A Constitutional Analysis of Student Residency Laws

Allen M. Silk

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A CONSTITUTIONAL ANALYSIS OF STUDENT RESIDENCY LAWS

I. Introduction

[T]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.1

The right to vote is virtually the *sine qua non* of a free society and has been labeled a "fundamental right" by the United States Supreme Court.2 Therefore, in order to obtain a fully operative democracy, one which provides the ballot as the means by which all citizens may express their political views, it is imperative that this franchise be extended equally to all citizens. There is, however, a noticeable gap in the application of this mandate in the case of the "out-of-town" student voter, *i.e.*, the student who moves into a new election district to attend an institution of higher learning.3

Since the passage of the twenty-sixth amendment,4 which lowered the voting age in all elections to eighteen, it is estimated that the electorate has been increased by approximately 5 million voters who are presently obtaining a post-high school education.5 Of these, approximately 2 million are living outside their parental election districts.6

These students are confronted with a serious dilemma when they attempt to exercise their franchise. First, the local government of the college town will necessarily have a more proximate impact on the students' daily activities than the parental town, and consequently the students will

3. For the purposes of this Comment, the word "student" shall mean an individual who, while attending an institution of higher learning, is living in an election district other than that from which he moved to enter the institution.
4. U.S. Const. amend. XXVI provides:
   Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
   Section 2. The Congress shall have the power to enforce this article by appropriate legislation.
6. Committee on Election Law Reform of the Young Lawyers Section of the ABA, Report of the Committee on Student Voting Residence 7 (Prelim. Unofficial Draft 1971) [hereinafter cited as Report]. The estimate was compiled from statistics pertaining to students who lived in dormitories on college campuses throughout the nation.
have a strong desire to vote in the college election district. When they attempt to register in the college town, however, they will be confronted with a student residency law creating a presumption against their bona fide residency and providing no standards for the determination of such residency by the local registrar or courts.

Secondly, if they cannot establish residency in the new district, they must vote in their parental district even though their interest as voters in that district is significantly diminished. Moreover, if it is impossible for a student to vote in person in his parental district, he must resort to absentee voting provisions which can often prove to be a very unsatisfactory substitute. For example, six states currently restrict absentee voting to particular elections, and one has no student absentee voting provision at all. Among the states allowing absentee voting, 24 do not permit registration by mail, thereby requiring the student to travel to his parental district in order to register. Thus, the combined operation of these provisions effectively denies some students the opportunity to vote in both their college and parental districts.

Liberalization of the absentee voting provisions will allow the student to vote in his parental district and thus permit him to exercise his right at least to that extent. However, this is hardly a desirable solution. As noted above, the student is not concerned with the activities of the local government in his parental district, if for no other reason than geographic alienation. He desires, and rightfully so, a voice in the governmental unit having the most direct affect upon him, i.e., the college town. Therefore, if the student vote is to be meaningfully exercised, facilitation of student registration in the college communities must be forthcoming. It will, therefore, be the purpose of this Comment to describe the current barriers to student voting in college communities — the special statutory residency provisions for students, the judicial presumptions that have arisen through interpretation of these statutes, and the lack of standards in those provisions for the determination of residency — and then to present a constitutional framework for their dissolution.

7. See note 33 and accompanying text infra.
8. See note 51 infra.
9. See Youth Citizenship Fund, Inc., The Young Voters Guide to Voting Rights and Residency (1971) [hereinafter cited as Young Voters]. In Delaware, there are absentee voting provisions only for general elections; in Maryland, with the exception of Baltimore, there are no absentee provisions pertaining to municipal elections; Massachusetts does not provide any absentee provisions for its primaries; New Hampshire only provides an absentee ballot for the biennial general election; New Mexico makes absolutely no provision with regard to municipal elections; and North Carolina makes no provisions for student voting in local primaries. Id. at 27-28.
10. There is no absentee voting provision pertaining to students in Mississippi. Miss. Code Ann. § 3196.01 (1956).
11. The following states will not permit a student to register to vote through the mails: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois (pertaining to only part of the state), Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington. See Young Voters, supra note 9, at 12-13.
II. Residency Statutes and the Question of Bona Fide Residency

