foreign state. With the clause being interpreted broadly, citizens can enjoy a multitude of privileges and immunities in each of the several states. The Privileges and Immunities Clause also confers a benefit upon the United States as a whole because it promotes the fashioning of a single, working nation. The right to enjoy the privileges and immunities of the citizens of the several states applies to the states through the Privileges and Immunities Clause of the Fourteenth Amendment as well, as this Note will discuss in Section IV. Moving forward from the history and background of the Privileges and Immunities Clause of Article IV, this Note will now analyze in Section III why the practice of differentiating between in-state and out-of-state tuition rates for residents and nonresidents violates this clause.

III. WHY IN-STATE TUITION RATES VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

As discussed in Section II of this Note, the Privileges and Immunities Clause is found in Article IV of the United States Constitution. Although this Note primarily argues later in Section V that durational residency requirements violate the right to travel under the Privileges and Immunities Clause found within the Fourteenth Amendment, in-state tuition rates also violate the clause found within Article IV. In-state tuition rates violate the Privileges and Immunities Clause of Article IV for two primary reasons: (A) treating students who come into a state to obtain a higher education the same as students who remain in the state in which they already live bears upon the unity of the Nation as a whole, and (B) the clause prevents states from treating anyone differently, no matter who they are and regardless of whether they came from a different state or not.

75. Gillis, *supra* note 45, at 97.

76. Supreme Court of Va. v. Friedman, 487 U.S. 59, 66 (1988).

77. *Id.*

A. The Unity of the Nation as a Whole

The purpose of the Privileges and Immunities Clause in Article IV is to place the citizens of each state on equal footing with citizens of other states, at least as far as advantages resulting from citizenship in that particular state are concerned.⁷⁸ The clause in Article IV commands that states treat all citizens, residents and nonresidents, equally, primarily with respect to those privileges and immunities “bearing upon the vitality of the Nation as a single entity[.]”⁷⁹ The clause aids the vitality of the Nation as a single entity because the enjoyment of privileges and immunities by citizens of one state who go into another state serves the purpose of perpetuating “mutual friendship and intercourse among the people of the different states of the Union.”⁸⁰

Treating a student who comes into the state for the purpose of obtaining a higher education differently from a student who has resided in the state for an extended period of time by charging the former student a much higher price tag on that education fails to perpetuate a mutual friendship among the people of the United States. This bears upon the vitality of the Nation as a single entity by preventing students from leaving their own states to receive an education in another state because they are aware that they will be treated differently in the new state. This seems to perpetuate a system of states operating individually and not as a collective whole or single entity. Depriving nonresidents of the privilege of in-state tuition could ultimately deprive them of the opportunity to receive a higher education in that state completely due to high costs of out-of-state tuition. The deprivation of education triggers strict judicial scrutiny, particularly when the deprivation results from the inability to pay for the education.⁸¹

Furthermore, the Privileges and Immunities Clause of Article IV was intended to foster the vitality of the Nation as a whole by also creating a national economic union.⁸² The clause achieves this purpose by guaranteeing to a citizen of one state the right to do business in another state on substantially equal terms as those citizens already in the other state.⁸³ For example, the Supreme Court of the United States said in *Supreme Court of New Hampshire v. Piper* that New Hampshire’s practice of excluding nonresidents from its state bar association violated the clause in Article IV because the profession bore upon the national economy and the state powers entrusted to lawyers do not “involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.”⁸⁴

78. *Id.* at 64.

79. *United Bldg. and Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984) (quoting *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371 (1978)).

80. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823).

81. *Plyler v. Doe*, 457 U.S. 202, 209 (1982).

82. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279-80 (1985).

83. *Id.* 280.

84. *Id.* at 283 (quoting *In re Griffiths*, 413 U.S. 717, 724 (1973)).

The practice of law holds significant importance in the national economy because, as the Supreme Court noted, “the activities of lawyers play an important part in commercial intercourse.”⁸⁵

The fostering of a national economic union under the Privileges and Immunities Clause of Article IV is not without its limits, however. Citizens of the several states are not permitted to participate in all of the rights that the citizens of that state enjoy under the guise of fostering a national economic union.⁸⁶ Nonresidents may not, for example, deplete bodies of water or property in foreign states of wildlife for commercial purposes and claim that it violates the Privileges and Immunities Clause of Article IV for the state to force them to stop.⁸⁷ The property belongs to individuals of the state as much as it belongs to the state itself, and the state can protect the property against aggressions from nonresidents.⁸⁸ The right to enjoy the privileges and immunities of citizens of the several states does not amount to a grant of co-tenancy in the state’s common property to nonresidents.⁸⁹

Most notably, education provides citizens with the tools to help lead economically productive lives that can ultimately benefit us all.⁹⁰ Education plays a vital role in our free society⁹¹ because the education that citizens receive can lead them on to create new inventions and foster new ideas, which will serve to benefit the Nation as a whole. All states offer public higher education, so it is not of such “unique responsibility” that states should attempt to attract only longtime residents by offering them a much lower rate of tuition. Education is an important state service, and denying in-state tuition to citizens who wish to attend a particular university within that state presents a large hurdle to obtaining that service.⁹² With tuition costs ever-rising, it may come to a point that only wealthy individuals can attend schools in different states.⁹³ That has quite the opposite effect from fostering a national economic union because it isolates those who are not in a wealthier portion of the population and deprives them of the opportunity to attend school in another state and ultimately join the national economy in a field of their choice.⁹⁴ Further, offering the same tuition rate to nonresidents that citizens receive does not rise to the level of creating a co-tenancy in the common property of the state. Residents and nonresidents alike would have the same opportunities at the same tuition

85. *Id.* at 281 (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975)).

86. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

91. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

92. Douglas R. Chartier, *The Toll for Traveling Students: Durational-Residence Requirements for In-state Tuition After Saenz v. Roe*, 104 MICH. L. REV. 573, 594 (2005).

93. Michael Llewellyn, *Citizens Without Statehood: Denying Domicile to Fund Public Higher Education*, 108 W. VA. L. REV. 775, 796 (2006).

94. Chartier, *supra* note 92, at 594.

rate, which assists in states working together rather than competing with each other in the field of higher education. This fosters a national economic union, which bears upon the vitality of the Nation as a whole.

B. All Citizens Must be Treated the Same Regardless

The Privileges and Immunities Clause of Article IV, by its plain language, prevents a state from treating anyone differently, whomever they are. The Privileges and Immunities Clause embraces the right of a citizen to pass through or reside in any other state for essentially any purpose.⁹⁵ Even if viewed from the perspective that a state university is not depriving nonresidents of the opportunity to obtain a higher education within its borders by charging the nonresidents a higher price for tuition, the state cannot treat those nonresidents differently. Offering in-state tuition rates to residents confers a privilege upon them that nonresidents do not receive, which is a violation of the mandates of the clause. Education plays a fundamental role in the maintenance of the fabric of society in the United States.⁹⁶ The acquisition of knowledge and education has been a long-term matter of supreme importance in American society, and public schools are the primary vehicle for transmitting knowledge.⁹⁷ By charging a higher tuition price tag for nonresidents, states effectively cause that vehicle to stop short, keeping many American citizens in their own states and preventing them from gaining knowledge elsewhere. States should not afford different treatment to individuals unless there is a relevant distinction among them.⁹⁸

Though citizens of the several states are not entitled to all of the rights granted to the citizens of a particular state, citizens of the several states have the right to the enjoyment of life and liberty and the right to pursue and obtain happiness in foreign states.⁹⁹ Citizens of the several states have the right under the Privileges and Immunities Clause of Article IV to pass through or reside in another state for purposes of their professional pursuits or otherwise.¹⁰⁰ Forcing citizens of the several states to pay out-of-state tuition rates deprives them of these rights for no reason other than their citizenship in another state. The Privileges and Immunities Clause of Article IV is designed to put citizens of one state on equal footing with those citizens of other states, "so far as the advantages resulting from citizenship in those States are concerned."¹⁰¹ Differences in tuition prices place nonresidents on far from equal footing from residents, depriving them

95. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823).

96. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

97. *Id.*

98. *Starns v. Malkerson*, 326 F.Supp. 234, 239 (D. Minn. 1970).

99. *Corfield*, 6 F. Cas. at 551-52.

100. *Id.* at 552.

101. *United Bldg. and Constr. Trades Council v. City of Camden*, 465 U.S. 208, 215-16 (1984) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1869)).

of the significant advantage that an in-state tuition rate provides. Giving residents the benefit of paying lower prices for tuition keeps nonresidents from feeling welcome in other states for higher education purposes, which both weakens the vitality of the Nation as a single entity and directly violates the requirement of the Privileges and Immunities Clause of Article IV that a state not treat nonresidents as lesser than residents.

IV. THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO TRAVEL

The way in which the Privileges and Immunities Clause of Article IV affords protection to United States citizens provides an important backdrop to how states afford these protections to citizens through the Fourteenth Amendment. This Note's primary argument is couched in the Privileges and Immunities Clause of the Fourteenth Amendment, particularly in the right to travel. The language of the clause in the Fourteenth Amendment states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"¹⁰² The Privileges and Immunities Clause of the Fourteenth Amendment grants certain fundamental rights to the people, and the fundamental right to travel is of most importance to this Note. Therefore, this Section will first briefly discuss the Privileges and Immunities Clause of the Fourteenth Amendment and then provide a history and analysis of the right to travel.

The Privileges and Immunities Clause of the Fourteenth Amendment provides each United States citizen with an understanding and appreciation that states cannot abridge his or her privileges and immunities.¹⁰³ This means, essentially, that the Privileges and Immunities Clause of the Fourteenth Amendment affords protection against discrimination on the basis of nonresident status directly to all citizens by keeping each state from being able to withhold privileges or immunities granted to residents of a state from nonresidents of a state. American citizens have the opportunity to enjoy privileges and immunities from all states, and no one state can abridge them.¹⁰⁴ There is a distinction between the citizenship to the United States and the citizenship to the individual state, and the Privileges and Immunities Clause of the Fourteenth Amendment does not serve to protect a citizen of a state against his or her own state's legislative power.¹⁰⁵ In turn, through the use of the words "privileges or immunities of citizens of the United States," it serves to

102. U.S. CONST. amend. XIV, § 1.

103. *Slaughter-House Cases*, 83 U.S. 36, 53 (1872).

104. *Id.* at 54.

