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COMMENTS

DISENFRANCHISEMENT OF THE COLLEGE STUDENT VOTE: WHEN A RESIDENT IS NOT A RESIDENT

I. Introduction

The standards used by state and local election officials to determine whether students may vote as residents¹ of the communities in which they attend college vary significantly among the fifty states.² Common

1. A "resident" is an actual intended dweller of a certain place as distinguished from a transient dweller. *See, e.g.*, *Don v. Don*, 142 Conn. 309, 311, 114 A.2d 203, 204 (1955); *People v. Carman*, 385 Ill. 23, 27, 52 N.E.2d 197, 199 (1943); *Goens v. Arinder*, 248 Miss. 806, 811, 161 So. 2d 509, 511 (1964) (more than mere physical presence is required); *In re Yap*, 39 Misc. 2d 835, 836, 241 N.Y.S.2d 976, 978 (Sup. Ct. Queens County 1963) (somewhere between transient person and permanent inhabitant); 77 C.J.S. *Resident* 305, at 306-08 (1952). "Resident" has many meanings in the law, largely determined by the statutory context in which it is used. *Kelm v. Carlson*, 473 F.2d 1267, 1271 (6th Cir. 1973); *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957); *Kristensen v. McGrath*, 179 F.2d 796, 801 (D.C. Cir. 1949), *aff'd*, 340 U.S. 162 (1950); *Whittell v. Franchise Tax Bd.*, 231 Cal. App. 2d 278, 284, 41 Cal. Rptr. 673, 677 (Ct. App. 1964).

Most courts and state statutes use the terms "residence" and "resident" when defining voter eligibility. *See, e.g.*, *Carrington v. Rash*, 380 U.S. 89, 95-96 (1965) (Court reviewed election officials' decisions in "determining residence"); *Mitchell v. Kinney*, 242 Ala. 196, 203, 5 So. 2d 788, 793 (1942); *Herron v. Passailaigue*, 92 Fla. 818, 827, 110 So. 539, 543 (1926); CAL. ELEC. CODE § 200(a) (West 1977); FLA. STAT. ANN. § 97.041(1)(a) (West 1982); MASS. STAT. ANN. tit. VIII, ch. 51, § 1 (1978); MO. STAT. ANN. § 115.133(1) (Vernon 1980); N.J. CONST. art. 2, § 3(a) (West Supp. 1982); N.Y. ELEC. LAW § 5-104 (McKinney 1978). However, the use is inaccurate because, while a person may have more than one residence, he may only vote in one place. That place is his domicile. *See* notes 4 & 38-39 *infra* and accompanying text. This Comment however, in keeping with the general practice in the voting context, *see supra*, will use the term "resident" to mean one entitled to vote in the relevant district. *See* notes 38-71 *infra* and accompanying text for a discussion of the law of domicile.

2. The constitutions or election statutes of 12 states contain a "no gain or loss" provision that reads substantially: "For the purpose of registering and voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while a student of any institution of learning." N.Y. ELEC. LAW § 5-104(1) (McKinney 1978). *See* ALA. CODE § 17-3-6 (1970); COLO. REV. STAT. § 1-2-104 (1973); IDAHO CODE § 34-405 (1970); MICH. COMP. LAWS ANN. § 168.11(b) (West 1963); MO. CONST. art. 8, § 6 (1970); NEV. REV. STAT. § 293.487 (1960); N.H. REV. STAT. ANN. § 654:2 (1981) ("[a student shall not] be deemed to have lost a domicile by reason of his presence or absence"); N.M. CONST. art. VII, § 4 (1978); OR. CONST. art. II, § 4 (1981); WASH. CONST. art. 6, § 4 (1966). *See* also notes 93-102 *infra* and

accompanying text for a discussion of the "no gain or loss" provision's effect on students' eligibility to vote as residents at college.

Six states have similar "no gain or loss" statutes but have included "solely" before "by reason of his presence or absence," thereby indicating that a student's presence *alone* does not make him eligible to vote as a resident of the college community. See ALASKA STAT. § 15.05.020(1) (1962); CAL. ELEC. CODE § 206 (West 1977); HAWAII REV. STAT. tit. 2, § 11-13(5) (Supp. 1982); ME. REV. STAT. ANN. tit. 21, § 242(4) (Supp. 1982); TENN. CODE ANN. § 2-2-122(a)(7) (1979); UTAH CODE ANN. § 20-2-14(1)(b) (1953); VT. STAT. ANN. tit. 17, § 2122(a) (Supp. 1981). See also notes 105-06 *infra* and accompanying text for a discussion of this modified "no gain or loss" provision.

The "no gain or loss" provisions of most of the 18 states employing them have been interpreted as not barring students from establishing a voting residence at college. See *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972) (student may establish domicile at college despite intention to leave area upon graduation); *Shivelhood v. Davis*, 336 F. Supp. 1111 (D. Vt. 1971) (students are to be treated the same as non-students); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr 697 (1971) (twenty-sixth amendment requires that 18- to 21-year-old citizens be treated the same as older citizens); *Sanders v. Getchell*, 76 Me. 158, 165 (1884) (must intend to make college permanent home independent of sojourn as a student); *Wilkins v. Bentley*, 385 Mich. 670, 189 N.W.2d 423 (1971) (students are to be treated the same as non-students); *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 48, 286 N.E.2d 247, 252, 334 N.Y.S.2d 860, 868 (1972) (facts supporting student claim of domicile change must be "wholly independent of his presence at the college for educational purposes . . ."); 387 Op. Mo. Att'y Gen. (1971) (requires abandonment of original residence, no intention of returning to it and declaration of intent to establish residence in college community indefinitely); *accord Zimmerman v. Zimmerman*, 175 Or. 585, 155 P.2d 293 (1945) (state's "no gain or loss" statute applying to soldiers and students interpreted as creating a rebuttable presumption as it applies to soldiers); 168 Op. Nev. Att'y Gen. (1920); 71-119 Op. N.M. Att'y Gen. (1971); 10 Op. Wash. Att'y Gen. (1971).

Two other states' statutes appear to be restrictive towards students. See IND. CODE ANN. § 3-1-21-3(1) (Burns 1982) (discussed at note 111 *infra*); TEX. ELEC. CODE ANN. art. 5.08(k) (Vernon Supp. 1982) (discussed at note 112 *infra*). The Texas statute was struck down as violative of students' equal protection rights. *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), *cert. denied sub nom. White v. Whatley*, 415 U.S. 934 (1974) ("compelling state interest" test applied). See notes 18-20 *infra* and accompanying text for a discussion of the compelling state interest test; see notes 112-16 *infra* and accompanying text for a discussion of the Texas statute and *Whatley*.

