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European Lessons in Higher Education

Dawn D. Schiller
Dawn.Schiller@chicagounbound.edu

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Dawn D. Schiller†

Every state in the United States requires nonresidents to pay more tuition than residents to attend state-supported colleges and universities.[1] Traditionally, United States courts have upheld such practices, ruling that states may constitutionally charge nonresidents more than residents in order to equitably apportion public education costs between the two. Because resident students (or their parents) have already helped underwrite public university expenses by paying taxes, their states require them to pay less tuition to attend such universities.[2] Courts have upheld such practices despite their potential infringement of two important constitutional guarantees: the right to interstate travel and the Article IV Privileges and Immunities Clause.

The European Court of Justice ("ECJ"), however, has forbidden European Community ("EC") Member States from charging noncitizens more to attend state-supported institutions, ruling that such practices violate Article 7 of the Treaty of Rome ("EEC Treaty" or "Treaty"), which prohibits Member States from discriminating against nationals from other Member States. The ECJ's opinions in this area reaffirm the European Community's commitment to rights such as equal opportunity and nondiscrimination—rights to which the United States is also committed.

Part I of this Comment discusses United States judicial scrutiny of resident/non-resident tuition differentiation. More particularly, it argues that charging non-residents higher tuition fees unconstitutionally interferes with their right to travel and violates the Privileges and Immunities Clause. Part II discusses EC law regarding tuition differentiation, assessing the ECJ's conclusion that differentiated tuition charges constitute impermissible discrimina-

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† B.A. 1988, University of North Carolina; J.D. Candidate 1993, University of Chicago.

[1] Note, *The Constitutionality of Nonresident Tuition*, 55 Minn L Rev 1139, 1139 (1971). A few limited reciprocity agreements exist between universities in neighboring states. For a description of some of these, see *Expanding Undergraduate Opportunities through Reciprocity: A Western Focus* (Western Interstate Commission for Higher Education, 1987).

[2] See, for example, *Kirk v Board of Regents of the Univ. of California*, 273 Cal App 2d 430, 444, 78 Cal Rptr 260 (1969).

tion. Part III concludes and suggests that the United States should follow the EC's example and eliminate tuition differentiation. This would both better protect constitutional values and improve the effectiveness and efficiency of the public university system.

I. UNITED STATES LAW

A. The Fundamental Right to Travel

Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State,"[3] the Constitution does not explicitly guarantee such a right. This omission can be justified on the ground that the right to interstate travel was so fundamental to the success of the new Union that the Founders simply understood it to be implicitly protected by the new Constitution.[4] Whatever the explanation, despite "recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel," its constitutional status has never been questioned.[5]

Courts have grounded the right to interstate travel[6] in no fewer than three constitutional provisions: the Commerce Clause,[7] the Fourteenth Amendment Privileges and Immunities Clause,[8] and the Article IV Privileges and Immunities Clause.[9] The right extends to all United States citizens: It is an "unconditional personal right," the exercise of which may not be restricted.[10] The

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[3] Articles of Confederation, Art IV.

[4] See *United States v Guest*, 383 US 745 (1966).

[5] *Guest*, 383 US at 759. See also *Attorney Gen. of New York v Soto-Lopez*, 476 US 898, 901 (1986) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

[6] For an explanation of the right to travel, see *Soto-Lopez*, 476 US at 901-02; *Shapiro v Thompson*, 394 US 618, 630 n 8 (1969).

[7] *Guest*, 383 US at 758-59 ("[T]he federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities."). See also *Gloucester Ferry Co. v Pennsylvania*, 114 US 196, 203 (1885); *Covington & Cincinnati Bridge Co. v Kentucky*, 154 US 204, 218-19 (1894); *Hoke v United States*, 227 US 308, 320 (1913); *United States v Hill*, 248 US 420, 423 (1919).

[8] US Const, Amend XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). For a discussion of the Privileges and Immunities Clause as applied to the right to travel, see *Edwards v California*, 314 US 160, 181, 183-85 (1941) (Douglas and Jackson concurring); *Twining v New Jersey*, 211 US 78, 97 (1908).

[9] US Const, Art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). See *Corfield v Coryell*, 6 F Cases 546, 552 (No 3230 CC E D Pa 1825); *Paul v Virginia*, 75 US (8 Wall) 168, 180 (1869); *Ward v Maryland*, 79 US (12 Wall) 418, 430 (1871).

[10] *Dunn v Blumstein*, 405 US 330, 341 (1972).

right includes the "freedom to enter and abide in any State in the Union."[11] Thus, a "state law implicates the right to travel when it actually deters such travel, . . . or when it uses any classification which serves to penalize the exercise of that right."[12]

1. *Compelling interest or rational basis scrutiny?*

State residency requirements that affect the ability of a particular class of individuals to travel to, or take up abode in, the state have been scrutinized under two different tests. One line of cases, represented by *Shapiro v Thompson*,[13] has held that in general, "any classification which serves to *penalize* the exercise of [the] right [to travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[14] However, a second line of cases, directly addressing the specific practice of tuition differentiation and represented by *Bryan v Regents of University of California*,[15] has held that a state need only show a rational basis for tuition differentiation in order to constitutionally justify the incidental burden these practices place on the right to travel. Because the Supreme Court has never considered the issue directly, the question of the appropriate level of scrutiny to apply to tuition differentiation practices remains an open one. Although the only cases to directly consider tuition differentiation—i.e., *Bryan* and its progeny—have assessed such practices under a rational basis test, both the Supreme Court's holding in *Shapiro* and the policy underlying the right to travel suggest that the compelling interest test is the more appropriate standard of review in this context.