Article I, section 2,\textsuperscript{12} and the seventeenth amendment\textsuperscript{13} of the Constitution have traditionally been interpreted as vesting the states with the sole power to establish voter qualifications.\textsuperscript{14} While the states are granted wide latitude in establishing voter qualifications, any standard adopted must meet the mandates of the Constitution.\textsuperscript{15} In \textit{Carrington v. Rash},\textsuperscript{16} the Supreme Court held that a state had the power to impose reasonable residency requirements.\textsuperscript{17} Such residency requirements are generally provided for in state statutes or constitutions and usually require an individual to be a "resident" of the state, county, and voting district for a specified period of time prior to the election.\textsuperscript{18} The state interests advanced in support of such residency requirements are the accurate identification of voters to prevent fraud\textsuperscript{19} and the maintenance of a locally interested and informed electorate.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{12} This section provides: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
\begin{itemize}
\item \textsuperscript{13} The amendment provides in part: [1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.
\end{itemize}
\textsuperscript{14} Louisiana v. United States, 380 U.S. 145 (1965). \textsuperscript{15} Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), wherein the Court stated: While the right of suffrage is established and guaranteed by the Constitution . . . it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.
\textsuperscript{16} Id. at 51 (emphasis added).
\textsuperscript{17} Id. at 91.
\textsuperscript{18} For example, the Tennessee Constitution and the Tennessee statutes provide in pertinent part:
\begin{itemize}
\item Right to vote — Election precincts — Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.
\item Qualifications of voters — Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this state for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside.
\end{itemize}
\textsuperscript{19} Howard v. Skinner, 87 Md. 556, 558, 40 A. 379, 381 (1898).
\end{itemize}
The term "resident" as used in the many suffrage statutes has been subject to various interpretations by the courts. In some cases bona fide residence has been construed to require habitual presence and intention to return after any departure.21 Other courts have required an affirmative intention to remain permanently or indefinitely at the place where one lives,22 or that there be no present intention of leaving.23 The majority of courts, however, agree that regardless of how bona fide residency is defined, there is no absolute criterion with which a person's actual residence can be determined,24 and thus, it remains a question of fact that must be resolved on a case-by-case basis.

Although one's physical presence is an essential fact in establishing a bona fide residence,25 the courts seem to agree that the actual physical presence of an individual is not, in and of itself, determinative in establishing bona fide residence. Rather, it is the individual's intent which is critical.26 Therefore, regardless of the definition utilized by the court, the intent of the individual is always ultimately at issue. In investigating this question, the courts have looked to various factors. For example, some courts have held that the individual's intent must be satisfactorily demonstrated by his conduct or prior statements.27 These courts generally maintain that the individual's oath as to his actual intent will not constitute conclusive proof thereof,28 although such a statement can constitute an extremely important factor. However, if a discrepancy exists between one's declarations and his conduct, most courts state that one's conduct will be determinative. Therefore, declarations of intent become important only where one's conduct is neutral.29

III. THE SPECIAL RULES ON STUDENT BONA FIDE RESIDENCY

When a student seeks to establish bona fide residency, the issue assumes a different posture. Under the general rules of residency, one's

23. In re Erickson, 18 N.J. Misc. 5, 12, 10 A.2d 142, 146 (Cir. Ct. 1939).
26. Ptak v. Jameson, 215 Ark. 292, 298-99, 220 S.W.2d 592, 595-96 (1946); Parsons v. People, 30 Colo. 388, 392, 70 P. 689, 690-91 (1902); Kegley v. Johnson, 207 Va. 54, 147 S.E.2d 735 (1966). In all three cases, the courts required a current intent to remain in the area for an indefinite time and not merely to attend college.
physical presence, although insufficient to establish bona fide residency in and of itself, is generally deemed to be an important factor. However, when student residency is at issue, physical presence is not an important factor; in fact, it is often of no effect whatsoever. The reason is simply that most statutes pertaining to student voters specifically provide that, for the purposes of voting, no one shall gain or lose his residency by virtue of his status as a student at an institution of higher learning. Provisions of this nature have been interpreted by most courts as creating a rebuttable presumption that the student came to the area without the intent necessary to establish bona fide residency. The student must overcome this presumption to prove residency. In attempting to rebut this presumption, the student's intent will be the controlling factor, and it is evident that if the student intends to return to his parental home upon completion of his education, he will not be deemed to have the state of mind necessary to acquire a voting residence in his college community. This result occurs even though the student may be emancipated from his parents. However, where the student can demonstrate the requisite intent, as defined

30. See note 26 and accompanying text supra. In Anderson v. Piifer, 315 Ill. 164, 146 N.E. 171 (1924), the court observed that, although the college student's residency is a question of fact, the mere physical presence of the student, without more, is insufficient to establish residency. Also in Welch v. Shumway, 232 Ill. 54, 83 N.E. 549 (1908), the court refused to allow a student to vote, even though the student remained in the college town the sufficient length of time under the durational statute. The Welch court held that bona fide residence must be established by evidence other than one's mere physical presence in the community. The court in Frakes v. Farragut Community School Dist., 255 Iowa 88, 121 N.W.2d 636 (1963), concluded that a student's presence in the college community for the purpose of an education did not cause him to lose residence in his prior community nor gain residence in the college community. See Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434 (1890); Goben v. Murrell, 195 Mo. App. 104, 190 S.W. 986 (1916); Bruckmann v. Frignoca, 9 N.J. Misc. 128, 152 A. 780 (Cir. Ct. 1930); In re Barry, 164 N.Y. 18, 58 N.E. 12 (1900).