Four states have domicile statutes that are expressly neutral towards students. See CAL. ELEC. CODE ANN. § 206 (West 1977) ("no gain or loss" provision shall not prevent student from establishing domicile at college if he has abandoned former place of residence); COLO. REV. STAT. § 1-2-104 (1973) ("[n]o person otherwise qualified . . . shall be denied the right to register or to vote . . . solely because he is a student . . ."); WIS. STAT. § 6.10(2) (1975) ("[s]tudent status shall not be a consideration in determining residence for the purpose of establishing voter eligibility"). Louisiana's statute is quite unrestricted: "Any bona-fide full-time student attending [college] in this state may choose as his residence and may register to vote either at the place where he resides while attending [college] or at the place where he resides when not attending such [college] . . . Such a student need not have an intent to reside indefinitely at the place where he offers to register." LA. REV. STAT. ANN. § 18:101(C) (West 1979).

law domicile principles³, which determine residency for voting purposes,⁴ often have been distorted when applied to students so that a state or its subdivision can effectuate its policy of encouraging or discouraging student voting at college.⁵

Two fundamental rights conflict in determining whether college students should be entitled to vote as residents of their college com-

The remaining states have no statute specifically relating to college students, but case law and attorney general opinions have established the law pertaining to voting at college in most of these states. *See, e.g.*, *McCoy v. McLeroy*, 348 F. Supp. 1034, 1037 n.7, 1039 (M.D. Ga. 1972) (no equal protection violation in denying the right to vote as Georgia residents to college students who paid out-of-state tuition and possessed out-of-state driver's licenses); *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972) (students living at college who intend it, and no other place, as their legal residence should be allowed to vote there); *Bright v. Baesler*, 336 F. Supp. 527 (E.D. Ky. 1971) (students are to be treated the same as non-students); *Anderson v. Brown*, 332 F. Supp. 1195 (S.D. Ohio 1971) (same); *Anderson v. Pifer*, 315 Ill. 164, 146 N.E. 171 (1925) (only those students free of parental control who regard college town as home and have no other home to return to in case of sickness may vote at college); *Paulson v. Forest City Community School Dist.*, 238 N.W.2d 344, 350 (Iowa 1976) (student may establish domicile and vote at college; where his home may arguably be in either of two places, it is where he declares it to be); *Schaeffer v. Gilbert*, 73 Md. 66, 20 A. 434 (1890) (rebuttable presumption against student domicile at college); *Hershkoff v. Board of Registrars*, 366 Mass. 570, 321 N.E.2d 656 (1974) (students are to be treated the same as non-students); *Swan v. Bowker*, 135 Neb. 405, 281 N.W. 891 (1938) (self-supporting students who regard college location as home may vote there); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 348, 294 A.2d 233, 245 (1972) (even students who plan to return to their previous residences can establish a voting residence at college); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (rebuttable presumption against student domicile at college); 72-1 Op. Ariz. Att'y Gen. 1 (1972) (unemancipated minor attending college in state whose parents are nonresidents of state may register to vote in Arizona); 071-202A Op. Fla. Att'y Gen. 287 (1971) (student status should place upon an applicant no greater burden than upon others); 71-328 Op. Okla. Att'y Gen. 350 (1971) (students are to be treated the same as non-students).

3. See notes 38-72 *infra* and accompanying text for a discussion of applicable common law domicile principles.

4. *See, e.g.*, *Penn Mut. Life Ins. Co. v. Fields*, 81 F. Supp. 54, 54 (S.D. Cal. 1948); *Mitchell v. Kinney*, 242 Ala. 196, 203, 5 So. 2d 788, 793 (1942); *Herron v. Passailaigue*, 92 Fla. 818, 827, 110 So. 539, 543 (1946); *Howard v. Skinner*, 87 Md. 556, 559, 40 A. 379, 380 (1898); *see also* 25 AM. JUR. 2D *Elections* §§ 66-78 (1966); 29 C.J.S. *Elections* § 19 (1965).

5. *See* note 73 *infra*; *see also* *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 47-48, 286 N.E.2d 247, 252, 334 N.Y.S.2d 860, 867-68 (1972) (a non-student's physical presence and claimed change of permanent residence would normally be sufficient to establish domicile but the same presence and claim by a student, without more, "is deemed evidence merely of an intention to reside temporarily . . . for purposes consistent with preparation for a certain calling"); *Lloyd v. Babb*, 296 N.C. 416, 442-43, 251 S.E.2d 843, 860 (1979) (rebuttable presumption that student who leaves parents' home to go to college is not domiciled at college does not violate equal protection).

munities: the right of students to the equal protection of the laws⁶ and the right of states to limit the right to vote to bona fide residents.⁷

This Comment will demonstrate the need for the education of election officials and college students⁸ in the common law principles of domicile.⁹ Moreover, it will conclude that uniform voting residency standards¹⁰ and more efficient and comprehensive absentee-ballot voting systems¹¹ are essential to the effective enfranchisement of stu-

6. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See notes 14-36 *infra* and accompanying text for a discussion of equal protection.

7. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972); *Carrington v. Rash*, 380 U.S. 89, 91, 93-94 (1965); *Whatley v. Clark*, 482 F.2d 1230, 1232 (5th Cir. 1973); *Ramey v. Rockefeller*, 348 F. Supp. 780, 787 (E.D.N.Y. 1972); *McCoy v. McLeroy*, 348 F. Supp. 1034, 1039 (M.D. Ga. 1972); *Bright v. Baesler*, 336 F. Supp. 527, 533 (E.D. Ky. 1971); Reiff, *Ohio Residency Law For Student Voters—Its Implications and A Proposal For More Effective Implementation of Residency Statutes*, 28 CLEV. ST. L. REV. 449, 465-68 (1979); Singer, *Student Power at the Polls*, 31 OHIO ST. L.J. 703, 707 (1970); Note, *State Residency Requirements For Purposes of Voting: The Eligibility of Students to Vote in Their College Communities*, 21 AM. U.L. REV. 774, 774 (1972) (citing *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972)). A bona fide resident is a domiciliary. See notes 38-39 *infra* and accompanying text.

8. See notes 121-29 *infra* and accompanying text for a discussion of how conflicting state voting residency standards might result in disenfranchisement of college students.

9. See notes 133-53 & 172 *infra* and accompanying text for a discussion of present absentee ballot voting laws and the recommended solution.

10. "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." U.S. CONST. amend XXVI, § 1.

Although the twenty-sixth amendment speaks only of age discrimination, its history shows a particular concern among legislators for college students, who comprised approximately 50% of those between 18 and 21 years of age at the time of its passage. See 117 CONG. REC. 5817, 5825 (1971) (remarks of Sens. Percy & Brooke); see also *Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (citing this legislative history).

The relatively high degree of education among 18- to 21-year-olds, and their frustration at not being allowed to voice their opinions through the ballot, were persuasive factors in the passage of the twenty-sixth amendment. See *Lowering the Voting Age to 18: Hearings on S.26 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); S. REP. NO. 26, 92d Cong., 1st Sess. (1971); see also notes 29 & 49 *infra*.

11. College students considering changing their voting residences to their college communities should be made aware of the requirements for and consequences of such a move so that they can make an informed decision.

Election registrars' lack of familiarity with domicile law might cause them to deny the right to vote at college to qualified students and permit unqualified non-students the right to vote. See notes 36, 55, 56 & 87 *infra* and accompanying text for discussions of how unequal domicile standards have been applied to students and non-students. Whether this unequal treatment has been intentional or due to registrars' ignorance of domicile law, the fourteenth amendment's equal protection clause

dents, a major congressional consideration in the passage of the twenty-sixth amendment.¹²

II. The Applicable Equal Protection Standard

Although the equal protection clause¹³ does not require identical treatment of all persons in all respects,¹⁴ it does require that a state provide adequate justification for treating one group of persons differently than another.¹⁵ However, since the right to vote is a fundamental right¹⁶ which the Supreme Court is "zealous to protect,"¹⁷ a state must show a "compelling" and not merely "rational" justification for a voting restriction.¹⁸ Moreover, the means used to attain the state's goal

requires that the same standards be applied to students and non-students. *See* note 89 *infra*. *See* note 6 *supra* for text of the equal protection clause.

Registrars' lack of familiarity with domicile law might also cause them to allow unqualified students to register and vote at college. Such a result has occurred in Ohio. *See* Reiff, *supra* note 7, at 451, 455 n.24.