In *Shapiro v Thompson*, the Supreme Court struck down a one-year residency requirement that Pennsylvania used to determine eligibility for state welfare benefits.[16] The opinion establishes a simple test: if a state's residency requirement *penalizes* the exercise of the right to travel, to survive constitutional scrutiny, the

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[11] *Oregon v Mitchell*, 400 US 112, 285 (1970), (Stewart concurring in part and dissenting in part).

[12] *Attorney General of New York v Soto-Lopez*, 476 US 898, 903 (1986) (citation omitted). See also, *Memorial Hospital v Maricopa County*, 415 US 250, 258 (1974) (*penalties* on the right to travel interstate must satisfy a compelling state interest and "any durational residence requirement imposes a potential cost on migration"). For further elaboration of the standard applied to penalties, see text at notes 21-26.

[13] 394 US 618 (1969).

[14] 394 US at 634 (first emphasis added, second emphasis original). However, the court limited its holding to the welfare context, noting that its opinion did not reach tuition differentiation practices. Id at 638 n 21.

[15] 188 Cal 559, 205 P 1071 (1922).

[16] 394 US at 618.

state must demonstrate that its requirement promotes a compelling governmental interest. For the test to apply, a plaintiff need not show that a particular requirement actually deterred her from traveling; the mere tendency for a requirement to penalize migration or interstate travel will suffice.[17]

Bryan v Regents of University of California was the first case to test the constitutionality of residency requirements in the tuition fee context.[18] Although decided by the California Supreme Court over 45 years before the United States Supreme Court decided *Shapiro*, *Bryan*'s analysis typifies the approach federal courts have subsequently used in assessing the constitutionality of differentiated tuition charges. Thus, in *Starns v Malkerson*,[19] a federal district court held that the University of Minnesota's domicile requirement did not deter interstate travel.[20] The court distinguished the Minnesota domicile requirement from the residency requirement at issue in *Shapiro*. First, the court noted that Minnesota's domicile requirement was *not intended* to deter out-of-state students from taking up residence in the state, and, indeed, it *did not actually deter* them as evidenced by the over 6,000 nonresidents that attended the school. Second, the court held that because higher education was not one of the "basic necessities of life," the Minnesota domicile requirement did not have the same deterrent effect on interstate migration as the welfare eligibility requirement at issue in *Shapiro*.[21]

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[17] *Dunn v Blumstein*, 405 US 330, 339-40 (1972) ("*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence."). See also, *King v New Rochelle Municipal Housing Authority*, 314 F Supp 427, 430 (S D NY 1970), aff'd 442 F2d 646 (2nd Cir 1971) ("*Shapiro* does not indicate that actual deterrence need be shown").

[18] 188 Cal at 559. In *Bryan*, a minor, denied residency status because her parents had not lived in California for the statutorily-mandated one-year period, sought a writ compelling the university to admit her as a resident.

[19] 326 F Supp 234 (D Minn 1970).

[20] Id.

[21] Id at 237-38. In its decision, the *Starns* court relied on the California Supreme Court's decision in *Kirk v Board of Regents of the University of California*, which applied the rational basis test for the same reasons. See id at 240-41, citing *Kirk*, 273 Cal App 2d 430.

In *Kirk*, the California Supreme Court reasoned that whereas the residency requirement in *Shapiro* denied petitioners essential sustenance for the preservation of life and health, differentiated tuition requirements presented problems of a less fundamental nature. *Kirk*, 273 Cal App 2d at 440. Thus, the *Kirk* court concluded that "[c]harging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents." Id. In addition, unlike the requirement in *Shapiro*, the residency requirement contested in *Kirk* did

Bryan and *Starns*, by resting their holdings on the "nonessential" nature of education and the consequential lack of deterrence due to higher tuition rates, are, at a minimum, statistically unsound.[22] More importantly, these decisions misconstrue the threshold requirement established by *Shapiro* for imposing the compelling state interest test. Under *Shapiro*, merely potentially *penalizing* the right to travel warrants the application of the compelling interest test; a state's apparently nondiscriminatory intent in enacting a statute cannot qualify the statute for scrutiny under the less exacting, rational basis test.[23]

Tuition differentiation practices easily satisfy the threshold showing needed to trigger application of the *Shapiro* test. Not only do such practices potentially penalize students' exercise of their right to travel, but they also actually deter many students from studying at out-of-state institutions. The reasons for this are not difficult to ascertain.