105. *Id.* at 74.

prevent states from treating United States citizens who are also citizens of foreign states differently than that states treat their own citizens.¹⁰⁶

The Supreme Court of the United States adopted a definition for “the privileges and immunities of citizens” in *The Slaughter-House Cases*, as it had previously been unclear to the Court what fundamental principles the clause protected.¹⁰⁷ The privileges and immunities protected by the clause are often viewed as the rights belonging to individuals as citizens of states and are “held to be the class of rights which the State governments were created to establish and secure.”¹⁰⁸ The Privileges and Immunities Clause of the Fourteenth Amendment did not create the right of the individual to enjoy the privileges and immunities of the several states and did not act as a mechanism to control how states measure the rights of its own citizens.¹⁰⁹ The clause declares to the several states that, regardless of what rights they choose to grant to their citizens or how they limit or qualify those rights, the states must grant the same rights in the same capacity to those citizens of the several states who come into that state.¹¹⁰

The Privileges and Immunities Clause of the Fourteenth Amendment preserves the right of a newly-arrived citizen in a state to enjoy the same privileges and immunities enjoyed by citizens of that state.¹¹¹ When looking at state actions that discriminate against a newly-arrived citizen because the citizen has been domiciled within the state for less than a year, for example, a higher standard of review must be used than mere rationality or an intermediate standard due to the discriminatory nature of the action.¹¹² Particularly, the Privileges and Immunities Clause of the Fourteenth Amendment protects citizens from this kind of discriminatory behavior by granting United States citizens the right to travel, which is protected by the newly-arrived person’s status as both a citizen of a state and a United States citizen.¹¹³ This Note argues that durational residency requirements for in-state tuition purposes violate the right to travel. The full discussion of that argument is found in Section V. This Section will now provide a foundation on the right to travel from which to argue.

In determining that residency requirements for tuition purposes fall within the purview of the Privileges and Immunities Clause of the Fourteenth Amendment, these requirements must affect the fashioning of a

106. *Id.* (emphasis removed).

107. *Id.* at 76 (“What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.”).

108. *Id.*

109. *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

110. *Id.*

111. *Saenz v. Roe*, 526 U.S. 489, 501 (1999).

112. *Id.* at 504.

113. *Id.* at 502.

single nation.¹¹⁴ The right to travel, though not explicitly stated anywhere in the Constitution,¹¹⁵ has been recognized by the Supreme Court as a basic right granted to the people under the Constitution.¹¹⁶ The right to travel affects the fashioning of a single nation because the Supreme Court has recognized that the United States' nature and concepts of personal liberty "unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."¹¹⁷

As early as 1920, in *United States v. Wheeler*, the Supreme Court declared the right to travel to be a fundamental right.¹¹⁸ This decision has been upheld since, notably in *Shapiro v. Thompson* in 1966 and *Saenz v. Roe* in 1992.¹¹⁹ Since the right to travel is a fundamental right, courts must apply strict scrutiny to any violations of and infringements upon this right.¹²⁰ As Justice Stewart stated in his concurring opinion in *Shapiro v. Thompson*, "[I]t is a virtually unconditional personal right, guaranteed by the Constitution to us all."¹²¹ In *Saenz v. Roe*, the Supreme Court articulated three components that the right to travel protects:

[T]he right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.¹²²

The right to travel fits within the purview of the Privileges and Immunities Clause of the Fourteenth Amendment, as the Supreme Court noted in *Saenz v. Roe*.¹²³ The Supreme Court further stated that the right to travel under the Privileges and Immunities Clause of the Fourteenth Amendment embraces the third component of the right to travel, which is the citizen's right to be treated equally in his or her new state of

114. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279 (1985).

115. *Saenz*, 526 U.S. at 498.

116. *United States v. Guest*, 383 U.S. 745, 758 (1966).

117. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

118. Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2465 (2010).

119. *Id.* at 2465-66.

120. *Id.* at 2465.

121. *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring).

122. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

123. *Id.* at 501 ("[A] citizen of one State who travels in other States . . . is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits.") (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 550 (E.D. Pa. 1823)).

residence.¹²⁴ Any discriminatory classification that hinders this right confers a penalty on the traveling citizen's right to travel.¹²⁵

Justice O'Connor's concurring opinion in *Zobel v. Williams* indicates that the Privileges and Immunities Clause of the Fourteenth Amendment has long been associated with interstate travel.¹²⁶ Justice O'Connor drew the roots of the Privileges and Immunities Clause to Article IV of the Articles of Confederation, which guaranteed the inhabitants of the free states "[the] privileges and immunities of free citizens in the several States."¹²⁷ Article IV of the Articles of Confederation also recognized a right of "free ingress and regress to and from any other State."¹²⁸ Justice O'Connor's comparison between the Privileges and Immunities Clause and Article IV of the Articles of Confederation shows that the right to travel has historically been linked to the protections afforded by the guarantee of the right to the privileges and immunities of citizens of several states.

The Supreme Court has noted that the Privileges and Immunities Clause of the Fourteenth Amendment protects the right of a citizen of one state to travel into another state, establish residence there, and enjoy the privileges and immunities afforded to the residents already living in the state.¹²⁹ The right to travel fits within the protections afforded by the Privileges and Immunities Clause because it protects the right of citizens to travel among the several states and be free from discrimination or denial of a state's privileges and immunities on the basis of their nonresident status. Residency requirements for in-state tuition relate to the right to travel because students will often travel from their home state to another with the objective of attending a college or university in that new state.