12. *See* notes 38-72 *infra* and accompanying text for a discussion of domicile law, requirements for changing domicile and consequences of such a change.

13. *See* note 6 *supra*.

14. *See, e.g.,* Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 583-84 (1935) (state statutory discrimination between foreign and domestic insurance corporations favorable to the latter does not violate equal protection); *accord* Stebbins v. Riley, 268 U.S. 137, 143 (1925) (tax regulation); Erb v. Morasch, 177 U.S. 584, 586 (1900) (railroad regulation).

15. *See, e.g.,* Oregon v. Mitchell, 400 U.S. 112, 270 (1970) (Brennan, White & Marshall, JJ., dissenting in part, concurring in part); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (denying right of recovery to illegitimate child for wrongful death of mother violates equal protection).

16. *See, e.g.,* Harper v. Virginia Bd. of Elections, 385 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) ("[n]o right is more precious in a free country than [the right to vote]"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("preservative of all rights"); *see also* 1 INDIANA UNIVERSITY, U.S. DEP'T OF COMMERCE, PUB. NO. PB 252-234, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING ABSENTEE REGISTRATION AND ABSENTEE VOTING IN THE U.S. 31 (1975) (prepared for the Office of Fed. Elections in cooperation with the U.S. Fed. Election Comm'n) (voting is the "most fundamental of the democratic rights upon which the nation is founded," but public administration of elections is a service that is poorly conducted) [hereinafter cited as ABSENTEE REGISTRATION LAWS]; *accord* Williams v. Rhodes, 393 U.S. 23, 31 (1968) (quoting *Wesberry*).

17. Carrington v. Rash, 380 U.S. 89, 96 (1965).

18. *See, e.g.,* City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-09 (1970) (state had no compelling interest in restricting right to vote for or against approval of general obligation bonds to real property taxpayers); Evans v. Cornman, 398 U.S. 419, 422, 426 (1970) (state had no compelling interest in preventing residents of federal enclave located within state borders from voting in state elections); Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969) (state had no compelling interest in restricting right to vote in school district elections to real property taxpayers and parents of school children); Cipriano v. City of Houma, 395 U.S. 701, 704, 706 (1969) (state had no compelling interest in restricting right to vote for or against approval of municipal revenue bonds to real property taxpayers); Kelm v. Carlson,

must be the most narrow available.¹⁹ This compelling state interest test is applied in student voting cases.²⁰

States argue that voter residency requirements (1) facilitate voter identification to prevent fraud,²¹ (2) promote a more informed electorate²² and (3) assure voter membership and interest in the community.²³ Most courts have found that these justifications are insufficient to support a presumption against student residency.²⁴

473 F.2d 1267, 1271 (6th Cir. 1973) (state regulation requiring that out-of-state residents pay higher college tuition than in-state residents does not invoke "compelling state interest" test, but regulation concerned with a fundamental right, "like voting," would invoke such a standard); *accord* *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (Court has been "extremely sensitive when it comes to basic civil rights").

19. *See, e.g., Kramer*, 395 U.S. at 632 (state law did not meet the "exacting standard of precision [required] of statutes which selectively distribute the franchise"); *accord Kolodziejski*, 399 U.S. at 208-09 (Court applied *Kramer* principles); *Cipriano*, 395 U.S. at 704 (same).

20. Relying on the Supreme Court's concern with preventing burdens on the right to vote, *see Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), the Michigan Supreme Court found that the distinction between an absolute denial of voting rights and a burden on them imposed by a rebuttable presumption of nonresidency was irrelevant to whether the compelling state interest test should be applied. *Wilkins v. Bentley*, 385 Mich. 670, 685, 189 N.W.2d 423, 429 (1971). *Accord Bright v. Baesler*, 336 F. Supp. 527, 533 (E.D. Ky. 1971) (voting rights involve the first amendment freedom of association; therefore, the extra burden imposed on students to prove domicile is constitutional only if a compelling state interest is thereby served); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 346, 294 A.2d 233, 244 (1972) (compelling state interest test applied because "it is so patently sound and so just in its consequences"); *see also* Comment, *Wilkins v. Bentley: Getting Out the Student Vote in Michigan*, 70 MICH. L. REV. 920, 937-42 (1972). *But see Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 49, 286 N.E.2d 247, 253, 334 N.Y.S.2d 860, 869 (1972) ("not every limitation or incidental burden upon the right to vote compels such close constitutional scrutiny").

21. The prevention of fraudulent voting is a legitimate state concern. *See* cases cited in note 23 *infra*. But *see* notes 25-28 *infra* and accompanying text for a discussion of why this concern does not justify preventing students from voting as college area domiciliaries.

22. States have a legitimate interest in promoting a more informed electorate by ensuring that voters have at least had the opportunity to obtain knowledge of the candidates and issues. *See* cases cited in note 23 *infra*. But *see* note 29 *infra* and accompanying text for a discussion of why this concern does not justify preventing students from voting as college area domiciliaries.

23. *See, e.g., Dreuding v. Devlin*, 234 F. Supp. 721, 724 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965); *Worden*, 61 N.J. at 346-47, 294 A.2d at 244; *Estopinal v. Michel*, 121 La. 879, 881, 46 So. 907, 908 (1908); *Shenton v. Abbot*, 178 Md. 526, 531, 15 A.2d 906, 908 (1940). *See also Wilkins v. Bentley*, 385 Mich. 670, 685-90, 189 N.W.2d 423, 430-32 (1971) (discussion of justifications number two and number three together in terms of promotion of a concerned and interested electorate); *Macleod & Wilberding, State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93, 94-95 (1969) (indicates that communications and registration improvements undermine state justifications).

24. *See* notes 25-34 *infra* and accompanying text. *But see Lloyd v. Babb*, 296 N.C. 416, 442-43, 251 S.E.2d 843, 860 (1979) (no denial of equal protection in use of

A state's interest in the prevention of fraudulent voting does not justify excluding students from voting in their college communities²⁵ because of existing adequate procedural safeguards²⁶ and criminal penalties for fraud.²⁷ Additionally, there is no reasonable basis for believing that students are more likely to engage in fraud than others²⁸ or are less informed than non-students regarding the candidates and issues.²⁹

rebuttable presumption that student who leaves parents' home to attend college is not domiciled at college).

25. See *e.g.*, *Whatley v. Clark*, 482 F.2d 1230, 1234 (5th Cir. 1973) ("a presumption that students are not residents of their college communities is [not] necessary to promote [the state's interest in preventing fraudulent voting]"); *Worden*, 61 N.J. at 346-47, 336-37, 294 A.2d at 244, 237 (citing *Dunn v. Blumstein*, 405 U.S. at 354 (state registration and criminal laws furnish adequate protection against fraudulent voting)); *Wilkins*, 385 Mich. at 686-87, 189 N.W.2d at 430; *cf.* *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D.Pa. 1972) (non-students with less proof of domicile than some students were permitted to register; this allows inference that preventing fraud was not a major state concern in prohibiting student registration).

26. See, *e.g.*, MICH. COMP. LAWS ANN. § 168.505 (West 1963) (registration officers shall ascertain whether registrant is already registered in another district); *id.* § 168.523 (before voting, one must sign his name and address, which are compared with the registration card "and if the same do not correspond the vote of such person shall be challenged"); N.Y. ELEC. LAW § 8-304 (McKinney 1978) (signature of voter must correspond with that on registration form).