To qualify for in-state tuition, most universities require students to either be "residents" of, or "legally domiciled" in, the state in which the university is located.[24] To establish legal residency or domicile, the student must usually reside in the state for a period of six to twelve months prior to enrolling at a public college or university.[25] Thus, a nonresident student who wants to avoid paying out-of-state tuition—which, in some instances, is as

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not preclude students from the benefit of obtaining higher education—they simply had to pay more for the privilege. Id.

[22] See text at notes 26-28.

[23] *Shapiro v Thompson*, 394 US 618, 638 (1969). While this test may become implausible if extended to extreme cases, *Shapiro* stands for the proposition that the constitutional right to travel prevents more than just physical impairment of movement. Exactly where the line should be drawn between permissible and impermissible regulation remains unclear. However, this Comment argues that tuition differentiation should qualify as the type of interference *Shapiro* forbids.

[24] Note, *Tuition Residence Requirements: A Second Look in Light of* Zobel *and* Martinez, 61 Ind L J 287, 289 (1986). For tuition purposes, "resident" and "legal domicile" are generally synonymous. See Note, *Residence Requirements for Tuition: An Unsolved Dilemma*, 6 Ind L Rev 283, 284 n 8 (1972). However, the legal tests for the two are different: "[d]omicile requires physical presence at a place with the intent of making that place a home," while the residency test is less exacting. Id, citing Restatement Second of Conflicts of Laws § 11 (1971), and J.D. McClean, *The Meaning of Residence*, 11 Intl & Comp L Q 1153, 1155 (1962) ("Any period of physical presence, however short, may constitute residence if it is shown that the presence is not transitory."). A student's knowledge that he may leave a state after graduating from its university does not preclude him from establishing temporary domicile for the purposes of voting registration. See *Shivelhood v Davis*, 336 F Supp 1111, 1114-15 (D Vt 1971); *Newburger v Peterson*, 344 F Supp 559 (D NH 1972).

[25] Note, 61 Ind L J at 289 (cited in note 24). In addition, many states exacerbate this problem by refusing to count towards the specified waiting period the time spent in the state while attending the university. Id.

much as seven hundred percent higher than in-state tuition[26]—must often discontinue her education for a significant length of time and support herself away from home. In so doing, she necessarily postpones career training and academic development. For a bright, ambitious student of modest means, such a penalty has often proven sufficient to convince her to attend an in-state college.[27] Out-of-state education, even if better suited to her needs, is often simply too expensive.[28] Therefore, courts, in reviewing tuition differentiation practices, should hold states to a compelling interest standard.

2. *Tuition differentiation does not survive compelling interest scrutiny.*

Although *Shapiro* does not exhaustively list those justifications that may qualify as compelling state interests, it suggests that fiscal justifications will rarely rise to such a level.[29] Thus, in *Zobel v Williams*,[30] the Supreme Court struck down an Alaskan policy that distributed surplus state oil revenues to residents in proportion to the length of their residency in the state. Citing language from *Shapiro*, the Court held that Alaska's asserted interest

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[26] *Expanding Undergraduate Opportunities* at 29 (cited in note 1) ("Average tuition and fee charges for nonresident students vary from 2.1 times greater than resident student charges to a high of seven times greater, with a simple average of 3.3 times greater"). See also, Report of the Advisory Committee on Nonresident Tuition Policies under S Con Res 69, Rep No 89-20, *State Policy Guidelines for Adjusting Nonresident Tuition at California's Public Colleges and Universities* 8 (Cal State Post Secondary Ed Comm'n, 1989) ("These data indicate that today's nonresident students are paying more than four times the amount paid by their resident student counterparts").

[27] The empirical data collected concerning the effects of differentiated tuition costs on enrollment levels indicate that charging nonresidents higher tuition fees often deters them from attending out-of state colleges and universities. Indeed, "studies using data from between 1968 and 1972 indicate that enrollments would increase by between 0.04 and 1.25 percent for every $100 reduction in tuition charges." Mary Jo Bane and Kenneth I. Winston, *Equality in Higher Education* 70 (Harvard Univ Graduate School of Education, 1980). See also, Steve Hunka, *Rationales for Determining Student Contributions to Costs of Post-Secondary Education and Information Report* 18-25 (Alberta Univ, Edmonton Div'n of Educational Research, 1979); James N. Morgan, *Tuition Policy and the Interstate Migration of College Students*, 19 Research in Higher Ed 183 (1983).

[28] See Comment, *Constitutional Law—Equal Protection—State University's One-Year Waiting Requirement to Attain Resident Status for Tuition Payment Does Not Violate Fourteenth Amendment*, 24 Ala L Rev 147, 154 (1971) ("To state flatly that higher tuition charges for nonresidents do not deter out-of-state students strains credibility; for a certain class of students—those who can only marginally afford the resident rate of tuition—the additional charge would be prohibitive.").

[29] *Shapiro*, 394 US at 638.