V. IMPOSING DURATIONAL RESIDENCY REQUIREMENTS ON NONRESIDENT STUDENTS VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Giving lower tuition rates using arbitrary classifications among residents through the use of durational residency requirements, although widely practiced among the several states, is unconstitutional under the Privileges and Immunities Clause of the Fourteenth Amendment. This Section of this Note argues that the practice infringes upon the right to interstate travel and violates the Privileges and Immunities Clause of the Fourteenth Amendment for the following reasons: (A) students who go into a new state for the purpose of establishing residency and attending school there should retain the right to be treated like citizens of that state under the

124. *Id.* at 504-05.

125. *Id.* at 505.

126. *Zobel v. Williams*, 457 U.S. 55, 78-79 (1982) (O'Connor, J., concurring).

127. *Id.* at 79.

128. *Id.*

129. *Slaughter-House Cases*, 83 U.S. 36, 80 (1872).

right to travel; (B) classifying new resident students as “nonresidents” creates a discriminatory classification; (C) durational residency requirements create a distinction between students who have lived in the state for a shorter amount of time and students who have lived in the state for a longer amount of time by depriving the shorter term residents of the privilege of in-state tuition; and (D) states must present a compelling state interest for infringing on the right to travel, and the Supreme Court has consistently struck down the reasons that states have offered for doing so. The Supreme Court has not clearly addressed whether residency requirements for tuition purposes are unconstitutional,¹³⁰ but this Note argues that they are and that the practice should be evaluated.

A violation of the right to travel is relevant to an analysis of durational residency requirements because these requirements can force a deprivation of the privilege of in-state tuition rates when a student travels into another state to attend a university, especially when the student has the intent to remain in that new state indefinitely. The right to travel is a fundamental right, and “any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”¹³¹ To briefly revisit what the right to travel entails, it affords protection to a citizen’s right to enter and leave other states, the right to be treated as a welcome visitor in the other several states, and the right to be treated like citizens of a particular state when a nonresident elects to establish residency in a new state.¹³²

A. The Right of a New Resident to be Treated the Same as Long-Term Residents

First, primarily at issue for purposes of in-state tuition residency requirements is the third component of the protections that the right to travel affords. The right to travel grants travelers who elect to become permanent residents of a new state the right to be treated like other citizens of the state.¹³³ Students have the ability to leave their home states and enter into a new state in order to attend a university in that new state. If the student is physically present in the state and has the intent to remain there indefinitely, the student has fulfilled the requirements for bona fide residency.¹³⁴

However, if the student had not been a resident of that state for the time period specified by the durational residency requirement prior to enrollment in the university, the student would not be able to enjoy in-state

130. Conlan, *supra* note 9, at 1389.

131. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

132. Saenz v. Roe, 526 U.S. 489, 500 (1999).

133. *Id.*

134. *See generally* Martinez v. Bynum, 461 U.S. 321, 329-30 (1983).

tuition prices. This puts the durational residency requirements in conflict with the right to travel because the state treats these students differently from those who had been residents for the specified time period, even though they all may be bona fide residents regardless. Even if the state offers a reason for depriving the nonresident of a privilege, there is no authority that makes it acceptable for the state to qualify the protection of the Privileges and Immunities Clause for a citizen of one state who goes into another state to settle there.¹³⁵ The Court has stated that it is “common ground” for the Privileges and Immunities Clause of the Fourteenth Amendment to protect this component of the right to travel because newly-arrived citizens have the right to enjoy the same privileges and immunities already enjoyed by citizens of the state.¹³⁶

Allowing state universities to use durational residency requirements for the purpose of tuition rates gives the universities quite a bit of leeway around the protections of the Privileges and Immunities Clause of the Fourteenth Amendment. If a newer resident who came into the state to attend school can offer proof that he or she intends to remain in that state upon graduation, the university could simply find that it was unconvinced and choose to classify that student as a nonresident anyway just based upon the length of time that student had already been in the state.¹³⁷ If a newer resident came into a state and immediately enrolled in a university, it would be difficult, if not impossible, for that student to be able to prove to the satisfaction of the university that they are a bona fide resident, regardless of any intent to remain indefinitely.¹³⁸ Out-of-state tuition imposes costs on new residents and nonresidents that are far higher than those imposed on residents, which penalizes those new residents that have exercised their right to travel.¹³⁹

B. Discriminatory Classifications Burden Freedom to Travel

Second, since the right to travel includes the right of the citizen to be treated equal to how the established residents are treated in his or her new state of residence, calling these new residents nonresidents because of the durational residency requirements creates a discriminatory classification.¹⁴⁰ This discriminatory classification, by itself, is a penalty on the new resident's right to travel, because it keeps the new resident from being able to enjoy the same privileges and immunities as those citizens of the state that meet the durational residency requirement.¹⁴¹ These

135. *Saenz*, 526 U.S. at 502.

136. *Id.* at 503.

137. Llewellyn, *supra* note 93, at 792.

138. *Id.* at 793.

139. *Sturgis v. Washington*, 368 F. Supp. 38, 43 (W.D. Wash. 1973) (East, J., dissenting).