31. See note 25 and accompanying text supra.


34. Welch v. Shumway, 232 Ill. 54, 83 N.E. 549, 562-63 (1908); Sanders v. Getchell, 76 Me. 158, 165 (1884); Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434, 435 (1890).

35. The court in Anderson v. Piifer, 315 Ill. 164, 146 N.E. 171 (1924), observed that a college student who had no home other than his college residence could be enfranchised since this freedom from parental support and control established the requisite intention required by the state residency statute. The court stated that a student who did not possess this independence could not establish residency. Id. at 165, 146 N.E. at 173. See Holmes v. Pino, 131 La. 687, 60 So. 78 (1912); Sanders v. Getchell, 76 Me. 158 (1884); Pittman v. Johnson, 10 Mass. 488 (1813); Swan v. Bowker, 135 Neb. 405, 281 N.W. 891 (1938); Seibold v. Wahl, 164 Wis. 82, 159 N.W. 546 (1916).

36. The court in Anderson v. Piifer, 315 Ill. 164, 146 N.E. 171 (1924), denied a voting residence to a group of college students because of their intent to return to their parental home or to locate elsewhere to find employment. Id. at 165, 146 N.E. at 173.

37. Fry's Election Case, 71 Pa. 302 (1872).
in the particular state, he will successfully rebut the presumption and attain residency.

Obviously then, the most difficult problem confronting a substantial number of students is their understandable indecision as to whether they will remain in the college community, move to another area, or return to their parental homes upon graduation. When faced with the student who is undecided as to his future plans, several courts have taken a liberal view and allowed the student to register, while others have taken a considerably stricter approach and have denied registration in the college community.

Since intent is normally demonstrated and verified through conduct, it seems appropriate, as a matter of fairness, that the courts or legislature standardize the factors which are to be considered by registrars in determining student residency. Unfortunately, the legislatures have been silent and the courts have been less than clear on this issue. Some of the factors cited by courts have been: parental control over the student; the student's financial independence from his parents; the student's marital status; the maintenance of local savings and checking accounts; local auto registration or the acquisition of a local driver's license; ownership of local property; payment of local and state income taxes; and employ-

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38. See notes 21–24 and accompanying text supra.
40. Putnam v. Johnson, 10 Mass. 488 (1813); Berry v. Wilcox, 44 Neb. 82, 62 N.W. 249 (1895); Asbahr v. Wahl, 164 Wis. 89, 159 N.W. 549 (1916).
41. In Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N.W. 487 (1880), the court held that a student who attended a university, not knowing whether he intended to make the university town his home or to return to his former home after he completed his education, would not be permitted to vote in the university town. Id. at 248, 5 N.W. at 489. See Opinion of the Justices, 46 Mass. 587 (1843); In re Hoffman, 187 Misc. 795, 65 N.Y.S.2d 107 (Sup. Ct. 1946).
42. Welch v. Shunway, 232 Ill. 54, 88, 83 N.E. 549, 562–63 (1908); Sanders v. Getchell, 76 Me. 186, 166 (1884); Putnam v. Johnson, 10 Mass. 488, 499–500 (1813); Hall v. Schoenecke, 128 Mo. 661, 666, 31 S.W. 97, 98 (1895); Seibold v. Wahl, 164 Wis. 82, 86, 159 N.W. 546, 548 (1916).
45. In Frakes v. Farragut Community School Dist., 255 Iowa 88, 121 N.W.2d 636 (1963), the court recognized that the maintenance of a bank account in the school community will constitute evidence of the student's intention to establish a residence in that community. Id. at 90, 121 N.W.2d at 638. In Goldhaber v. Onondaga County Bd. of Elections, 31 App. Div. 2d 891, 299 N.Y.S.2d 814 (1967), the court held that the student's local savings and checking accounts, along with the purchase of mutual funds and insurance from local brokers, was indicative of an intent to make the school community his home.
47. In Opinion of the Justices, 46 Mass. 587 (1843), the court stated that the student's ownership of real property in his prior community should be considered circumstantial evidence that he had not changed his voting residence to the college community. In Michaud v. Yeomans, 115 N.J. Super. 200, 278 A.2d 537 (1971), the court regarded the student's lack of storage of his clothing at his school abode as indicative of the student's intent not to make his school community his voting residence. The court in Palla v. Suffolk County Bd. of Elections, 38 App. Div. 2d 84, 327 N.Y.S.2d 739 (1971), recognized the applicability of the New York "gain or...
mendment in the local community. Given the wide variety of factors that are considered and the lack of judicial and legislative guidance not only as to which factors must be considered, but also to the weight to be afforded any given factor, it is apparent that the resulting uncontrolled discretion wielded by the local registrar presents a serious barrier to student voting. It is submitted that such residency laws — creating a presumption against bona fide residence and containing no intelligible standards — are of doubtful constitutional validity.