[30] 457 US 55 (1982).

in rewarding its citizens for past tax contributions did not qualify as a compelling governmental interest:

> [Sustaining the challenged classification] as an attempt to distinguish between new and old residents on the basis of the contributions they have made to the community through payment of taxes . . . would . . . permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services.*[31]

Thus, *Shapiro* and its progeny suggest that in most instances, a state's fiscal interest in rewarding past tax contributions cannot qualify as a compelling governmental interest.[32]

Nonetheless, under rational basis scrutiny, the only justification most states have offered for their practice of charging out-of-state students higher tuition is that it is a means of equalizing costs between in- and out-of-state students:

> [I]t appears to be a reasonable attempt to achieve a partial cost equalization by collecting lower tuition fees from those persons who, directly or indirectly, have recently made some contribution to the economy of the state through having been employed, having paid taxes, or having spent money in the state for the brief period of

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[31] Id at 63, quoting *Shapiro*, 394 US at 632-33 (1969) (emphasis added).

[32] State residency requirements may also be designed to foster attachment to the state. However,

> [A]n undifferentiated goal of fostering "attachment" to the state is, no doubt, best achieved by penalizing interstate migration and rewarding longtime residents. But without a showing that fostering "attachment" furthers some other, independently valid purpose, it surely cannot justify burdening the right to migrate, which necessarily includes the right to *change* one's geographical attachments.

Comment, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 Stan L Rev 1557, 1579-80 (1989) (emphasis in original).

Arguments by the state that its duties extend only to its citizens and that cost equalization is therefore permissible discrimination against persons who are not its citizens and do not intend to become citizens, or that overcrowding of colleges and inability to provide quality education necessitate discrimination, might bring the state closer to showing a compelling interest in distinguishing between residents and nonresidents. Whether these arguments would qualify as a compelling justification for state abridgment of the right to travel is unclear. The Supreme Court has not yet directly addressed the constitutionality of tuition residency requirements, although it affirmed without opinion both *Starns v Malkerson*, 401 US 985 (1971), and *Kirk v Board of Regents of the Univ. of California*, 396 US 554 (1970).

> one year prior to their attendance at a publicly financed institution of higher education.[33]

However, this is precisely the kind of state justification that *Zobel* held *did not* qualify as a compelling state interest. The fact that in-state students may have contributed in the past to the public revenues through taxes, employment, or expenditure is simply irrelevant; the Fourteenth Amendment prohibits such allocation schemes. Therefore, tuition differentiation practices unconstitutionally burden the exercise of a student's right to travel.

B. The Interstate Privileges and Immunities Clause

Residency-based tuition differentiation also violates the Article IV Privileges and Immunities Clause.[34] The Clause states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[35] The Supreme Court authoritatively interpreted the Clause eight decades after the Constitution was ratified, stating that:

> [T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any

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[33] *Kirk v Board of Regents of the Univ. of California*, 273 Cal App 2d 430, 444, 78 Cal Rptr 260 (1969). See also, *Starns v Malkerson*, 326 F Supp 234, 240 (D Minn 1970).

[34] Despite the nearly identical "privileges and immunities" language in both Article IV and the Fourteenth Amendment of the Constitution (see notes 7 and 8), the Supreme Court rendered the Privileges and Immunities Clause of the Fourteenth Amendment a practical nullity in the *Slaughter-House Cases*, 83 US (16 Wall) 36 (1873), which limited Fourteenth Amendment protection to those rights derived from national citizenship, such as the right to travel. See id at 79; *Twining v New Jersey*, 211 US 78, 97 (1908).

However, the Article IV Privileges and Immunities Clause accomplishes more than its Fourteenth Amendment counterpart; Article IV frustrates discrimination based on *state* citizenship. *United Building & Construction Trades Council v Camden*, 465 US 208, 226 (1984) (Blackmun dissenting). Thus,

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Slaughter House Cases, 83 US (16 Wall) at 77.

[35] US Const, Art IV, § 2. However, in the Articles of Confederation, the Clause read as follows:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Articles of Confederation, Art IV.

> other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation. . . .[36]

Thus, at a minimum, the Article IV Privileges and Immunities Clause protects the rights of free trade and commerce.[37] The Clause also, arguably, guarantees certain fundamental, natural rights.[38] Other commentators have argued that the Framers drafted the Privileges and Immunities Clause to preserve peace among the several states, and that this required a general rule of nondiscrimination.[39]

Whether it protects commercial rights, fundamental rights, or some combination thereof, "like many other constitutional provisions, the privileges and immunities clause is not an absolute."[40] However, it at least prohibits "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."[41] Thus, in *Toomer v Witsell*, the Supreme Court struck down a South Carolina licensing law that required nonresidents to pay significantly more than residents for a fishing license.[42] The Court held that the state failed to adduce a substantial reason to justify its discriminatory licensing practice, because it could find no "reasonable relationship between the alleged danger to the

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[36] *Ward v Maryland*, 79 US 418, 430 (1870). More recently, in 1984 the Court reiterated, "Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union." *Supreme Court of New Hampshire v Piper*, 470 US 274, 279-80 (1985).

[37] Mark P. Gergen, *The Selfish State and the Market*, 66 Tex L Rev 1097, 1119 (1988).

[38] Indeed,

> The fourth Article of Confederation guaranteed "all privileges and immunities of the free citizens in the several States," Articles of Confederation, Art. IV; the Dickinson draft promised "the same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, which the said inhabitants now have," Articles of Confederation, Art VI (Proposed Draft July 12, 1776); . . . and the Union with Scotland Act protected "all other rights privileges and advantages which do or may belong to the subjects of either kingdom," An Act for an Union of the Two Kingdoms of England and Scotland (The Union with Scotland Act), 1706, 6 Anne, ch 11.