140. Conlan, *supra* note 9, at 1406.

141. *Saenz v. Roe*, 526 U.S. 489, 504-05 (1999).

discriminatory classifications are penalties on the right to travel regardless of the severity with which the classifications actually affect the right to travel.¹⁴²

Conversely, in *Starns v. Malkerson*, the United States District Court for the District of Minnesota, Fourth Division held that durational residency requirements for in-state tuition do not violate the right to travel.¹⁴³ The court reasoned that there were not sufficient facts alleged to determine that the state's one-year durational residency requirement had a specific objective of excluding out-of-state students from attending the state's universities.¹⁴⁴ Since the court found that the durational residency requirement did not have the effect of excluding out-of-state students, the court held that the requirement had no chilling effect on the right to travel.¹⁴⁵ The court further held that, since there was no infringement upon the right to travel, the state did not have to present a compelling state interest for imposing these durational residency requirements.¹⁴⁶

However, this holding is too narrow, because it ignores those students who come into the state with the intent to remain there post-graduation from a state university. Those students would still have to pay out-of-state tuition due to the durational residency requirements, and that could ultimately deter a student from traveling into another state and attending a university of his or her choice in that state. Just because a durational residency requirement does not have a sweeping exclusionary effect on out-of-state students does not mean that it does not impose a burden on out-of-state students who wish to attend a state university. It also does not mean that these out-of-state students are not deprived of the privilege of in-state tuition, especially in the case of out-of-state students who intend to remain in that state after graduating. As Judge East stated in his dissent in *Sturgis v. State of Washington*, "This freedom to travel is not limited to a mere directional concept or act of interstate commerce but embraces the fundamental right of an individual to go about in his own individualistic pursuit of happiness, and receive equal treatment under the laws of a given state."¹⁴⁷

C. Distinctions Among Residents

Third, durational residency requirements deprive out-of-state students who intend to remain in the state of the privileges afforded to residents of the state by creating a distinction between different classes of

142. Conlan, *supra* note 9, at 1406.

143. *Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970).

144. *Id.* at 237.

145. *Id.* at 238.

146. *Id.*

147. *Sturgis v. State of Washington*, 368 F. Supp. 38, 43 (W.D. Wash. 1973) (East, J., dissenting).

residents. By creating a distinction between newer residents and older residents, these students who come from other states are not allowed to enjoy the privilege of in-state tuition solely because they have not been residents for as long as other students have been. One particular justification offered by states for creating this distinction through the imposition of durational residency requirements is that the requirements keep nonresidents from coming into the state for the purpose of obtaining benefits that they could not receive in their home states. This justification falls short because states cannot create a distinction among residents based upon the notion that some residents are somehow less worthy of benefits based upon the length of time they have been in the state. The in-migration of nonresidents who just want to reap state benefits is a constitutionally impermissible justification.¹⁴⁸ This justification is unconstitutional because it promotes a classification among residents, allowing some residents to enjoy privileges that other residents do not get to enjoy.¹⁴⁹ The distinctions created by these durational residency requirements are overinclusive because they effectively bar all bona fide residents who applied from out of state from ever being considered bona fide residents.¹⁵⁰ This is because the student's predominant purpose for being in the state, even if that student is a bona fide resident, is to attend a university.¹⁵¹

For example, in *Shapiro v. Thompson*, there was a state statutory provision that denied welfare assistance to residents if they had not lived in the state for at least one year immediately prior to their applications for assistance.¹⁵² The Supreme Court reasoned that this justification implied that people who come into the state hoping to secure higher welfare assistance benefits for themselves and their families were somehow less deserving than those who came into the state for other reasons.¹⁵³ The Supreme Court stated, "But 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."¹⁵⁴

This same reasoning can be applied to durational residency requirements being used to keep out-of-state students from coming into a state solely for the purpose of attending a university in that state. If a student comes into a state for the purpose of attending a state university, why should that student receive any different treatment from the state than a student who moved to the state due to a marriage (or any other reason) and had just moved there over a year prior to enrollment at a university?

148. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

149. *Id.*

150. Parent, *supra* note 6, at 313.

151. *Id.*

152. *Shapiro*, 394 U.S. at 623.

153. *Id.* at 631.

154. *Id.* at 632.

Deciding where to obtain a higher education is a very important decision in an individual's life, and there is no justifiable reason to treat a student as less of a resident just because they came to the state to attend school. In *Shapiro*, however, the Supreme Court withheld judgment on durational residency requirements in any areas other than welfare benefits.¹⁵⁵

Penalizing those who have gone from one state to another during the qualifying period of a durational residency requirement further creates a distinction among residents by treating people differently just because they have exercised their right to travel into the state more recently than others may have. This distinction is baseless, as there should be no blanket determination that someone has less intent to be a permanent resident of the state than another just because the newer resident has not been in the state for quite as long. What if the durational residency requirement is one year, and one student has to pay out-of-state tuition because he or she has only lived in the state for eleven months while another student gets to pay in-state tuition because he or she has lived in the state for thirteen months? The former student should not have to pay a higher price tag for exercising his right to travel into the state two months later than the latter student.

For example, in *Dunn v. Blumstein*, the state of Tennessee imposed durational residency requirements on the right to vote in the state.¹⁵⁶ The Supreme Court held that these durational residency requirements directly infringe upon the fundamental right to travel.¹⁵⁷ The Court reasoned that these requirements did so because they classified bona fide residents on the basis of their recent travel into the state and penalized those "who have gone from one jurisdiction to another during the qualifying period."¹⁵⁸ Even if these requirements did not actually deter newer residents from voting in Tennessee, actual deterrence is not the basis for determining whether the durational residency requirements impose a penalty on the right to travel.¹⁵⁹ These durational residency requirements singled out those residents who had more recently exercised their right to travel within the specified time period and, in doing so, directly penalized them.¹⁶⁰

These durational residency requirements in *Dunn* forced those who wished to travel or change their states of residency to choose between their right to travel and their right to be able to vote in the state of Tennessee, and the state cannot burden the right to travel without a compelling state interest.¹⁶¹ Even though education is not recognized as a fundamental right,¹⁶² an individual's education can be of such great importance to him or her that the prospect of paying higher tuition prices would force him or her

155. Parent, *supra* note 6, at 295.

156. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

157. *Id.* at 338.