27. See, *e.g.*, CAL. ELEC. CODE § 296.40 (West 1977) (crime punishable by 1-3 years in jail); *id.* § 296.42 (fraud by absentee is a felony); FLA. STAT. ANN. § 104.041 (West 1982) (a felony); KY. REV. STAT. § 127.150(2) (1971) (a misdemeanor); N.J. STAT. ANN. § 19:34-11 (West 1964) (a misdemeanor); VA. CODE ANN. § 24.1-268 (1980) (a misdemeanor).

28. See *Worden*, 61 N.J. at 346-47, 294 A.2d at 244 ("there has been no suggestion . . . that there is any real danger of dual or improper voting, once the right of students who choose to register and vote from their college residences and not elsewhere is recognized"); Note, *supra* note 7, at 786 (there is no evidence that students have ever, or will ever, seek to vote in two places).

29. See, *e.g.*, *Oregon v. Mitchell*, 400 U.S. at 245-46 (1970) (Brennan, White & Marshall, JJ., concurring in part, dissenting in part) (18-year-olds are as "interested, able, and responsible in voting" as are older citizens); *Wilkins*, 385 Mich. at 690, 189 N.W.2d at 432 ("[t]here is every reason to believe they might be even better informed on current issues than other citizens"); *Worden*, 61 N.J. at 347, 294 A.2d at 244 (students have actively participated in political campaigns and have shown special political awareness and interest in state and local as well as federal matters).

The legislative history of the twenty-sixth amendment indicates that college students are at least as well informed as the rest of the electorate. At hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, Deputy Attorney General Kleindienst conveyed President Nixon's views about the wisdom of lowering the voting age:

America's 10 million young people between the ages of 18 and 21 are better equipped than ever . . . to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplifies the highest qualities of mature citizenship.

Most courts have ruled that a presumption that college students are not interested members of the community has no factual basis.³⁰ Moreover, the exclusionary classification³¹ is not "sufficiently drawn

91st Cong., 2d Sess. 130 (1970). *Accord* remarks of Senator Goldwater, *id.*; remarks of Dr. Margaret Mead, *id.*, remarks of former Presidential Assistant Sorenson, (citing the conclusion of the Fact-Finding Commission on Columbia Disturbances (Cox Commission) (young adults possess a "higher level of social consciousness than preceding generations")). *Id.* at 129.

This legislative history was included in the Senate Report accompanying Senate Joint Resolution 7 (later enacted as the twenty-sixth amendment). S. REP. NO. 26, 92d Cong., 1st Sess. 3, 4 (1971). The report stated, in part:

Today more than half of the 18- to 21-year-olds are receiving some type of higher education. Today nearly 80 percent of these young people are high school graduates. [In 1920] less than 10 percent went on to college and less than 20 percent . . . actually graduated from high school.

. . . [S]tudent unrest of recent years . . . reflects the interest and concern of today's youth over the important issues of our day.

[W]e must channel these energies into our political system and give young people the real opportunity to influence our society in a peaceful and constructive manner.

Id. at 6. *See also* Oregon v. Mitchell, 400 U.S. at 243-45 (nearly uniform practice of treating 18-year-olds as adults for other legal purposes further undermines the rationale for denying them the voting franchise); 117 CONG. REC. 5817 (1971) (remarks of Sen. Percy); 116 CONG. REC. 6433-34 (1970) (remarks of Sen. Cook); *id.* at 6929-30 (remarks of Sens. Talmadge & Ervin).

30. *See, e.g.,* Sloane, 351 F. Supp. at 1304-05 (state failed to show a compelling interest in requiring that students meet a more stringent test of domicile than non-students; such a scheme was not even reasonable); *Bright*, 336 F. Supp. at 533 (there is no reason to believe that students can not (1) establish a domicile within the university community, (2) take a serious interest in the political issues of that area and (3) responsibly exercise their franchise); *Shivelhood v. Davis*, 336 F. Supp. 1111, 1116 (D.Vt. 1976) (due to increased mobility, fewer students than in the past are likely to return to settle in their pre-college communities and, while attending college, they are more likely to be aware of and concerned about the issues in their college towns than those in their former communities); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 574, 488 P.2d 1, 6, 96 Cal. Rptr. 697, 702 (1971) (emphasizes the value of younger citizens' interest in state and local policy) (citing S. REP. NO. 26, 92d Cong., 1st Sess., reprinted in 1971 U.S. CODE CONG. & AD. NEWS 372 (legislative history of the twenty-sixth amendment)); *Wilkins*, 385 Mich. at 688-90, 189 N.W.2d at 431 (factors showing students' ties with the college community include: (1) subjection to state and local regulations, *id.* at 689, 189 N.W.2d at 431; (2) consideration as residents of the college area by the Census Bureau, *id.*; *see* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, USUAL RESIDENCE OF COLLEGE STUDENTS 3 (1966); and (3) payment of state income, sales, gasoline and property taxes (through increased rents)); *Worden*, 61 N.J. at 347, 294 A.2d at 244-45 (same); *see* notes 75-79 *infra* and accompanying text for a discussion of these indicia of domicile. *See* notes 55-56 *infra* and accompanying text for a discussion of equal protection standards as applied to student questionnaires and presumptions.

31. The exclusionary classification presumes that students are not college-area residents for voting purposes.

to insure that only voters who are primarily interested are allowed to vote."³² Several courts suggest that this alleged justification is a thinly-disguised exclusion of citizens for fear of the way they may vote,³³ a practice uniformly held to be violative of equal protection laws.³⁴

Election officials possess much discretion in applying common law domicile principles to determine which applicants are eligible to vote in a particular district.³⁵ Inconsistent application of these principles to

32. *Wilkins*, 385 Mich. at 687, 189 N.W.2d at 430. "Clearly . . . [the state's general voter registration statute] will allow many disinterested persons, by any criteria, to vote, while [the "no gain or loss" statute] as applied to students, disenfranchises many interested and concerned citizens." *Id.* "[T]he classifications must be tailored so that the exclusion . . . is necessary to achieve the articulated state goal." *Id.* at 687, 189 N.W.2d at 430 (quoting *Kramer*, 395 U.S. at 632).

33. *See, e.g., Sloane*, 351 F. Supp. at 1304-05 ("policy followed by [election officials] in determining the residence of new voters was adopted as a result of their apprehension over the student vote . . ."); *Jolicoeur*, 5 Cal. 3d at 571-72, 488 P.2d at 4, 96 Cal. Rptr. at 700 ("[f]ears of the way minors living away from their parents may vote or of their impermanency in the community may not be used to justify special presumptions—conclusive or otherwise—that they are not bona fide residents of the community in which they live"); *Wilkins*, 385 Mich. at 691-92, 189 N.W.2d at 432-33 (court notes that fear of how students might vote influenced its decision in 1893 not to allow them to vote at college, but that the development of the equal protection clause since then makes such a motive unconstitutional).

34. *See, e.g., Dunn v. Blumstein*, 405 U.S. at 354-55; *Evans v. Cornman*, 398 U.S. 419, 423 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 705-06 (1969); *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *cf. Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("[c]ompetition in ideas and governmental policies is at the core of our electoral process").

35. *See, e.g., N.Y. ELEC. LAW § 5-104(2)* (McKinney 1978):

[I]n determining a voter's qualification to register and vote, the board . . . shall consider . . . the applicant's expressed intent, his conduct and all attendant surrounding circumstances relating thereto, [including his] financial independence, business pursuits, employment, income sources, . . . marital status, residence of parents . . . and other such factors that it may reasonably deem necessary. . . . The decision of a board to which such application is made shall be presumptive evidence of a person's residence for voting purposes.

New York election officials have *summarily* denied students the right to register because they resided at college. *Palla*, 31 N.Y.2d at 43-44, 286 N.E.2d at 250-51, 334 N.Y.S.2d at 864.