IV. THE CONSTITUTIONAL ANALYSIS OF STUDENT RESIDENCY LAWS

The presumption against bona fide student residency would appear to violate the equal protection clause of the fourteenth amendment, especially if the analysis of the Supreme Court in the recent case of Dunn v. Blumstein is applied. In addition, since no standards for determining intent have been established, the laws would also appear violative of the due process clause of the fourteenth amendment. Following is an analysis of such propositions.

A. The Presumption Against Bona Fide Residency

1. The Dunn Decision.

Prior to the Supreme Court's decision in Dunn v. Blumstein, every state had a durational residency requirement ranging from two years to ninety days, with the usual length being one year. In addition, a split existed in the lower federal courts in regard to the constitutionality of these durational residency requirements.

50. Several opinions have emphasized that the factors which may be enumerated are not, in fact, exclusive. Welch v. Shumway, 232 Ill. 54, 77-79, 83 N.E. 549, 559 (1908); Pedigo v. Grimes, 113 Ind. 148, 153, 13 N.E. 700, 702 (1887); Sanders v. Getchell, 76 Me. 158, 165 (1884).
51. Several opinions have emphasized that the factors which may be enumerated are not, in fact, exclusive. Welch v. Shumway, 232 Ill. 54, 77-79, 83 N.E. 549, 559 (1908); Pedigo v. Grimes, 113 Ind. 148, 153, 13 N.E. 700, 702 (1887); Sanders v. Getchell, 76 Me. 158, 165 (1884). Thus it would be fair to conclude that there is no limit on the number of factors a registrar may consider and the weight the registrar may place on any single factor.
52. See Report, supra note 6, at 24. The report stated that election boards had no written standards setting forth the criteria to be used or the weight to be given such criteria. In addition, there was no system designed to elicit the correct information as to the questions being asked by the registrar.
54. Id. For a pre-Dunn analysis, see Guido, Student Voting and Residency Qualifications: The Aftermath of the Twenty-sixth Amendment, 47 N.Y.U.L. Rev. 32 (1972).
58. Durational residency requirements were held unconstitutional in Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971); Keppel v. Donovan, 326 F. Supp. 15 (D.

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In *Dunn*, the durational residency law of Tennessee was challenged as violative of the fourteenth amendment equal protection clause. That law required a voter to be a resident of the state for one year and a resident of the county for three months prior to the election date. Since the Court found the durational residency requirement to affect two fundamental rights — the right to vote and the right to travel — they applied the “compelling state interest” equal protection test.

Under this “compelling state interest” test, which is the stricter equal protection test, the requirement is unconstitutional unless the state can demonstrate that the laws are necessary to promote a compelling governmental interest. “[A] heavy burden of justification is on the state, and that statute will be closely scrutinized in light of its asserted purpose.” In addition, the state cannot choose a means of achieving its interest which has the effect of unnecessarily burdening or restricting a constitutionally protected activity. If other reasonable alternatives are available, the state must employ these less burdensome methods. Moreover, even if the least drastic alternative is used, the state’s interest must be compelling when balanced against the constitutional interests infringed by the statute.

In beginning its analysis of the Tennessee law, the Court noted, in *Oregon v. Mitchell*, a specific finding was made that durational residency requirements and more restrictive registration practices do not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections. However, since the Tennessee law applied to congressional, state, and local elections, conceivably the state could establish a compelling state interest. Therefore, the Court examined the alleged state interests promoted by the durational residency requirements:

59. 405 U.S. at 335.
61. 405 U.S. at 338–39 & n.8.
62. Id. at 338–39.
63. Id. at 337 n.6.
65. 405 U.S. at 343.
70. 405 U.S. at 344.
(1) INSURE PURITY OF BALLOT BOX — Protection against fraud through colonization and inability to identify persons offering to vote, and

(2) KNOWLEDGEABLE VOTERS — Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently.

In considering the first purpose for the requirements, the Court held that although "the prevention of such fraud is a legitimate and compelling government goal . . . it is impossible to view durational residence requirements as necessary to achieve that State's interest." The Court reasoned that the durational residency requirement was not necessary to identify bona fide residents since the voter registration system adequately served this purpose. Moreover, it was noted that while the law was designed to prevent only nonresidents from voting, it, in effect, deprived newly arrived residents, as well as nonresidents, of the franchise. The Court then concluded "that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud — and a year or three months, too much." However, it is probably not valid to assume from this statement that the Court has set up an absolute thirty-day maximum, for Justice Blackmun stated in his concurring opinion:

I am content that the one year and three month requirements be struck down for want of something more closely related to the State's interest. It is, of course, a matter of line-drawing, as the Court concedes . . . But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves. I suspect, to the future.