158. *Id.* at 339-40.

159. Parent, *supra* note 6, at 295.

160. *Dunn*, 405 U.S. at 334.

161. *Id.* at 342.

162. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

to choose between getting an education at the school of his or her choice and exercising his or her right to travel. Regardless of whether the student's access to education at a certain state university is infringed upon, the student's right to travel would be infringed upon by these durational residency requirements. Constitutional rights hold little to no value if they can be denied or infringed upon.¹⁶³ Students should not have to choose between obtaining the protections afforded by the right to interstate travel under the Privileges and Immunities Clause and attending the university which would provide them with the most beneficial education simply because they decided to change their state of residence within a specified time period. Further, durational residency requirements can create a distinction among residents by depriving them of a state benefit even if that state benefit does not constitute a fundamental right.

The right to travel has extended to other benefits and rights that are not fundamental.¹⁶⁴ Although education may not be classified as a fundamental right at the federal level, obtaining a higher education at a lower cost is a benefit conferred by states upon residents for which United States citizens should be allowed to exercise their right to travel. In *Attorney General of New York v. Soto-Lopez*, the right to travel extended to the denial of the benefit of civil service employment.¹⁶⁵ The Supreme Court stated, "While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial."¹⁶⁶ Therefore, the right to travel can extend and has extended beyond rights that are fundamental or basic necessities of life. Although higher education is not a fundamental right,¹⁶⁷ and arguably may not be a basic necessity of life, it still holds a high level of importance to all individuals and to the country as a whole. Certainly it holds a level of importance similar to the benefit of civil service employment. If the Supreme Court has been willing to extend the coverage of the right to travel to that area to avoid distinctions among residents,¹⁶⁸ it follows that obtaining the benefit of a higher education at a lower cost falls within the same coverage.

D. Unsatisfactory State Justifications

Fourth, if a durational residency requirement creates a classification among residents that ultimately serves to penalize the right to travel for any residents who have not been in the state for at least the period of time specified by the requirement, that classification triggers the compelling

163. *Dunn*, 405 U.S. at 341.

164. Chartier, *supra* note 92, at 591.

165. *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 908 (1986).

166. *Id.*

167. *Rodriguez*, 41 U.S. at 35.

168. *Soto-Lopez*, 476 U.S. at 911.

state interest test.¹⁶⁹ To meet this test, the state must provide a compelling state interest as justification for imposing these durational residency requirements that infringe upon the newer residents' right to travel.¹⁷⁰ Since the right to travel is found under the Privileges and Immunities Clause, the compelling state interest must affect the vitality of the Nation as a single entity.¹⁷¹

The compelling state interest test is necessary only when there is evidence to indicate that there is an infringement upon a fundamental right, such as the right to travel.¹⁷² Since public education is not a fundamental right at the federal level,¹⁷³ placing limitations on the ability of these new residents to attend public universities by charging out-of-state tuition does not trigger the compelling interest test in this circumstance. It is the infringement upon the right to travel of those nonresident students who come into a state to attend a public university that triggers the compelling interest test. Courts have held that durational residency requirements should be viewed under strict scrutiny, thus creating the need for the compelling state interest test, even when the right or the benefit denied is not essential to one's survival.¹⁷⁴ The right to travel may not be essential to the nonresident student's survival, but any infringement upon that right necessitates the compelling state interest test regardless, so the compelling state interest test is applicable here.

From another perspective, it may be argued as a justification for differentiating between residents and nonresidents that durational residency requirements only incidentally burden the right to travel, and that since the practice of charging in-state tuition may not seem to directly infringe upon a fundamental right, the compelling state interest test is not necessary. However, the Supreme Court held in *Saenz v. Roe* that any "[p]ermissible justifications" for discrimination between residents and nonresidents are wholly inapplicable to a nonresident's exercise of his or her right to move into a new state and establish domicile there.¹⁷⁵ *Saenz* concerned a California statute that limited the amount of welfare benefits that would be available to new residents.¹⁷⁶ The statute provided that, for the first year a new resident lives in California, they were only permitted to receive the welfare benefits they received in their prior state of residence, thus deterring nonresidents from moving into California to obtain greater welfare benefits.¹⁷⁷ The plaintiffs challenged the durational residency

169. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974).

170. *Id.*

171. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279 (1985).

172. *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972).

173. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

174. *Chartier*, *supra* note 92, at 590.

175. *Saenz v. Roe*, 526 U.S. 489, 502 (1999).

176. *Id.* at 492.