Id at 1125-26 n 145.

[39] Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U Pa L Rev 379, 383-86. (1979). For a complete discussion of the history of the Privileges and Immunities Clause, see Gergen, *The Selfish State*, 66 Tex L Rev at 1116-32 (cited in note 37).

[40] *Toomer v Witsell*, 334 US 385, 396 (1948).

[41] Id.

[42] Id at 385.

shrimp supply represented by non-citizens as a class, and the severe discrimination practiced upon them."[43]

Toomer v Witsell, by analogy, also speaks to tuition differentiation: "[A] state . . . must share its surplus educational facilities, like its fish, with citizens of other states rather than deliberately let them waste."[44] Thus, *Toomer* and its progeny prohibit a state from levying disproportionately high taxes upon nonresidents in order to subsidize the benefits that it makes generally available to both residents and nonresidents.[45]

With respect to tuition differentiation, a state's taxpayers and resident students would have to pay for all fixed costs of the state's educational facilities if nonresidents were not admitted to the state's schools.[46] Consequently, if states admit nonresident students and charge them the same tuition as residents, they will thereby lower resident tuition or educational expenditures to some extent. However, when a state seeks to cross-subsidize resident educational costs by charging nonresident students more for tuition—in some instances, as much as seven times more than its residents[47]—it necessarily discriminates against nonresident students.[48] A state cannot do this without violating the Article IV Privileges and Immunities Clause: "A state is absolutely forbidden from reducing tax burdens or other costs to its citizens by forcing nonresidents to make good all of the reduction."[49]

Perhaps, at some level, if a state could show that nonresident students would displace resident students if it charged both the same tuition, it could justify residency-based tuition charges. However, in most states, resident students attend out-of-state colleges and nonresident students attend in-state colleges in roughly equal numbers.[50] Thus, with a few exceptions, nonresident students do not displace resident students, and the state can supply no substantial reason to justify its discrimination against nonresident students as a class. Accordingly, under *Toomer v Witsell*, tuition dif-

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[43] Id at 386.

[44] Charles H. Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immunities Clause*, 50 Neb L Rev 31, 34 (1971).

[45] Id.

[46] Id.

[47] See note 26.

[48] Clarke, 50 Neb L Rev at 34 (cited in note 44).

[49] Id, citing *Chalker v Birmingham & N.W. Ry.*, 249 US 522 (1919), and *Ward v Maryland*, 79 US (12 Wall) 418.

[50] See Melodie E. Christal, *Residence and Migration of College Students* (Working Paper Series, Nat'l Ctr for Higher Educ Mgmt Systems, 1982).

ferentiation violates the Article IV Privileges and Immunities Clause and is therefore unconstitutional.[51]

II. EC Law

Article 7 of the EEC Treaty prohibits discrimination on the basis of nationality:

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.[52]

Article 7 thus seeks to prevent Member States from enacting or maintaining discriminatory legislation and/or administrative practices.[53]

Article 7's broad wording lends itself to a variety of interpretations. However, it is best understood as one step towards the Community's broader goal of integration:

> to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[54]

Viewed as such, Article 7 arguably guarantees rights akin to those guaranteed by the United States Constitution—namely, the Article IV Privileges and Immunities Clause and the right to interstate travel.

However, within the context of higher education, the ECJ has held that Article 7 forbids Member States from charging residents of other Member States additional tuition to attend state-sup-

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[51] The Supreme Court has followed and expanded the principles of *Toomer* in subsequent cases. See, for example, *Hicklin v Orbeck*, 437 US 518 (1978), striking down an Alaskan employment measure that gave preferential treatment to Alaskan residents. The Court found that Alaska's unemployment was not attributable to the influx of non-residents and therefore held that discrimination against nonresidents did not bear a substantial relationship to the "evil" they were said to present. See also, *Supreme Court of New Hampshire v Piper*, 470 US 274 (1985), striking down a New Hampshire law requiring attorneys to possess state residence as a prerequisite to bar admittance. Again, the Court held that the state's objectives did not justify its blanket discrimination against all nonresidents.

[52] Treaty Est the Eur Eco Comm, Art 7.

[53] Prohibition of Discrimination Based on Nationality, 1 Common Mkt Rptr (CCH) ¶ 192 (1988).

[54] EEC, Art 2.

ported universities. In *Forcheri v Belgian State*,[55] the ECJ first interpreted Article 7 to mean that a Member State may not organize educational courses and later charge citizens of other Member States an additional fee to enroll in such courses. Such a requirement is invalid under Article 7 because it discriminates on the basis of nationality.[56] However, the Court limited its holding to enrollment fees for vocational training.[57]

In *Gravier v City of Liege*,[58] the ECJ broadened its *Forcheri* holding. In *Gravier*, Belgium, like United States state universities, argued that the additional fee represented an attempt to equitably apportion the costs of public education between citizens and noncitizens.[59] The ECJ, however, rejected Belgium's argument and deemed the additional fee violative of Article 7. Although the Court again limited its holding to vocational training, it defined the term more broadly to include:

> [a]ny form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, even if the training programme includes an element of general education.[60]

Subsequently, the ECJ has required undifferentiated fees for most university studies,[61] ruling that most studies will qualify as vocational training for Article 7 purposes:

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[55] Case 152/82, 1983 ECR 2323, 1984:1 CMLR 334.