Since the Court discussed the constitutionality of the three-month county requirement together with the one-year state requirement — implying that the same problems face both the state and the county, it appears

71. Id. at 345.
72. Id.
73. Id. at 354. The Court noted that since the resident's qualifications, including bona fide residency, are established by oath, the durational residency requirement becomes an obstacle to those residents who truthfully state their actual situation. The state was trying to prevent fraudulent voting, but the fraudulent voter would certainly swear that he had fulfilled the various requirements. The Court found no evidence that the state routinely went behind the voter's qualifications, and thus concluded that the burdensome qualifications really failed to deter such fraudulent conduct. The Court could not reconcile the fact that the state permitted registration up to thirty days before a state election, nor the fact that it had only a three-month requirement for county elections, with the one-year requirement for the state. From these lower requirements, the Court inferred that the state could sufficiently investigate the sworn claims within those periods and that the longer requirement was, therefore, unnecessary. Id. at 346-49.
74. Id. at 354.
75. Id. at 348.
76. Id. at 363 (Blackmun, J., concurring).
that a maximum durational residency requirement must be less than the three-month period and that a thirty-day requirement will be upheld. This holding, in effect, declared unconstitutional every state's durational residency law for congressional and state elections.\textsuperscript{77}

In arriving at its estimation of the time period actually necessary to prevent fraud, the \textit{Dunn} Court was confronted with the state's argument that longer durational periods assure the bona fide residency of the voter since they create an administratively useful, conclusive presumption that recent arrivals to the state are not, in fact, bona fide residents. The state argued that this presumption inhibits fraud since political candidates are discouraged from inducing migration for voting purposes.\textsuperscript{78} The Court rejected this argument,\textsuperscript{79} citing \textit{Carrington v. Rash},\textsuperscript{80} which held that states "may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."\textsuperscript{81} The \textit{Carrington} Court held such "conclusive presumptions" violative of equal protection because they excluded many eligible voters while more precise tests were available to determine residency.\textsuperscript{82} The \textit{Dunn} Court, therefore, concluded that the other devices available to Tennessee for calculating bona fide residency should be employed:

\begin{quote}
[Since] it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by durational residence requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or drivers license.\textsuperscript{83}
\end{quote}

Finally, the Court concluded that the various available criminal sanctions were a more effective measure for the deterrence of fraudulent voting.\textsuperscript{84}

Having decided that the prevention of fraud was not a sufficiently compelling interest to justify retention of Tennessee's durational residency requirements, the Court analyzed the state's argument that the durational requirement fostered the state's interest in assuring a knowledgeable electorate. The state initially claimed that the requirements "afford some surety that the voter has, in fact, become a member of the community."\textsuperscript{85} The Court found no merit in this argument since the durational period did not begin to run until the individual had become a bona fide resident, which admittedly required a finding that he was a member of the com-

\begin{footnotes}
\item[77] See MacLeod & Wilberding, \textit{supra} note 57.
\item[78] 405 U.S. at 349–50.
\item[79] \textit{Id.} at 350–51.
\item[80] 380 U.S. 89 (1965). In \textit{Carrington}, the Court was faced with a situation in which the State of Texas having difficulty determining whether persons moving into the state while serving in the military were bona fide residents and facing difficult administrative determinations of factual issues, had established a conclusive presumption which excluded from voting all military personnel moving to Texas who had not been prior residents.
\item[81] \textit{Id.} at 96.
\item[82] \textit{Id.} at 95–96.
\item[83] 405 U.S. at 352.
\item[84] \textit{Id.} at 353–54 & n.25.
\item[85] \textit{Id.} at 354.
\end{footnotes}
munity. Therefore, through the durational requirement, the state was not merely insisting that the individual be a member of the community, but also that he be a “longtime,” as opposed to a “recent,” bona fide resident.86

The state also maintained that the durational requirement assured that the voter possessed a common interest in all matters pertaining to the community’s government.87 The Court noted that a similar claim had been refuted in Carrington:

But if they are in fact residents . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . “Fencing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.88

Finally, the state argued that a longtime resident was likely to cast a more informed vote than a recent resident.89 The Court rejected this argument, stating that it had previously held unconstitutional exclusions based on this rationale.90

Finding neither state interest sufficiently compelling to sustain the abridgement of the constitutional rights to vote and to travel, the Court voided the Tennessee durational requirement as violative of the fourteenth amendment equal protection clause.91

2. Application of the Dunn Rationale to the Presumption Against Student Bona Fide Residency

Although the Supreme Court in Dunn was very careful to decide only the specific issue of the constitutionality of durational residency requirements,92 it is logical to conclude that the case identified the path that must be taken when the constitutionality of the student presumption against bona fide residency laws is challenged. This is true because the challenge will develop around the equal protection clause, and the states will argue that they have a compelling reason for placing restrictions on student voters. The states will probably introduce the same interests sought to be protected in Dunn — fraud and knowledgeable voters — and the Court will have to examine these interests by using the same reasoning employed in Dunn since the Court will be examining the same fundamental right — the right to vote.