177. *Id.*

requirement because it violated the right to travel into California and obtain the privileges California conferred upon its longtime residents.¹⁷⁸

In *Saenz*, California argued that its cost-saving benefits from the enactment of this statute were a compelling state interest¹⁷⁹ and that, because the new residents were not made wholly ineligible for welfare benefits during their first year of residency, the statute did not penalize the right to travel.¹⁸⁰ The Supreme Court did not accept these reasons from California and held that the right to travel ensures the right to be treated equally in your new state of residence regardless of the length of time spent physically present in that state.¹⁸¹ The state of California tried to argue that the welfare scheme only burdened the right to travel “incidentally,” so that was not of issue.¹⁸² However, the Supreme Court responded that since the durational residency requirements discriminated against newer residents, the discriminatory classification itself was a penalty on the right to travel and a violation of the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁸³

Durational residency requirements for in-state tuition rates burden the right to travel in the same way that the durational residency requirements for welfare benefits burdened the right to travel in *Saenz*. Regardless of whether a state seems to only be “incidentally” burdening the fundamental right to travel, these residency requirements create discriminatory classifications that penalize the right of a citizen of one state to move into another and establish residency there to attend a public institution of higher education. The discriminatory classification is itself an infringement of the right to travel, which is a fundamental right protected under the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁸⁴ These durational residency requirements penalize students solely because they come from a different state or came from a different state more recently than others, and this in turn impinges upon their right to travel. Where a state has undertaken to provide an opportunity for public education, that opportunity must be provided to all within the state on equal terms.¹⁸⁵

States have offered a number of other interests to justify the imposition of durational residency requirements. A primary reason offered is that the state has an interest in equalizing the cost of public higher education between residents and nonresidents so that the state can ensure that the bona fide residents receive their full subsidies.¹⁸⁶ This reason

178. *Id.* at 496.

179. *Id.* at 497.

180. *Id.* at 499.

181. *Saenz v. Roe*, 526 U.S. 489, 505 (1999).

182. *Id.* at 504.

183. *Id.* at 505.

184. *Id.* at 503.

185. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

186. *Vlandis v. Kline*, 412 U.S. 441, 448 (1973).

ignores the fact that a student can still be a bona fide resident of the state even though he originally applied to the university from a different state. Therefore, the durational residency requirements really only ensure that some bona fide residents will receive their full subsidies and not others, with students from foreign states not being able to receive their full subsidies while attending the university.¹⁸⁷ The Supreme Court rejected this reason in *Vlandis v. Kline* as a compelling interest of the state, finding this reasoning wholly unrelated to the objective of cost equalization between residents and nonresidents.¹⁸⁸ Furthermore, courts have generally held that cost equalization is not a compelling state interest that justifies durational residency requirements.¹⁸⁹

States also claim that it is permissible to favor longer-term residents with a lower tuition rate because the long-term residents had contributed higher tax contributions to the state than the nonresidents or newer residents, so the long-term residents should get the benefit of in-state tuition.¹⁹⁰ This kind of reasoning just perpetuates arbitrary classifications between more established residents and newer residents. The state cannot classify newer residents as nonresidents when their residency is equal to that of more established residents in all facets apart from the length of residency.¹⁹¹ The Supreme Court rejected this reason in *Vlandis* as well, determining that this kind of reasoning is not sound because it creates a distinction between “established” residents and “new” residents.¹⁹² The Supreme Court reinforced this reasoning and demonstrated how it violated the right to travel in *Memorial Hospital v. Maricopa County* by stating, “The conservation of the taxpayers’ purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.”¹⁹³

States also claim that durational residency requirements ensure administrative certainty because the requirements make it easier for the state to keep students from coming into the state solely to attend a university and claiming residency status just to get in-state tuition.¹⁹⁴ Administrative certainty should not be an acceptable reason to discriminate amongst residents. A student who comes into a state to attend a university there, especially with the intention of staying in that state after graduating, should not have to pay a much higher tuition price tag simply to aid in administrative certainty. The Supreme Court also rejected this reason as a compelling state interest in *Vlandis*, because administrative certainty is not

187. *Id.*

188. *Id.* at 448-49.

189. Anderson, *supra* note 3, at 1084.

190. *Vlandis*, 412 U.S. at 449.

191. *Id.*

192. *Id.*

193. *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 264 (1974).

194. *Vlandis*, 412 U.S. at 451.

a proper justification for creating classifications among residents.¹⁹⁵ The Supreme Court re-articulated its statement from *Stanley v. Illinois* that “the Constitution recognizes higher values than speed and efficiency.”¹⁹⁶

States have denied benefits and justified an imposition on the right to travel in other contexts, such as welfare benefits, by claiming that durational residency requirements help maintain the fiscal integrity of state programs by giving the benefits to residents because of their tax contributions to the state.¹⁹⁷ Even though a state may have a compelling state interest in maintaining the fiscal integrity of its higher education programs and schools, it does not constitutionally further this interest by creating classes of citizens that distinguish between newer residents coming into the state to attend school and residents who have been in the state for a longer period of time. The Supreme Court conceded in *Shapiro v. Thompson* that the state does have an interest in maintaining the fiscal integrity of the programs it offers, but still the Court maintained that the state may not accomplish this interest by creating classifications among its residents.¹⁹⁸ Since the limitation of welfare benefits to those citizens who contributed more in taxes to the state was not regarded as a constitutional means of furthering a compelling state interest in *Shapiro*,¹⁹⁹ it follows that this reasoning can also be applied to durational residency requirements for tuition purposes.