Vague statutory and administrative standards can give rise to violations of the fourteenth amendment's due process clause ("[no State shall] deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1). *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (due process "requires legislatures to set reasonably clear guidelines . . . to prevent 'arbitrary and discriminatory enforcement'"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972) (due process is violated by local ordinance that gives police "unfettered discretion" in its enforcement); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (city ordinance prescribing no appropriate standard for administrative action and giving administrative official discretionary power to control in advance the right of citizens to speak on religious matters in public places violates the first amendment and due

students and non-students by election officials raises equal protection problems.³⁶ Proper resolution of this issue requires reconciliation of one's right not to be discriminated against because of his student status with the state right to require that only bona fide residents vote. Since domicile principles determine residency for voting purposes,³⁷ correct application of these principles is essential to resolving this issue.

III. Application of the Common Law of Domicile

"Domicile" is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively; whereas "residence" connotes any factual place of abode of some permanency, more than a mere temporary sojourn.³⁸

process under the fourteenth amendment); *Collin v. Smith*, 447 F. Supp. 676, 691 (N.D. Ill. 1978) ("[a] law is unconstitutionally vague when it . . . gives law enforcement personnel the opportunity to enforce it according to their personal prejudices") (citing *Smith v. Goguen*, 415 U.S. 566 (1974)); *cf.* *International Soc'y For Krishna Consciousness v. Rochford*, 585 F.2d 263, 268 (7th Cir. 1978) (city ordinance restricting distribution of literature to those "authorized by law" to do so was "void . . . for vagueness" because it gave enforcement officials no guidelines).

Some courts have considered whether special voting statutes or practices applied to students are so vague that they violate the fourteenth amendment's due process clause as well as the equal protection clause. *Compare Wilkins*, 385 Mich. at 677-78, 189 N.W.2d at 426 (" 'guidelines are so vague as to be tantamount to no standards; thus each registration clerk determines himself which factors will overcome the presumption against student registrability in his city' ") *with Lloyd*, 296 N.C. at 442, 251 S.E.2d at 860 (no due process violation in asking special questions of students) [*and*] *Palla*, 31 N.Y.2d at 46, 286 N.E.2d at 251, 334 N.Y.S.2d at 866 (state's "no gain or loss" provision does not violate students' due process rights). *See generally* Bullard & Rice, *Restrictions on Student Voting: An Unconstitutional Anachronism*, 4 J.L. REFORM 215, 221 (1970).

36. *See, e.g.*, *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D.Pa. 1972) (two non-students were allowed to register after listing their occupations and without furnishing proof of domicile; court concluded that "in actual practice non-students were not subjected to the same scrutiny and proof as were students"); *Bright*, 336 F. Supp. at 532 & n.4 (non-students were routinely registered; students were routinely not registered); *Worden*, 61 N.J. at 329, 294 A.2d at 235 (election officials admitted disparate treatment of students); *accord Whatley*, 482 F.2d at 1233.

37. *See* note 4 *supra* and accompanying text.

38. *Smith v. Smith*, 45 Cal. 2d 235, 239-40, 288 P.2d 497, 499 (1955); *see also* *Williamson v. Osenton*, 232 U.S. 619, 624-25 (1914); *Codagnone v. Perrin*, 351 F. Supp. 1126 (D.R.I. 1972); *Shreveport Long Leaf Lumber Co. v. Wilson*, 38 F. Supp. 629, 631 (W.D. La. 1941); *Whittell v. Franchise Tax Bd.*, 231 Cal. App. 2d 278, 284, 41 Cal. Rptr. 673, 676 (Ct. App. 1964); *Schultz v. Chicago City Bank & Trust Co.*, 384 Ill. 148, 156, 51 N.E.2d 140, 144 (1943); *Estopinal v. Michel*, 121 La. 879, 881, 46 So. 907, 908 (1908); *Shenton v. Abbot*, 178 Md. 526, 530, 15 A.2d 906, 908

While a person may have more than one residence, he may not, at one time, have more than one domicile.³⁹ Courts apply the legal principle of domicile of choice⁴⁰ in determining one's domicile for voting purposes.⁴¹ Three elements are required to establish a domicile of choice: (1) legal capacity, (2) physical presence at a place and (3) the intention of making such place one's home for the time at least.⁴² The burden of proof is on the party alleging a change of domicile.⁴³

(1940); *State v. Benny*, 20 N.J. 238, 251, 119 A.2d 155, 162 (1955) (intention to make a place one's home, "adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile"); *In re Paich's Estate*, 90 Ohio L. Abs. 470, 473, 186 N.E.2d 755, 757 (Ct. App. 1962); *accord Van Matre v. Sankey*, 148 Ill. 536, 547, 36 N.E. 628, 633 (1893) (domicile and residence are not synonymous); *In re Yap*, 39 Misc. 2d at 837, 241 N.Y.S.2d at 979 ("a person may be a domiciliary of one place and a resident of another, and even a resident of more than one place"); J. STORY, CONFLICT OF LAWS § 43, at 37 (1872) ("there is no universally agreed . . . enumeration of the ingredients which constitute domicile").

39. *See, e.g., Williamson v. Osenton*, 232 U.S. 619, 625 (1914); *United States ex rel. Thomas v. Day*, 29 F.2d 485, 486 (2d Cir. 1928); *Penn Mut. Life Ins. Co. v. Fields*, 81 F. Supp. 54, 57 (S.D. Cal. 1948); *Shenton*, 178 Md. at 530, 15 A.2d at 908; *Rawstorne v. Maguire*, 265 N.Y. 204, 207-08, 192 N.E. 294, 295 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971) ("at least for the same purpose, no person has more than one domicile at a time"); 28 C.J.S. *Domicile* § 3 (1941).

40. Domicile of choice is that which is voluntarily acquired. This is distinct from domicile of origin (acquired at birth) and domicile by operation of law (constructively applied). *See, e.g., Wade v. Wade*, 93 Fla. 1004, 1008, 133 So. 374, 375 (1927); *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 415, 99 S.E. 240, 242 (1919); RESTATEMENT OF CONFLICT OF LAWS § 15 (1934); J. STORY, *supra* note 38, § 49, at 44; 25 AM. JUR. 2D *Domicile* §§ 12-15 (1966); 28 C.J.S. *Domicile* §§ 4-7 (1941).

41. *See* cases and other authorities cited in note 4 *supra*.

42. *See, e.g., Yale v. West Middle School Dist.*, 59 Conn. 489, 491, 22 A. 295, 296 (1890); *Lloyd*, 296 N.C. at 449, 251 S.E.2d at 861, *Zimmerman v. Zimmerman*, 175 Or. 585, 592, 155 P.2d 293, 296 (1945); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15 (1971); 1 J. BEALE, CONFLICT OF LAWS 132-33 (1935); H. GOODRICH, CONFLICT OF LAWS 40-41 (E. Scoles 4th ed. 1964); J. STORY *supra* note 38, §§ 44, 46 at 37, 41. Acquisition of domicile of choice presumes legal capacity. *Matthews v. Matthews*, 141 So. 2d 799, 802 (Fla. App. 1962); *Zimmerman*, 175 Or. at 592, 155 P.2d at 296; 25 AM. JUR. 2D *Domicile* § 14 (1966). Most cases do not discuss legal capacity. *See, e.g., Texas v. Florida*, 306 U.S. 398, 424 (1939); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353 (1874); *Jennings v. Fanti*, 96 F. Supp. 264, 266 (M.D. Pa. 1951); *Penn Mut. Life Ins. Co.*, 81 F. Supp. at 57; *In re Dorrance's Estate*, 115 N.J. Eq. 268, 277, 170 A. 601, 604 (N.J. Prerog. Ct. 1934), *aff'd*, 116 N.J.L. 362, 184 A. 743 (1935), *cert. denied*, 298 U.S. 678 (1936); *In re Dorrance's Estate*, 309 Pa. 151, 168, 163 A. 303, 307 (1932). *See also Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 545, 546-47 (3d Cir. 1950) (intention to remain for an indefinite period is sufficient); *Marathon County v. Milwaukee County*, 273 Wis. 541, 548, 79 N.W.2d 233, 238 (1956) (intent to remain for the rest of one's life or for any particular length of time not required).