[56] 1983 ECR at 2324.

[57] Id. This qualification kept the issue within the ECJ's jurisdiction, which only extends to matters requiring interpretation of the EEC Treaty:

> The Council shall . . . lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market.

EEC, Art 128. On this basis the court determined that it had jurisdiction over the case:

> although educational and vocational training policy is not as such part of the areas which the Treaty has allotted to the competence of the Community institutions, the opportunity for such kinds of instruction falls within the scope of the treaty.

Forcheri, 1983 ECR at 2323.

[58] Case 293/83, 1985 ECR 593, 1985:3 CMLR 1.

[59] 1985 ECR at 596.

[60] Id.

[61] Thus, the Court held that studies in veterinary medicine fall within the meaning of "vocational training." See Case 24/86, *Blaizot v University of Liege*, 1988 ECR 379, 380, 1989:1 CMLR 57.

> University studies constitute vocational training not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment, but also in so far as the studies in question provide specific training and skills needed by the student for the pursuit of a profession, trade or employment, even if no legislative or administrative provision makes the acquisition of that knowledge a prerequisite for that purpose.[62]

Thus, ECJ decisions have uniformly invalidated Member State tuition differentiation as contrary to Article 7 of the EEC Treaty.[63]

III. The European Lesson

A. Protecting Access to Education

The EC's primary objective is to integrate twelve independent political and economic systems.[64] Community lawmakers and the ECJ have realized that an educational policy that transcends state boundaries is an effective way to promote such integration, eliminate discrimination, and ensure that the Community's human resources are used wisely. Thus, the EC has sought to promote the exchange of university students and to enhance the intra-Community mobility of university graduates. Towards these ends, the Council has issued numerous directives concerning mutual recognition of diplomas, certificates, and other indicia of professional qualification.[65] The Council has also adopted the European Community Action Scheme for the Mobility of University Students ("ERASMUS"),[66] established a trans-European mobility scheme for university students ("TEMPUS"),[67] and drafted general principles for implementing a common training policy.[68] In addition, nu-

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[62] Id.

[63] See also Case 39/86, *Lair v Universität Hannover*, 1988 ECR 3161, 1989:3 CMLR 545; Case 197/86, *Brown v Secretary of State for Scotland*, 1988 ECR 3205, 1988:3 CMLR 403; Case 242/87, *Commission v Council*, 1989 ECR 1425, 1991:1 CMLR 478.

[64] EEC, Art 2.

[65] See, generally, Council Dir 89/48, 1988 OJ L019:16 (on a general system for the recognition of higher-education diplomas awarded on completion of professional education of at least three year's duration).

[66] Council Dec 87/327, 1987 OJ L166:20 (adopting the European Community action scheme for the mobility of university students).

[67] Council Dec 90/923, 1990 OJ L131:21 (establishing a trans-European mobility scheme for university studies).

[68] Council Dec 63/226, 1963 OJ Spec Ed 1338 (laying down general principles for implementing a common training policy).

merous conventions and resolutions have further encouraged integration of Member State education systems.[69] Therefore, the ECJ's interpretation of Article 7 reflects the broader view that Community goals are best served through an education policy that eliminates discrimination, regionalism, and parochialism and that promotes the free exchange of trained students.

United States courts have also recognized that education plays "a fundamental role in maintaining the fabric of our society."[70] Nonetheless, the Supreme Court has refused to recognize a constitutional right to education: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[71] However, to conclude that higher education therefore deserves no judicial protection oversimplifies the issue:

> Whether the interest involved be described as a right or a privilege, the fact remains that [education] is an interest of almost incalculable value . . . . Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth.[72]

American society is also founded on a belief in individual choice. This libertarian ethos extends to the educational realm:

> We are philosophically committed to the freedom of the individual to select education that will bring that person the greatest measure of personal satisfaction, both in personal career and in use of leisure time. However, to be assured of this freedom of choice, the individual must

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[69] See, for example, Council Res of 18 December 1979 on Linked Work and Training for Young Persons, 1980 OJ C001:1; Convention Setting Up a European University Institute, 1976 OJ C038:1; Res of the Council and of the Ministers for Education Meeting Within the Council of 12 July 1982 Concerning Measures to be Taken to Improve the Preparation of Young People for Work and to Facilitate their Transition from Education to Working Life, 1982 OJ C193:1.

[70] *Plyler v Doe*, 457 US 202, 221 (1982), citing, among other cases, *Meyer v Nebraska*, 262 US 390, 400 (1923) (The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance"); *Abington School Dist. v Schempp*, 374 US 203, 230 (1963) (Brennan concurring) (recognizing public schools as vital to the preservation of a democratic system).

[71] *San Antonio School Dist v Rodriguez*, 411 US 1, 35 (1973).