States often impose durational residency requirements for tuition purposes in an effort to keep students from moving into the state to obtain the benefit of in-state tuition and fraudulently claiming residency status to “game the system.”²⁰⁰ This reasoning ignores that there could be plenty of students from out of state who come into the state for other reasons, such as family or marriage, and do intend to remain in that state upon graduation or at least for the foreseeable future. In this circumstance, durational residency requirements put all of these out-of-state students into one category. The Supreme Court has rejected this type of reasoning as being wholly overinclusive, since some people could have moved into the state for purposes other than obtaining benefits but would still be denied those benefits if they did not meet the durational residency requirement.²⁰¹ This particular reasoning effectively just lumps all in-migrants into one category that makes it seem as though all of them came into the state for this sole purpose, when many of them may not have.²⁰²

Denying students who come into a state and attend a university there the privilege of in-state tuition through the use of durational residency

195. *Id.*

196. *Id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 655 (1972)).

197. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

198. *Id.* at 633.

199. *Id.*

200. Anderson, *supra* note 3, at 1087.

201. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 264 (1974).

202. *Id.*

requirements is unconstitutional because it infringes on the right to travel, and thus contravenes the Privileges and Immunities Clause. These students should not be penalized for moving into a state within a certain time frame and then attending a university there, and they certainly should not be penalized for being a “new” resident as opposed to being a more established resident. Any requirement that goes beyond simply requiring a showing of physical presence and intent to remain indefinitely will end up discriminating against some bona fide residents by denying them privileges that they deserve as residents.²⁰³ Because durational residency requirements go beyond this by imposing essentially a waiting period in order for residents to become eligible for in-state tuition, this practice is questionable at least.²⁰⁴

Durational residency requirements further create arbitrary classifications among residents that do not serve to further a compelling state interest. States may have a compelling interest in the fiscal integrity of their higher education institutions, but this interest should not be served at the expense of discriminating against students who have moved into the state more recently than others. These durational residency requirements penalize those residents who have more recently exercised their right to travel, with the penalty coming in the form of out-of-state tuition costs that are far higher than the in-state tuition costs charged to residents who have been in the state longer.²⁰⁵ By charging these students out-of-state tuition, the state is not treating these students the same way it treats other citizens, and is thus denying these students a privilege of the state to which the student should be entitled. The judicial system should ensure that those who are entitled to the benefit of in-state tuition receive it.²⁰⁶

CONCLUSION

Choosing where to attend college is one of the most important decisions in the life of a student, and some feel as though their educational needs can be best met at a university in a state far away, or even just next door, from the state in which the student has lived his or her whole life. The high costs of out-of-state tuition rates are more than enough to deter anyone from wanting to pursue an educational path outside of the home state, and the constitutional implications of the differentiations between in-state and out-of-state tuition further erode the necessity of the practice. Students who attend college in their states of residence receive the benefit of lower in-state tuition rates, and this benefit constitutes a privilege that states deem nonresidents unworthy of receiving. Furthermore, even if a student moves

203. Parent, *supra* note 6, at 311.

204. *Id.*

205. Sturgis v. Washington, 368 F. Supp. 38, 43 (W.D. Wash. 1973) (East, J., dissenting).

206. Llewellyn, *supra* note 93, at 797.

into a new state and resides there, the student still will not receive the privilege of in-state tuition if that student moved into the state too soon before enrolling in a state university.

The Privileges and Immunities Clause of Article IV establishes that a state must treat all United States citizens—regardless of status as a state resident or nonresident—alike and shall not provide privileges and immunities to its citizens that it refuses to provide to those who come into the state from a foreign state. This same protection is afforded to the people as applied to the states through the Privileges and Immunities Clause of the Fourteenth Amendment, which ensures to citizens that states will not abridge their privileges and immunities. Further protected by the Privileges and Immunities Clause of the Fourteenth Amendment is the right to travel, which is an affirmative right granted to the people that gives United States citizens the freedom to travel from state to state and establish residence in another state without being treated as lesser than residents already living in the state.

In-state tuition rates violate the Privileges and Immunities Clause of Article IV because, quite simply, the practice allows states to treat some United States citizens differently than others. Higher education plays a significant role in the unity of the Nation as a whole, and it is constitutionally impermissible to impose a much higher price tag on higher education upon someone just because they came into the state from another one. Durational residency requirements, which state universities use to determine whether a student is a bona fide resident or not, violate the Privileges and Immunities Clause of the Fourteenth Amendment by infringing upon the right to travel. These durational residency requirements create discriminatory classes of citizens, classifying someone as a nonresident just because they came into the state more recently than others may have and completely disregarding whether that person intends to remain in the state indefinitely. These discriminatory classifications give states a basis for determining whether a student must pay out-of-state tuition rates or receive the benefit of in-state tuition, which directly penalizes the right to travel by denying newer residents in-state tuition rates due to the student's exercise of his or her right to travel.

Ultimately, out-of-state tuition rates present a substantial obstacle to the student who wishes to leave his or her home state and attend a university elsewhere, particularly the student who is entirely unable to afford the high costs associated with out-of-state tuition. The student would either have to move to the new state and wait for the qualifying period of time, which is often six months to a year, before enrolling in and beginning a higher education or just forego the opportunity to learn at his or her university of choice in a foreign state and remain in his or her home state. Neither of those options would appear to be particularly appealing to a student whose university of choice is in a foreign state, and the student certainly should never be treated as though he or she is not worthy of the

privileges and immunities of the citizens who already live in the state in which the university is located.