43. *See, e.g., Texas v. Florida*, 306 U.S. at 427; *Desmare v. United States*, 93 U.S. 605, 610 (1876); *Mitchell*, 88 U.S. (21 Wall.) at 353; *Agassiz v. Trefry*, 260 F.

A. Legal Capacity

Under common law rules of domicile, an unemancipated⁴⁴ minor cannot acquire a domicile of choice.⁴⁵ The mere fact that a minor has moved away from his parents' home does not necessarily result in emancipation.⁴⁶ However, emancipation may be implied from the circumstances and requires neither attainment of majority nor issuance of a court decree.⁴⁷ Some courts have found that students still substantially supported by parents and subject to parental control may not vote in their college communities because no change of domicile has occurred.⁴⁸ This common law rule should not be used in

226, 230 (D.C. Mass. 1919), *aff'd*, 266 F. 8 (1st Cir. 1920); *Sealy v. United States*, 7 F. Supp. 434, 437 (E.D. Va. 1934); *Caheen v. Caheen*, 233 Ala. 494, 497, 172 So. 618, 620 (1937); *In re Lydig's Estate*, 191 A.D. 117, 120, 180 N.Y.S. 843, 846 (1st Dep't 1920); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 comment c (1971); 28 C.J.S. *Domicile* § 16 (1941).

44. An unemancipated minor is still subject to parental control and authority and legally entitled to parental support. *See, e.g.*, *Wood v. Wood*, 135 Conn. 280, 283-84, 63 A.2d 586, 587-88 (1948); *Town of Plainville v. Town of Milford*, 119 Conn. 380, 384-85, 177 A. 138, 140 (1935); *State Farm Mut. Auto Ins. Co. v. Differding*, 46 Ill. App. 3d 15, 20, 360 N.E.2d 522, 525-26 (App. Ct. 1977); *Vogel v. Williams*, 118 Ind. App. 451, 457, 79 N.E.2d 548, 550 (Ct. App. 1948); *Wallace v. Cox*, 136 Tenn. 69, 73, 188 S.W. 611, 612 (1916).

45. *See, e.g.*, *Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933) (in divorce proceeding, domicile of unemancipated minor is that of father seeking divorce); *Bjornquist v. Boston & A.R. Co.*, 250 F. 929, 931 (1st Cir. 1918), *cert. denied*, 248 U.S. 573; *In re Henning's Estate*, 128 Cal. 214, 219, 60 P. 762, 764 (1900); *Yale*, 59 Conn. at 491, 22 A. at 296 (because a minor can not exercise an independent intent in a matter such as domicile); *Van Matre*, 148 Ill. at 547, 36 N.E. at 633; *Wear v. Wear*, 130 Kan. 205, 221, 285 P. 606, 614 (1930); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 comment a (1971); 25 AM. JUR. 2D *Domicile* § 63 (1966).

46. *See, e.g.*, *Vaupel v. Bellach*, 154 N.W.2d 149, 151 (Iowa 1967); *Porter v. Powell*, 79 Iowa 151, 157-59, 44 N.W. 295, 297-98 (1890); *Wallace*, 136 Tenn. at 76, 188 S.W. at 613; 59 AM. JUR. 2D *Parent and Child* § 95 (1971).

47. *See, e.g.*, *Zozaski v. Mather Stock Car Co.*, 312 Ill. App. 585, 588-89, 38 N.E.2d 825, 826 (1942) (emancipation may be implied from the circumstances); *Surface v. Dorrell*, 115 Ind. App. 244, 250, 57 N.E.2d 66, 68 (1944); *Porter*, 79 Iowa at 154-55, 44 N.W. at 296; *Merithew v. Ellis*, 116 Me. 468, 471-72, 102 A. 301, 302 (1917); *Lufkin v. Harvey*, 131 Minn. 238, 240, 154 N.W. 1097, 1098 (1915) (however, a minor may be emancipated for some purposes and not for others); *Wallace*, 136 Tenn. at 73, 188 S.W. at 612; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 comment f (1971) (it is usually sufficient that the minor "[attain] years of discretion, [and] maintain . . . a separate way of life, . . . with his parents' consent," if they are living and have not abandoned him); 59 AM. JUR. 2D *Parent and Child* § 95 (1971) ("[o]nce the family relationship is altered so that the child is no longer subject to parental care and discipline, the child is . . . emancipated").

48. *See, e.g.*, *Anderson v. Pifer*, 315 Ill. 164, 167, 146 N.E. 171, 173 (1925) (only those students "entirely free from parental control, who regard the college town as

determining where a particular minor resides for voting purposes because the twenty-sixth amendment emancipates minors over 18 "for all purposes related to voting."⁴⁹

their home and who have no other home to return to in case of sickness" may vote at college); *Reiner v. Board of Elections*, 54 Misc. 2d 1030, 283 N.Y.S.2d 963 (Sup. Ct. Onondaga County), *aff'd*, 28 A.D.2d 1095 (4th Dep't), *aff'd*, 20 N.Y.2d 865, 231 N.E.2d 785, 285 N.Y.S.2d 95 (1967) (court allowed college domicile to students who were married and showed that they were "on their own," implying that students still subject to parental control and support could not establish domicile at college).

49. *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 575, 488 P.2d 1, 7, 96 Cal. Rptr. 697, 703 (1971) (American youth's deep concern about their country and their defense of it in Vietnam are strong arguments for allowing them to vote; refusing to treat them as adults for voting purposes "violates the letter and spirit of the Twenty-Sixth Amendment"); *accord* 71-119 Op. N.M. Att'y Gen. (1971); 5-24-72 Op. Wis. Att'y Gen. 256 (1972).

Two other courts did not need to consider this statutory age-of-emancipation conflict because their states' laws make 18-year-olds adults. *See Paulson v. Forest City Community School Dist.*, 238 N.W.2d 344, 349 (Iowa 1976); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-46, 294 A.2d 233, 243-44 (1972). Other courts seemed to assume the point made in *Jolicoeur*, that 18-year-olds are adults for voting purposes. *See, e.g., Bright v. Baesler*, 336 F. Supp. 527, 531 (E.D. Ky. 1971) ("[t]here is no law or statute in Kentucky, as far as this court has been able to ascertain, which states that a minor cannot, for voting purposes, establish a domicile other than that of his parents"); *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 48, 286 N.E.2d 247, 252, 334 N.Y.S.2d 860, 868 (1972). *See generally* Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 YALE L.J. 35, 53-59 (1971) (discussion of twenty-sixth amendment's presumption that 18-year-olds are adults).