[72] *Knight v State Bd. of Educ.*, 200 F Supp 174, 178 (M D Tenn 1961). The court granted black students injunctive relief to enforce their rights to procedural due process after they were suspended from a state-supported university for participating in "freedom rides." The court found that they had been deprived of a valuable right to continue their training at a university of their choice.

> have a genuine opportunity to carry out his career aspiration—an opportunity for access to education.[73]

Furthermore, when a state seeks to provide an opportunity, it becomes a right that the state must make available to all citizens on equal terms.[74] Since each state provides some sort of higher education, the ability to obtain public higher education has taken on the status of a right in many instances. Thus, for the student, this state-provided opportunity has become "a right unencumbered by a host of regulations and conditions whereby he might lose that opportunity for reasons which he does not regard as absolutely essential."[75]

Access to post-secondary education is not among the general rights guaranteed by the U.S. Constitution. Rather, the right to higher education is defined by the specific educational needs of students and society. The "right" to an education should therefore be understood as access to an opportunity: "It is a right which becomes more specific in its nature as the student continues to demonstrate that he or she can maintain that right by the ability to learn."[76] No state should arbitrarily deny access to such opportunity, nor be permitted to offer it in a discriminatory manner.

Unfortunately, not all U.S. students have equal access to public higher education. They do not possess equal choices because "[f]ees that restrict the full scope of available educational opportunities deprive some students of development to the limits of their capabilities,"[77] while students who can afford out-of-state tuition can acquire an education that is better suited to their interests and qualifications, regardless of where it is located.

The current system of tuition differentiation has its greatest adverse effect on the poor. Indeed, studies show that despite financial aid grants, college enrollment by those who are members of the lowest socioeconomic level drops very rapidly as costs increase, while at the highest level of socioeconomic status, enrollment decreases only slightly with increasing costs:[78] "The discriminatory

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[73] T. H. Bell, *Increasing Access to Post Secondary Education—The Federal Role* 2 (Paper Presented at the 35th Intl Conf on Educ of the Intl Bureau of Educ, Geneva, Switzerland, 1975).

[74] *Brown v Board of Education*, 347 US 483, 493 (1954).

[75] Roy Lucas, *The Right to Higher Education*, 41 J Higher Ed 55 (1970).

[76] Hunka, *Rationales For Determining Student Contributions* at 2 (cited in note 27).

[77] Note, *Public School Fees in Illinois: A Re-examination of Constitutional and Policy Questions*, 1984 U Ill L Rev 99, 120 (1984).

[78] Id. While an equalization of tuition fees for all students will likely lead to a slight increase in overall tuition charges, this effect should not be decisive. The systematic un-

[tuition] charge makes an interstate education impossible for the student who barely can manage the resident rate of tuition."[79]

The wealth of a student's parents should not determine a student's ability to attend college in another state. John Stuart Mill once explained, "[t]he chief duty of the university is to produce good citizens."[80] However, the United States's system of tuition differentiation hinders this goal: It disadvantages those students who cannot afford to pay higher fees for out-of-state education. This type of wealth differentiation instills values that are contrary to basic democratic principles of equal opportunity and nondiscrimination:

> The enduring lesson taught in public schools is that wealth breeds favored status while disadvantage leads to still greater handicaps. A public school system designed as the "very foundation of good citizenship" is thereby weakened at its base.[81]

In addition, the present American system perpetuates parochialism and prejudice. Public universities can reduce ignorance and eliminate barriers among antagonistic social groups by providing a forum for interaction and cooperation in various settings. Nonresident students enhance the learning experience of resident students by exposing them to a diversity of backgrounds, viewpoints, and cultures.[82] By imposing fees that discourage such interaction, states detract from the education that they provide.

B. A United States "Academic Common Market"

Access to publicly-funded higher education deserves a high degree of protection. The European Economic Community, because it is just now unifying, is particularly concerned with removing communication barriers and ensuring equality among its citizens. However, in pursuing values that also resonate loudly in the Constitu-

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derfunding of public higher education and the inadequacy of current financial aid packages does not provide an excuse for continued violations of constitutional rights and unequal application of state conferred benefits.

[79] Clarke, 50 Neb L Rev at 40 (cited in note 44).

[80] Taken from John Stuart Mill's address to the students of St. Andrew's, in Ben C. Fisher, *Toward a Philosophy of Higher Education*, 9 Private Higher Education: The Job Ahead 5 (Am Ass'n of Presidents of Independent Colleges and Universities, 1981).

[81] Note, 1984 U Ill L Rev at 121 (cited in note 77) (citing *Johnson v New York State Educ. Dep't*, 449 F 2d 871, 883 (2d Cir 1971) (Kaufmann dissenting); *Brown v Board of Education*, 347 US 483, 493 (1954); *Ambach v Norwick*, 441 US 68, 76 (1979)).

[82] Advisory Committee, *State Policy Guidelines* at 26 (cited in note 26).

tion, the ECJ has eclipsed the United States Supreme Court. At the least, such irony suggests that the Supreme Court should reevaluate the effect and validity of tuition differentiation. By following the European example, it would both more faithfully protect the values embodied in the Constitution and more effectively promote the interests of American society.

