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Constitutional Law- Rebuttable Statutory Presumption Of Student Non-Residency Held Violative Of Due Process Clause of Fourteenth Amendment

Constitutional Law—IRREBUTTABLE STATUTORY PRESUMPTION OF STUDENT NON-RESIDENCY HELD VIOLATIVE OF DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT—*Vlandis v. Kline*, 93 S. Ct. 2230 (1973).

In the past the durational residence requirement has been subject to constitutional challenge under the equal protection clause of the fourteenth amendment.[1] When coupled with an irrebuttable statutory presumption of non-residency as in *Vlandis v. Kline*,[2] the durational residence requirement displays a further fourteenth amendment vulnerability—the contravention of procedural due process.[3]

Durational residence requirements have traditionally been justified upon the grounds that they provide objective evidence of domiciliary intent and hence separate the bona fide resident from the transient. The bona fide resident, or domiciliary, is accorded greater rights and privileges[5]

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1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

2. 93 S. Ct. 2230 (1973), *aff'g* 346 F. Supp. 526 (D. Conn. 1972) [hereinafter cited as *Vlandis*].

3. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

4. The term "residence", when used in its technical sense, is indicative of inhabitance only, without domiciliary intent, whereas the term "domicile" denotes physical presence in a given jurisdiction concomitant with the intent to remain there. RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 11-23 (1971); 28 C.J.S. *Domicile* § 9 (1941). However, "the terms "domicile" and "residence", as used in statutes, are commonly, although not necessarily, construed as synonymous." 28 C.J.S. *Domicile* § 2(b) (1941). Virginia courts have looked to legislative purpose and to context in determining the meaning of the words in a particular setting; *see* Cooper's Adm'r v. Commonwealth, 121 Va. 338, 93 S.E. 680 (1917). "Reside", as used in the fourteenth amendment, was early interpreted to mean bona fide residence, *i.e.* domicile. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1872).

5. He may vote in state elections, obtain a professional license, seek a divorce in the state's courts.

Voting is now classified as a fundamental right, sheltered by stringent equal protection standards. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); United States v. Classic, 313 U.S. 299 (1941); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Carrington v. Rash, supra, like *Vlandis* involved a permanent, irrebuttable presumption of non-residence. The 1965 decision held that statute violative of the equal protection clause, as it infringed upon the fundamental right to vote. Education, under San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) [hereinafter cited as *Rodriguez*], is not a fundamental right and thus is not sheltered by the "new" equal protection. *See* note 14 *infra* and accompanying text.

Statutes restricting the availability of professional licenses via a durational residence law are also vulnerable to fourteenth amendment attack. Under the due process clause, a state must demonstrate some rational connection between its professional licensing criteria and the competent practice of the regulated profession. *See* Baird v. State Bar, 401 U.S. 1 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

than the out-of-stater, among them eligibility for lower tuition rates at the state's publicly-funded colleges and universities.[6] The state's right to discriminate between resident and non-resident students for tuition purposes has withstood equal protection challenge[7] when tested under the conventional "rational relationship" standard;[8] the *Vlandis* appellees,[9] precluded

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As for state jurisdiction over divorce, "each State is the sole judge of the marital status of its citizens, and it alone has the exclusive right to say upon what grounds or for what causes such status may be dissolved or modified." Andrews v. Andrews, 188 U.S. 14, 24 (1903). *Accord*, Willlams v. North Carolina, 325 U.S. 226 (1945); Bell v. Bell, 181 U.S. 175 (1901). The constitutionality of a durational residence law was challenged in Boddie v. Connecticut, 401 U.S. 371 (1971), wherein the Court held that the due process clause of the fourteenth amendment prohibited a state from denying an indigent access to its divorce tribunals. *See* Note, *Domicile as a Constitutional Requirement for Divorce Jurisdiction*, 44 IOWA L. REV. 765 (1959).