It should be noted that the Court has previously acknowledged that the states have the power to require that their voters maintain a bona fide

86. Id.
87. Id.
88. 380 U.S. at 94.
89. 405 U.S. at 356.
91. 405 U.S. at 361.
92. The Court stated that the “appellee does not challenge Tennessee’s power to restrict the vote to bona fide Tennessee residents.” Id. at 342.
residency in the relevant political subdivision of the state. In fact, the Dunn Court stated in dicta that:

An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.

It is therefore conceded, for the purposes of this Comment, that the state may require bona fide residency as a condition precedent to registration. Nevertheless, it is advanced that the special student presumption against bona fide residency is discriminatory and falls short of the "appropriately defined and uniformly applied requirement" referred to in Dunn.

Following the Dunn rationale, therefore, the constitutional framework for the dissolution of this student presumption is clearly the equal protection clause of the fourteenth amendment. Upon attack, it is certain that a court will apply the "compelling interest" test, rather than the "rational basis" test, since a fundamental right is affected by the classification, i.e., the right to vote. As the Court stated in Dunn:

[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest."

The state's first argument in support of the constitutionality of its statute will undoubtedly be that it insures the purity of the ballot box by protecting against fraudulent voting through student colonization. Fraudulent voting through colonization is the practice whereby nonresidents temporarily invade a state and, through false swearing, register to vote for the sole purpose of electing a particular candidate.

Before reaching the question of whether this state interest is compelling or whether there are reasonable alternatives, it appears that the state would have to establish that the student poses a greater threat to the state in controlling fraudulent and double voting than other groups to justify the special classification for students. A strong argument can be made that migration within our nation is substantial among all groups, and thus, there is no legal reason for the heavier restrictions on students.

94. 405 U.S. at 343-44 (emphasis added).
95. Id.
96. See note 71 and accompanying text supra.
97. 405 U.S. at 345.
98. According to the 1960 census, the largest groups of transients were operative and kindred workers, with craftsmen and foremen second, and professionals, including students, third. Schmidhauser, Residency Requirements for Voting and the Tensions of a Mobile Society, 61 Mich. L. Rev. 823, 830 n.10 (1963).
99. 405 U.S. at 345.
100. It is unreasonable for a state to place a higher burden on students when the mere presence in a community for other classes of individuals, who are almost certain
In any event, unless the state can establish by valid empirical data that the students, in fact, pose a special threat to the state, the distinctive treatment of students must be considered an arbitrary and hence unconstitutional classification. Moreover, the state’s alleged interest in the presumption against students, to prevent a student from crossing the state line for the sole purpose of voting or from voting in more than one political subdivision, may be satisfied by less inhibitive methods.\textsuperscript{101}

It has been suggested that to prevent dual voting, state voting officials simply have to cross-check lists of new registrants with their former jurisdictions.\textsuperscript{102} This approach would be more effective in controlling the practice since, under many existing systems, the local registrar relies exclusively upon the information received from the student upon registration.\textsuperscript{103} Moreover, with the aid of modern communications, it is administratively feasible for the state to check a voter’s identification through the use of social security numbers, drivers licenses, or photographs. Perhaps, a nationwide voter identification service could be established which would process each voter and allow him to register in only one political subdivision at a time, with forfeiture of voting rights in that subdivision upon the adoption of another.

A criminal law prohibiting fraudulent or double voting is another viable solution. In fact, the Supreme Court in \textit{Dunn} stated:

\begin{quote}
Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared.\textsuperscript{104}
\end{quote}

In sum, although the student residence provisions may serve legitimate state interests in preventing fraudulent and double voting, it is evident that unless the state can show that these less restrictive alternatives are administratively unfeasible, the Supreme Court will probably not consider student residency statutes necessary to the achievements of the state goals.\textsuperscript{105}

The second argument the state will undoubtedly assert in support of its law is that the student bona fide residency statute furthers the legitimate state interest in maintaining “knowledgeable voters.” Such a status is purportedly achieved when the voter becomes a member of the community and, as such, acquires a common interest with other residents with respect to move at some future time, is regarded as positive evidence of the latter’s intention to become residents for voting purposes. Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887); \textit{In re Lower Merion Election}, 1 CHESTER REP. 257 (Pa. 1880).

\textsuperscript{101} In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court struck down the residency requirement of a welfare statute which the state had argued was a safeguard against fraud, but the Court concluded that fraud could be minimized through the use of less drastic means which were available to the state. \textit{Id.} at 637.


\textsuperscript{103} 405 U.S. at 346.

\textsuperscript{104} \textit{Id.} at 353.

\textsuperscript{105} In Wilkins v. Bentley, 385 Mich. 670, 189 N.W.2d 423 (1971), the court held that, in view of the other safeguards available to insure the purity of the election process, the student residency statute was unnecessary to prevent fraud.
to local governmental matters. This, in turn, theoretically produces a voter who will exercise the franchise more intelligently since a local election directly affects his interests.