Such a shift would also be timely and beneficial. Since World War II, the percentage of the United States population enrolled in higher education programs has increased far more rapidly than the rate of general population growth.[83] The Carnegie Commission has thus predicted that by the year 2000, the United States will have moved from a system of mass higher education to one of universal higher education.[84] United States institutions must also grapple with expanding enrollments and increasing student heterogeneity. Thus, the country desperately needs "a greater diversity of paths to a college education and for a broader range of educational services."[85]

The public should also assist in the selection and training of those practitioners in each field who will be most useful to society *after graduation*.[86] Towards that end, "[t]he federal government must shift its concern from encouraging growth to a new concern for *effectiveness* throughout postsecondary education."[87] Such effectiveness necessitates pairing national educational opportunities as closely as possible with the abilities and interests of individual students. Professionals should hone their skills in the programs best suited to their individual abilities and interests: average education produces only average practitioners. Thus, the states must make available "an educational opportunity appropriate for the student, and this requires a diversity of institutions beyond that available today."[88]

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[83] Robert M. Hendrickson and M. Edward Jones, *Nonresident Tuition: Student Rights v. State Fiscal Integrity*, 2 J L and Ed 443, 456 (1973).

[84] The Carnegie Commission on Higher Education, *New Students and New Places; Policies for Growth and Development of American Higher Education* 9 (McGraw Hill, 1971).

[85] Department of Health, Education, and Welfare, *The Second Newman Report: National Policy and Higher Education. Report of a Special Task Force to the Secretary of Health, Education, and Welfare* xx (Dept HEW, 1973) (concluding that a change in governmental policy towards higher education is essential).

[86] Id at 17.

[87] Id at xxii. Incidentally, making education more effective should also spur economic growth by enlarging human capital supplies.

[88] Id at 36.

Nonetheless, few states can afford—and one suspects that it would be grossly inefficient—to establish and maintain postsecondary institutions of the highest quality in all disciplines. National resource sharing is a viable alternative because it avoids unnecessary duplication of programs. If a state can avoid the need for a high cost or unusual program because a neighboring state offers the necessary facilities, the state could then reallocate such savings to other instructional programs. These programs will then better educate not only resident students, but also students migrating from neighboring states.[89] Thus, states can enhance overall quality by sharing both experiences and actual resources or facilities.

Creating a national system of public universities would address many of our national educational challenges. Such a system would also better serve state educational objectives, including:

> the provision of postsecondary education for all students seeking it; diversity of programmatic and institutional choices; the efficient use of tax money; academic excellence appropriate to individual programs and institutions; and responsiveness both to society's need for a trained workforce and the need of the individual student for self-development.[90]

Under a national system, each student could obtain the best education for his specific needs without greatly increasing the public costs of providing education. The state would remain secure in the knowledge that its resources were being used to ensure the academic success of its own citizens. Expenditures from a state's treasury not being recovered by higher tuition charges to nonresidents would actually be recouped when its students qualify for tax-supported education in other states.[91]

The idea of an "Academic Common Market"[92] of this kind is not new. Several states have recognized the advantages of such interstate cooperation. Indeed, some interstate alliances between public universities already exist.[93] Although most of these pro-

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[89] Because a large percentage of students after graduation remain in the state where they attended college, states would disserve their own interests by relying on other states to fund education. Thus, a perverse incentive structure that encourages states to decrease the funding of their universities will not likely develop. Although other practical problems may arise with the elimination of discriminatory tuition charges, a complete analysis of economic harms and benefits is beyond the scope of this Comment.

[90] *Expanding Undergraduate Opportunities* at 3 (cited in note 1).

[91] Clarke, 50 Neb L Rev at 41 (cited in note 44).

[92] *Expanding Undergraduate Opportunities* at 10 (cited in note 1).

[93] For a complete listing and description of these programs, see id.

grams are experimental and limited to particular types of universities or specific geographic areas,[94] a national system could surely build upon such experiences.

CONCLUSION

The European Court of Justice has not compromised basic Community values such as freedom of travel and nondiscrimination in order to accommodate national economic considerations, such as cost equalization. Recognizing education's role in fostering social integration and economic growth, the EC sets an example for the United States. The United States also has a strong interest in fostering social integration and economic growth and, like the EC, it must promote such goals in the context of racial, religious, and demographic heterogeneity. As universities are uniquely suited to bridge such heterogeneity, they should play a central role in promoting integration and growth.

Yet, education should also be used efficiently. Demands created by a rapidly changing economy and burgeoning technological development require greater diversity and specialization in fields of study. Revising United States policies to eliminate barriers to student mobility would not only enhance the ability of the educational system to meet such demands, but would do so without sacrificing efficiency concerns. Specifically, an "Academic Common Market" would broaden access to educational opportunity, enhance diversity, promote efficiency, and improve quality—all without necessarily enlarging public expenditure.

Thus, the United States would be wise to emulate the EC and establish a national public university system. In so doing, United States courts should declare tuition differentiation unconstitutional, as such practices violate both the right to travel and the Article IV Privileges and Immunities Clause.

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[94] Id.