6. *E.g.*, VA. CODE ANN. § 23-7 (1973 Supp.). Virginia maintains a state university system which charges her out-of-state students a higher tuition, according the lower rate only to such person who "is and has been domiciled in Virginia for a period of at least one year prior to the commencement of the term, semester, or quarter for which any . . . reduced tuition charge is sought . . . ." A heavy burden of proof is placed upon the newly-arrived Virginian who seeks to prove his bona fide residency and thus qualify for the lower rate. He must, if over eighteen, establish that he abandoned his previous domicile and moved to Virginia, with the intent of remaining there permanently after graduation, at least one year prior to the date upon which he seeks reclassification. If under eighteen, he must, in addition to the foregoing, show that he was an emancipated minor at the time of his entry into the state. "The burden of establishing these matters by convincing evidence is on the person alleging them." *Id.*

7. *See* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), *aff'd*, 406 F.2d 883 (8th Cir. 1969), *cert. denied*, 396 U.S. 862 (1969) (tuition differential at University of Iowa justified on grounds of past tax contributions by residents); Landwehr v. Regents of Univ. of Colorado, 156 Colo. 1, 396 P.2d 451 (1964) (court refused to interfere with legislative decision to distinguish between residents and non-residents for tuition purposes).

8. Conventional, less stringent equal protection standards necessitate only a finding of:

> [S]ome rational relationship to a legitimate state end . . . . [D]istinctions drawn by a challenged statute . . . will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . . [T]heir statutory classificatons will be set aside only if no grounds can be conceived to justify them. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969), *citing* McGowan v. Maryland, 366 U.S. 420 (1961), Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) *and* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

The traditional equal protection standard here enunciated by former Chief Justice Warren is superseded and the more stringent doctrine invoked upon the infringement of a "basic, fundamental right". 394 U.S., *supra* at 807. The issue is thus seen to devolve upon the determination of what rights are to be termed fundamental, and thus worthy of the most exacting judicial scrutiny.

9. *Vlandis* details the case of appellee Margaret Kline, a California student who became the wife of a life-long Connecticut resident. The Klines established a permanent home in Storrs, Connecticut; Mrs. Kline obtained a Connecticut driver's license and automobile registration and registered to vote in that state. Appellee Catapano, an unmarried graduate student, applied for admission to the University of Connecticut from Ohio, where she then

from invoking the more stringent equal protection standard,[10] direct the Court's attention to a procedural weakness of Connecticut's tuition differential system.

Under Connecticut law, a "resident" student is eligible for a lower tuition rate at state-supported colleges and universities.[11] To distinguish the bona fide resident from the transient, a durational residence requirement is employed.[12] *Vlandis* puts in issue the evidentiary means by which Connecticut may deny the status of "resident" to the newly-arrived student. By statute, the residential status of the student is fixed at the time of his application for admission and is conclusively presumed to continue throughout the period of his attendance at the university.[13] During this period, the student was not permitted to change his classification to "resident" even if he had actually satisfied the definitional requirements of state citizenship. The *Vlandis* Court, avoiding a confrontation between durational residence requirements and the equal protection clause, held the conclusive presumption violative of due process of law.

The Supreme Court's conscription of the due process clause as ratio decidendi was perhaps a necessary consequence of its earlier holding in *San Antonio Independent School District v. Rodriguez*.[14] *Rodriguez* ruled that

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resided. After receiving word of her admission to the state university, she moved from Ohio to Connecticut. Like Mrs. Kline, she has a Connecticut driver's license; her car is registered in Connecticut, and she is a Connecticut voter. Appellant Vlandis, Director of Admissions at the University of Connecticut, irreversibly classified both Miss Catapano and Mrs. Kline as out-of-state students pursuant to the challenged statute.

10. *See* note 14, *infra* and accompanying text.

11. CONN. GEN. STAT. § 10-329b (1969), *as amended* Pub. Act No. 5, § 122 (Jun. 1971).

12. CONN. GEN. STAT. § 10-329b (1969), *as amended* Pub. Act No. 5. § 126(a)(2) (Jun. 1971), provides that an unmarried student shall be classified as a non-resident, or out-of-state student if his "legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut."

§ 126(a)(3) provides that a married student, if living with his spouse, shall be classified as out-of-state if his "legal address at the time of his application for admission to such a unit was outside of Connecticut."