In *Evans v. Cornman*, the state presented a similar argument for denying residency to members of the National Institute of Health, a federal enclave. In that case, the members of the enclave were exempt from certain laws which applied to other residents; therefore, the state argued that they lacked a sufficient attachment to the community to be considered members thereof and hence were not bona fide residents. The *Evans* Court held this denial of the right to vote violative of equal protection, notwithstanding the different rights and obligations of the individuals within the enclave.

By comparison, students would seem to have a more direct attachment to the community than the residents in *Evans*. As the Michigan Supreme Court stated:

> [W]e see that students have just as many connections with the community as those found by the Supreme Court in *Evans* and *Kolodziejski*. Students . . . are included in the census determination of the state's congressional apportionment . . . [and] are subject to the state's laws and regulations. Jury lists are chosen from lists of registered voters. Thus, by denying students the right to register and vote, they are also denied . . . trial by a jury of their peers. Students pay state income tax, city income tax (if any), gasoline, sales and use taxes . . . . As the United States Supreme Court has recognized, property taxes are ultimately paid by renters such as some of the appellants . . . . Students with children can and do enroll them in the public school system, and, therefore, have more than a passing interest in the educational standards of the community.

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106. See text accompanying note 71 *supra*.
109. *Id.* at 425 n.5. They were exempt from real estate, severance, and personal property taxes, state regulatory and licensing legislation, state militia service, compulsory education laws, and state court jurisdiction for criminal offenses committed on the enclave's grounds.
110. *Id.* at 426.
111. Wilkins v. Bentley, 385 Mich. 670, 688-90, 189 N.W.2d 423, 431-32 (1971) (footnotes omitted). There seems to be a definite conflict between the United States census, which includes students as residents of their college communities, and the state residency laws which do not. This problem is dramatized by the fact that "forty-three states included for census purposes all students residing within the state and correspondingly excluded any student who had left the state to attend college elsewhere." Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 *YALE L.J.* 35, 46 (1971). Further, at least 43 states base their apportionment formulae on population figures. Silva, *One Man, One Vote and the Population Base*, in *Representation and Misrepresentation* 57-58 (R. Goldwin ed. 1966), citing COUNCIL OF STATE GOVERNMENTS, *The Book of the States* 1964-65, at 62-63 (1964). Thus students are part of the apportionment formulae but not part of the voting population. A similar situation was noted by the Supreme Court in *Evans v. Cornman*, 398 U.S. 419, 421 (1970), to be an argument favoring the registration of federal workers, who experience a similar voting problem. Such apportionment formulae also seem to be contrary to the holding in *Reynolds v. Sims*, 377 U.S. 533 (1964), where the Court stated that each vote should have an equal effect, and that, therefore, geographical representation should be as near equal as possible.
Therefore, it appears that the students' attachment to the local community is sufficiently proximate to satisfy the state interest that voters be "knowledgeable." Moreover, Wilkins invalidated, as arbitrary, residency statutes which failed to place similar burdens on other groups of citizens who were concededly more transient than students.112

The second claim the state will propose to justify the exclusion of the student under the "knowledgeable voter" criterion is that the state has a compelling interest in assuring that the student has a common interest in all matters pertaining to the local government.113 In Dunn, the Court recognized that the State "may require a period of residence sufficiently lengthy to impress upon its voters the local viewpoint."114 However, in the student context, the state motive is not to impress the local viewpoint but rather to prevent a student takeover in communities with large student populations.115 This fear stems from the supposition that these students will have views different from those of the local residents. Nevertheless, even if this belief is valid, it is clear, in light of Carrington v. Rash,116 that a difference of opinion cannot serve as a legitimate basis for excluding any group from the franchise. In Carrington, Texas law precluded "new residents" from voting until their interests were the same as the "local residents." The Court stated:

"Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions" . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.117

Thus, the "common interest" goal will not qualify as a "compelling interest" sufficient to sustain an abridgement of student voting rights.

Finally, the state will argue that the student, being less aware of local issues, is not likely to exercise his vote "intelligently."118 In regard to this argument two points should be noted. First, the federal policy of the 1970 Voting Rights Act, section 201,119 is to allow people to vote even if they are not well informed on the issues.120 Arguably, this policy for...
presidential elections should be applicable to other elections. Secondly, the Dunn Court rejected a similar argument in support of the durational residency statute, stating:

[T]he durational residence requirements in this case founder because of their crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any long-time resident to vote regardless of his knowledge of the issues — and obviously many long-time residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become minimally, and often fully, informed about the issues. 121

The Court noted that Tennessee had never attempted to further “intelligent” voting, although it had had the opportunity, under the absentee ballot provisions, to impose a standard of knowledge or competence on the longtime residents. 122

Even if it is assumed that this state interest is legitimate, the state must establish that students, as a class, are not likely to cast votes intelligently. The consensus of opinion, however, does not support this assumption. As stated during the Senate hearings concerning the adoption of the twenty-sixth amendment:

Today, all authorities agree that high school graduates are better educated than ever before in the history of our country. Scores of tests indicate that the 18 year-olds of today are more concerned and more aware of national and local issues than their elders. On the subjects of government, politics, and the functions of the electoral system time and time again young adults score higher than their parents. The young men and women reaching maturity in the past decade have also shown a greater desire to participate in the political process of the nation than ever before. 123

Therefore, if one assumes that educational achievement bears some relationship to the voter’s ability to comprehend political issues and to become acquainted with the various candidate’s positions, then student residency requirements create the anomaly of disenfranchising those quite likely to make an intelligent use of the ballot. As such, the alleged state interest in “intelligent” voting clearly is constitutionally inadequate to justify the unequal treatment of student voters.

In the final analysis, it is clear that under the Dunn rationale the states will have difficulty justifying the special criteria for students set forth in

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121. 405 U.S. at 357–58.
122. Id. at 358–59.
their voter registration laws. The foregoing discussion demonstrates that the student poses no greater obstacle to the state in achieving the legitimate state interests underlying residency laws than any other class of citizens. Therefore, there being no reason in law for the unequal treatment and the consequent abridgement of voting rights, the laws must be considered violations of the fourteenth amendment equal protection clause.

B. The Lack of Standards in Bona Fide Residency Laws — Due Process Considerations

As previously noted, the right to vote has been characterized by the Supreme Court as a “fundamental right.” Further, laws which interfere with a fundamental right are subject to close judicial scrutiny in determining compliance with the protections of due process of law. A valid argument can be made that student registration laws violate the due process clause of the fourteenth amendment because they are unduly vague and give local officials unfettered discretion as to which students shall be considered a “resident” within the meaning of the state law. It has recently been noted that:

[T]he standards which students must meet in order to vote in the locality in which their college is located are extremely vague .... [T]hus each registration clerk determines himself which factors will overcome the presumption against student registrability in his city.

[T]he procedures used in determining student voting residence were generally chaotic and fraught with the opportunity for discrimination against students of some particular race, party, or cultural persuasion, or against students generally.

In Louisiana v. United States, parish registrars were given unlimited discretion in administering interpretation tests to prospective voters. An applicant was asked to interpret a section of the Louisiana or United States Constitutions, and the registrar decided whether or not the interpretation was correct. These qualification tests, used to disenfranchise Blacks, were struck down by the Court for vagueness due to the lack of precise standards to be used by registrars. Although it may be argued that the reasoning of Louisiana should be construed narrowly to encom-

127. REPORT, supra note 6, at 38–39.
129. The Court stated:

The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.

Id. at 153.
pass only "interpretation tests," the decision seems to be more broadly based and reflective of a general judicial disapproval of vesting unfettered discretion in registrars. Following this analysis, it is certain that unless precise standards are established in student residency laws to guide registrars and to facilitate effective judicial review of their decisions, these laws will remain devoid of the minimum due process limitations required by the Supreme Court in *Louisiana* and hence will be clearly unconstitutional.

V. CONCLUSION

Although the states have a compelling interest in requiring that voters be bona fide residents, it is reasonable to conclude that they have no such interest in treating students differently from other groups for voter registration purposes. Since the Supreme Court in *Dunn* has recently held durational residency requirements unconstitutional when they extend beyond a three-month period, the various states will have to make changes in their current waiting periods for residency. Moreover, the same reasoning utilized by the *Dunn* Court may be adopted in deciding the constitutionality of the present bona fide residency requirement for student voters.

The students' position is highly persuasive when one weighs the grave loss they sustain against the alleged benefits to the state. When the student enters a new community with the same intent as his nonstudent neighbor, they both become members of that community, pay taxes, and are affected by the local laws and elected officials. Yet, when the opportunity to participate in the local government arrives, the student must rebut a presumption against his bona fide residency, whereas his neighbor — who may even be a member of a more transient group — faces no presumption at all. The inequities of such a situation are compounded by the lack of precise standards which vests the registrar with unfettered discretion in determining whether the student's residency is bona fide.

With the young student population now able to exercise the right to vote, many college communities are afraid of the potential consequences in their political districts. This threatened loss of power may cause communities to unite in their attempt to stop the students from voting. Such an attempt cannot be justified under the Constitution and must be frustrated by vigorous assertion of the precious rights inalienably granted thereunder.

Allen M. Silk

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130. Cf. id., wherein the Court explicitly stated:

[T]he provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to "understand and give a reasonable interpretation of any section" of the Federal or Louisiana Constitution violate the Constitution.

131. See id. at 152-53.

132. Cf. id. at 153, wherein the Court considered that the ability to register and vote should be a function of "clearly defined laws rather than the passing whim or impulse of an individual registrar."

133. Id. at 348. See text accompanying note 77 supra.