The congressional history of the twenty-sixth amendment strongly supports this position. The Senate Report accompanying Senate Joint Resolution, later to become the twenty-sixth amendment, stated:

[T]hese younger citizens are fully mature enough to vote. There is no magic to the age of 21. The 21 year age of maturity is derived only from historical accident. In the eleventh century 21 was the age at which most males were physically capable of carrying armor. But the physical ability to carry armor in the eleventh century clearly has no relation to the intellectual and emotional qualifications to vote in twentieth century America. And even if physical maturity were the crucial determinant of the right to vote, 18-year-olds would deserve that right: Dr. Margaret Mead and others have shown that the age of physical maturity of American youth has dropped more than three years since the eighteenth century. . . .

[O]ur younger citizens today are mentally and emotionally capable of full participation in our democratic form of government. . . .

[O]ur 18-year-old citizens have earned the right to vote because they bear all or most of an adult citizen's responsibilities.

S. REP. No. 26, 92d Cong., 1st Sess. 5-6 (1971). *See also* note 29 *supra* and accompanying text for a discussion of college students' interest in and knowledge of political affairs.

B. Physical Presence and Durational Residency Requirements

Many state statutes have required varying periods of physical presence within the intended domicile before one is eligible to vote there.⁵⁰ In 1971, the Supreme Court struck down Tennessee's one-year durational residency requirement as unconstitutional.⁵¹ Since then, durational residency requirements have been held invalid except to the extent that they are required for reasonable administrative purposes with respect to registration.⁵² Therefore, durational residency requirements are merely administrative devices to help identify bona fide residents.⁵³

C. The "Intention" Criterion

The intention requirement clearly has caused the most controversy as applied to college students.⁵⁴ This controversy centers around the more extensive questioning of students than of non-students⁵⁵ and the use of rebuttable presumptions of intention.⁵⁶

50. See, e.g., PA. STAT. ANN. tit. 25, § 2811(2), (3) (Purdon 1963) (one year in state, 60 days in district); N.J. STAT. ANN. § 19:31-5 (West 1964) (6 months in state, 40 days in county). Subsequent to *Dunn v. Blumstein*, 405 U.S. 330 (1972), durational residency requirements were decreased to 30 days. See, e.g., 1972 Op. Pa. Att'y Gen. 63 (durational residency requirements in excess of 30 days are unenforceable); N.J. STAT. ANN. § 19:31-5 (West Supp. 1982) (30 days in state and county). See also note 52 *infra* and accompanying text.

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

52. See, e.g., *Meyers v. Jackson*, 390 F. Supp. 37, 44 (E.D. Ark. 1975); *State v. Van Dort*, 502 P.2d 453, 455 (Alaska Sup. Ct. 1972) (30 days is the maximum permissible residency period that can be required for voting); *Chapman v. Foote*, 112 N.H. 298, 293 A.2d 772 (1972); 1972 Op. Pa. Att'y Gen. 63 (instructing Pennsylvania's chief election officer to disregard the Commonwealth's constitutional and statutory durational residency requirements greater than 30 days). See also ABSENTEE REGISTRATION LAWS, *supra* note 16, at 119. ("[i]mproved communications, improving educational levels, and improved methods of identifying citizens through the issuance of official documents of identity (e.g., birth certificates, driving licenses, social security cards) have largely removed the original rationale for durational residency requirements").

53. See Reiff, *supra* note 7, at 461 n.59.

54. See note 28 *supra* and notes 92, 93-116 & 120 *infra* and accompanying text.

55. See, e.g., *Auerbach v. Kinley*, 499 F. Supp. 1329, 1341 (N.D.N.Y. 1980); *Sloane v. Smith*, 351 F. Supp. 1299, 1303-04 (M.D. Pa. 1972); *Worden*, 61 N.J. at 348, 294 A.2d at 245 (students "are no more transient than many other groups whose right to vote in communities where they are short-term residents is never questioned"). *But see McCoy v. McLeroy*, 348 F. Supp. 1034, 1037 n.7 (M.D. Ga. 1972) (because Georgia law requires that all motor vehicles owned by residents be licensed by Georgia, "a person who regularly drives an out of state licensed motor vehicle in Georgia has already determined and is evidencing his determination that he is not a resident of Georgia").

56. See, e.g., *Auerbach*, 499 F. Supp. at 1341, 1343 (presumption of student nonresidency and use of a questionnaire solely for students violates their equal

protection rights); *accord* *United States v. Texas*, 445 F. Supp. 1245, 1257, 1261 (S.D. Tex. 1978), *aff'd mem.*, 439 U.S. 1105 (1979) (use of questionnaire solely for students and refusal to register them unless they established that they intended to remain in the community after graduation violates the fourteenth and twenty-sixth amendments). *But see* *Lloyd*, 296 N.C. at 442-43, 251 S.E.2d at 860-61 (rebuttable presumption that student who leaves parents' home to go to college is not domiciled at the college location does not violate equal protection because it "is merely a specialized statement of the general rule that the burden of proof is on one alleging a change in domicile"). A special inquiry of students is "not an attempt to 'fence out' a segment of the community because of the way they may vote. It is instead a permissible attempt to determine who are the members of the relevant community." *Id.* at 441-42, 251 S.E.2d at 860. But a student who intends to remain only until graduation should not on that basis alone be denied the right to vote in that community. *Id.* at 443, 251 S.E.2d at 861; *accord* *Ramey v. Rockefeller*, 348 F. Supp. 780, 786 (E.D.N.Y. 1972) (constitutionally permissible to "enumerate certain categories of persons who, despite their physical presence, may lack the intention required for voting," as long as they "are given at least an opportunity to show the election officials that they are bona fide residents") (citing *Carrington v. Rash*, 380 U.S. 89, 95 (1965)).

The Supreme Court in *Carrington* held unconstitutional a Texas statute that prohibited members of the armed forces who had moved to Texas during their military service from acquiring a voting residence. 380 U.S. at 96. The Court held only that Texas' absolute denial of the right to vote to servicemen violated their equal protection rights. *Id.* The Court noted that the conclusive presumption of nonresidency applied only to servicemen. *Id.* at 95. Other groups, including students, presenting "specialized problems in determining residence" were provided "at least an opportunity" to prove residency. *Id.* (dictum). The Court then stated that "Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence." *Id.* at 96.

Shortly before *Ramey* was decided, a Texas statute providing a rebuttable presumption against student residency was found constitutional. *Wilson v. Symm*, 341 F. Supp. 8 (S.D. Tex. 1972) (relying on *Carrington* dictum). However, subsequent to the *Ramey* decision, this statute was struck down on equal protection grounds. *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), *cert. denied sub nom. White v. Whatley*, 415 U.S. 934 (1974). The *Whatley* court concluded that (1) *Carrington* did not foreclose a challenge to the Texas statute and (2) the Supreme Court's reference in *Carrington* to the opportunity given to students and other groups to prove domicile "should be seen only in contrast to the total disenfranchisement of servicemen, not as tacit approval of a rebuttable presumption of nonresidency as applied to students." *Id.* at 1234.

"Since the equal protection analysis in *Ramey* was premised at least in part on the authority of *Wilson*, which subsequently was overruled by *Whatley*, *Ramey's* precedential weight is now limited." *Auerbach*, 499 F. Supp. at 1337.

The position that a presumption against student residency status for voting at college violates the equal protection clause gains support from the Supreme Court's affirmance of *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd mem.*, 439 U.S. 1105 (1979). The district court in *United States v. Texas* permanently enjoined election officials from requiring that students go to any greater lengths to prove domicile than non-students 445 F. Supp. 1245.