13. The classifications detailed in note 12 *supra* are rendered permanent and irrebuttable for the entire period of time during which the student remains at the university. CONN. GEN. STAT. § 10-329b (1969), *as amended* Pub. Act No. 5, § 126(a)(5) (Jun. 1971):

> The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit.

It is this portion of the statute which the Court pinpoints as unconstitutional.

14. 411 U.S. 1 (1973). Equal protection doctrines of "strict judicial scrutiny" and "compelling state interest" are henceforth reserved for analysis of a statute which "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . ." *Id.* at 17.

the right to education is not "fundamental" and thus not sheltered by the tests of "strict judicial scrutiny" and "compelling state interest" under the equal protection clause of the fourteenth amendment. Any direct reliance upon the right to education is thus proscribed; *Rodriguez* dictates that the *Vlandis* challenge be predicated upon other constitutional grounds. The determination of whether the right of interstate travel is substantially impeded by the imposition of a durational residence requirement, a basis previously adopted by the Court,[15] is not squarely presented. *Vlandis* does not examine the constitutionally vulnerable resident/non-resident classification, but rather focuses on the procedural means[16] through which the suspect classification is ascertained.[17]

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15. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969) [hereinafter cited as *Shapiro*]. *Shapiro* propounds the right of interstate travel, terming it fundamental and hence invocative of the equal protection clause of the fourteenth amendment. Under the more stringent, "new" equal protection standards recently espoused by the Warren Court, a state classification based upon inherently suspect criteria such as wealth or race, or which impairs a fundamental right will be upheld only if necessary to advance some compelling state interest. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Korematsu v. United States, 323 U.S. 214 (1944). The *Shapiro* Court, placing the right of interstate travel within the protective sweep of the equal protection clause, held that the right was substantially impeded by the imposition of a one-year durational residence requirement upon newly-arrived citizens seeking to qualify for state welfare assistance. Although the opinion includes an oft-cited, limiting footnote (394 U.S. at 638 n.21) which expressly withholds judgment on the validity of residency requirements in determining eligibility for tuition-free education, it cannot negate the thrust of the implied parallel to education:

> 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 others [sic] factors, the level of a State's public assistance. *Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.* 394 U.S. at 632 (emphasis added).

Three years later in Dunn v. Blumstein, *supra*, the Court examined the impact of a residence requirement which limited the right to vote in state elections. The Court again focused on the right of interstate travel, reasoning by analogy to *Shapiro* that this fundamental right was impaired by a law which postponed the interstate traveler's right to vote in state elections. "Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." 405 U.S. 330, 342 (1972). *See generally* Note, *Residence Requirements after Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 152 (1970); Comment, *The Demise of the Durational Residence Requirement*, 26 SW. L.J. 538 (1972).

16. "Whether the courts use the words "conclusive presumption of law", "presumption of law", or some other expression, the result is the same, the rule being one of substantive law rather than one governing the burden of proof or the duty of going forward with evidence." United States v. Provident Trust Co., 291 U.S. 272, 273 (1934).

17. Justices White and Marshall each authored concurring opinions disputing the Court's choice of ratio decidendi. Vlandis v. Kline, 93 S. Ct. 2230, 2238 (1973) (White, J., concurring). Mr. Justice Marshall, citing *Shapiro* and *Blumstein*, would favor an equal protection analysis of tuition residency laws:

Appellant Connecticut terms the tuition differential system a reasonable means of securing cost equalization between out-of-state students and Connecticut residents, who have contributed to the cost of the state university through taxes.[18] By freezing the student's residential status as of the time he applies, Connecticut argues, the state's residents are assured of their rightful subsidy. The Court rejects this argument, pointing to the fact that the conclusive presumption instead denies this subsidy to certain of its bona fide, albeit newly-arrived, residents. Admitting this *arguendo*, Connecticut further contends that it may justifiably discriminate between old and new bona fide residents, again advancing past tax contribution[19] in justification. The Court replies that the legislature did not so phrase its statute and thus may not now be heard to assert such a construction. Lastly, Connecticut attempts to defend its challenged statute by citing its administrative expediency; this the Court rejects, reaffirming that "the Constitution recognizes higher values than speed and efficiency".[20]

Chief Justice Burger, dissenting, terms the Court's very willingness to

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Because the Court finds sufficient basis in the Due Process Clause of the Fourteenth Amendment to dispose of the constitutionality of the Connecticut statute here at issue, it has no occasion to address the serious equal protection questions raised by this and other tuition residency laws. *Id.* at 2238 (Marshall, J., concurring).

18. *Cf.* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966); Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

19. *Shapiro* clearly forbids the advancement of past tax contributions as justification for discrimination against newly-arrived citizens:

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes . . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. 394 U.S. 618, 632-33 (1969).

Courts faced with the question of the constitutionality of higher tuition charges for nonresidents have generally sought to avoid the pervasive thrust of *Shapiro* by citing to the limiting footnote (394 U.S. at 638 n.21, discussed in note 15 *supra*). Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970), sought to distinguish between the need for basic sustenance—food, clothing, shelter—at stake in *Shapiro* and the luxury of attending a publicly-financed instituton of higher learning, upholding California's residence requirement. *Cf.* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd summarily*, 401 U.S. 985 (1971). These cases sidestep the basic holding of *Shapiro*—that a durational residence law per se infringes upon the right of interstate travel and may only be vindicated by a compelling state interest. Dispositive is the issue of the infringement upon the right, not the motivation behind the exercise of the right, be it the procuring of larger welfare benefits or the desire to attend a state-supported university. Indeed, *Shapiro* makes it plain that motive is to be considered irrelevant. 394 U.S. at 632 (quoted in note 15 *supra*).

20. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

examine the operation and effect of the challenged statute equivalent to the strict judicial scrutiny of an equal protection adjudication.[21] Further, the Chief Justice disavows the majority's willingness to enter into the delicate process of weighing the state's administrative convenience against the gravity of denying the student the opportunity of proving bona fide residence. Such a balancing process, argues Mr. Chief Justice Burger, is central to the "compelling state interest" test and hence not properly before the *Vlandis* Court.[22]

The importance of *Vlandis* is twofold. With respect to substantive content, the overturning of Connecticut's conclusive presumption of nonresidency is result-oriented; further, it is consistent with the attitude of disfavor with which the Court has viewed the durational residence requirement in the aftermath of *Shapiro*. With respect to constitutional theory, the *Vlandis* ruling evidences a focus upon the due process clause as the constitutional tool selected to hasten the demise of the durational residence requirement. The apparent invocation of equal protection doctrine by the majority widens the parameters of the due process clause[23] and perhaps betokens a new emphasis upon that clause as the striking arm of the fourteenth amendment.

S.T.N.

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21. "There will be, I fear, some ground for a belief that the Court now engrafts the 'close judicial scrutiny' test onto the Due Process Clause whenever we deal with something like 'permanent irrebuttable presumptions'." Vlandis v. Kline, 93 S. Ct. 2230, 2241 (1973) (Burger, C.J., dissenting). The Chief Justice's argument could have been circumvented had the majority involved the equal protection clause as urged by Justices Marshall and White. *See* note 17 *supra*. The Chief Justice laments the lack of a "genuine constitutional interest truly worthy of the standard of close judicial scrutiny", 93 S. Ct. at 2240; the right of interstate travel, pronounced fundamental by *Shapiro* and *Blumstein*, could serve as the nucleus for an equal protection challenge of tuition residency laws. By relying on the right of interstate travel, viewing the durational residence requirement as an impermissible penalty upon the exercise of that right, the *Rodriguez* consideration of whether education itself is a fundamental right is rendered unnecessary.

22. 93 S. Ct. 2230, 2240 (1973) (Burger, C.J., dissenting):

> The Court . . . seems . . . to accomplish a transferrence [*sic*] of the elusive and arbitrary "compelling state interest" concept into the orbit of the Due Process Clause.

Chief Justice Burger further stated that:

> The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for? *Id.* at 2241.

23. Even more strongly opposing the due process ratio decidendi of the majority holding, Mr. Justice Rehnquist, joined by the Chief Justice and by Mr. Justice Douglas, terms the opinion a return to pre-Holmesian doctrines of substantive due process. *Id.* at 2244, (Rehnquist, J., dissenting).