The Supreme Court has ruled that summary affirmances have precedential value, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), and at least the Second Circuit has concluded that they are binding on the lower courts of that circuit, *Mercado v. Rockefeller*, 502 F.2d 666, 673 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

The requisite intent is often expressed as an absence of an intention to make a home elsewhere⁵⁷ and requires abandonment of one's former domicile.⁵⁸ Generally, intent to make a place one's domicile is proved by one's own declarations⁵⁹ and acts.⁶⁰ One's acts are to be given the greatest weight as indicators of intent,⁶¹ followed by one's

Therefore, the *Auerbach* court concluded, "the Court's affirmance of *United States v. Texas*, together with the reasoning in the *Baessler-Whitley* line of cases provides ample support for [the] conclusion that [the plaintiff students] in this case have raised a substantial 14th amendment challenge to New York's student registration scheme," sufficient to warrant the issuance of a preliminary injunction against requiring students to fill out a special questionnaire. 499 F. Supp. at 1338. At the time this Comment went to print, the court was awaiting plaintiff's motion for summary judgment.

57. See, e.g., *Williamson*, 232 U.S. at 624; *Gallagher*, 185 F.2d at 546; *Re Glassford's Estate*, 114 Cal. App. 2d 181, 186, 249 P.2d 908, 911 (Ct. App. 1952) (no intention to return to former place of abode); *In re Dorrance's Estate*, 115 N.J. Eq. at 277, 170 A. at 605; *Gardner v. Gardner*, 118 Utah 496, 500, 222 P.2d 1055, 1057 (1950).

58. See, e.g., *New York Trust Co. v. Riley*, 24 Del. Ch. 354, 379, 16 A.2d 772, 783 (1940) (abandonment with "intention not to return"), *aff'd*, 315 U.S. 343 (1942); *Schultz*, 384 Ill. at 156, 51 N.E.2d at 144 (abandonment with "intention not to return"); *Shenton*, 178 Md. at 534, 15 A.2d at 909-10 (abandonment "so permanent as to exclude the existence of an intention to return to the former place"); *Means v. Means*, 145 Neb. 441, 444, 17 N.W.2d 1, 3 (1945) (permanent abandonment); *Shapiro v. State Tax Comm'n*, 67 A.D.2d 191, 193, 415 N.Y.S.2d 282, 284 (3d Dep't 1979), *rev'd on other grounds*, 50 N.Y.2d 822, 407 N.E.2d 1330, 430 N.Y.S.2d 33 (1980); *Lloyd*, 296 N.C. at 449, 251 S.E.2d at 861; *Reynolds*, 177 N.C. at 415-16, 99 S.E. at 242 (permanent abandonment); *Elwert v. Elwert*, 196 Or. 256, 265, 248 P.2d 847, 851 (1952); *Re Estate of McKinley*, 337 A.2d 851, 855 (Pa. 1975); 25 AM. JUR. 2d *Domicile* § 24 (1966) (permanent abandonment).

59. See, e.g., *Shreveport Long Leaf Lumber Co.*, 38 F. Supp. at 631 (oral declaration made before a controversy existed); *Slater v. Munroe*, 313 Mass. 538, 546, 48 N.E.2d 149, 153 (1943) (written declarations in tax returns, deeds and correspondence); *In re Dorrance's Estate*, 309 Pa. at 168, 163 A. at 309 (written and oral); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 20 (1971) (Special Note on Evidence for Establishment of a Domicile of Choice) [hereinafter cited as Special Note on Evidence].

60. See, e.g., *Jennings v. Fanti*, 96 F. Supp. 264, 266 (M.D. Pa. 1951); *Penn Mut. Life Ins. Co.*, 81 F. Supp. at 60; *Pignatelli v. Pignatelli*, 169 Misc. 534, 537, 8 N.Y.S.2d 10, 13-14 (Sup. Ct. N.Y. County 1938); *In re Dorrance's Estate*, 309 Pa. at 168, 163 A. at 309; see also Special Note on Evidence, *supra* note 59.

61. See, e.g., *Texas v. Florida*, 306 U.S. at 425; *E.I. Dupont De Nemours & Co. v. Byrnes*, 101 F.2d 14, 14 (2d Cir. 1939); *Jennings*, 96 F. Supp. at 266; *Penn Mut. Life Ins. Co.*, 81 F. Supp. at 60; *Rosenberg v. Commissioner*, 37 F.2d 808, 810 (D.C. Cir. 1930); *Coca-Cola Int'l Corp. v. New York Trust Co.*, 8 A.2d 511, 524 (Del. Ch. 1939) (conduct is the most important evidence of intention to acquire a domicile); *Shenton*, 178 Md. at 533, 15 A.2d at 909; *Pignatelli*, 169 Misc. at 540, 8 N.Y.S.2d at 16; *In re Dorrance's Estate*, 309 Pa. at 168, 163 A. at 308 (expression of desire cannot supersede effect of conduct in determining domicile); see also Special Note on Evidence, *supra* note 59.

informal statements (presumed not to be based upon any pre-conceived design to fabricate)⁶² and one's formal statements.⁶³

Some states require intent to reside in a given locality "permanently" or "indefinitely" before domicile can be acquired there.⁶⁴ However, words such as "permanently" and "indefinitely" are not to be taken literally in applying domicile principles⁶⁵ because our society is more mobile than it was when these principles developed.⁶⁶ In any

62. See Special Note on Evidence, *supra* note 59.

63. See, e.g., *Townsend v. Bucyrus-Erie Co.*, 144 F.2d 106, 109 (10th Cir. 1944) (declaration is to be considered in the light of the motive of the one making it); *Canadian Pac. Ry. Co. v. Wenham*, 146 F. 207, 208 (S.D.N.Y. 1906) (self-serving declarations should be accorded little, if any, weight); *Watters v. Ralston Coal Co.*, 38 F. Supp. 16, 17 (M.D. Pa. 1941) (weight to be given declarations is to be determined by the time and circumstances under which they are made); see generally Special Note on Evidence, *supra* note 59; 25 AM. JUR. 2d *Domicile* § 93 (1966); 28 C.J.S. *Domicile* § 18(b) (1941). But see *Paulson*, 238 N.W.2d at 350 (state election code's definition of residence for voting purposes was changed from "the place which he maintains as his home with the intent . . ." to "the place which he declares is his home with the intent . . .") (emphasis added). However, the court stated that the legislature's intent in changing the law was only to allow one's declarations to "tip the scales" when his home may arguably be in either of two places. *Id.*

64. See, e.g., IND. CODE ANN. § 3-1-21-3(1) (Burns 1982); TEX. ELEC. CODE ANN. art. § 5.08(k) (Vernon Supp. 1982). See notes 111-12 *infra* for the text of these statutes.

65. See, e.g., *District of Columbia v. Murphy*, 314 U.S. 441, 451 n.2 (1941); *Gallagher*, 185 F.2d at 547 (court doubts that courts using the word "permanent" in describing the requisite intention actually required permanency); *Ramey*, 348 F. Supp. at 789 ("such expressions 'should not be taken literally' but rather capulate the many elements relevant to determining whether a person has made a place his home") (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 comment c (1971)); *Lloyd*, 296 N.C. at 448, 251 S.E.2d at 863; cf. *Bright*, 336 F. Supp. at 533-34 ("[a]dmittedly a student may not be able to state with certitude that he intends to permanently live in the university community, but such a declaration is not necessary to establish domicil"). See generally Annot., 44 A.L.R.3d 797 (1972).

66. See, e.g., *Ramey*, 348 F. Supp. at 788 (ours is an increasingly mobile society); accord *Worden*, 61 N.J. at 347-48, 294 A.2d at 244-45 ("[students] are no more mobile than the general population, which has admittedly become quite restless"); *Lloyd*, 296 N.C. at 444, 251 S.E.2d at 861. See also Reiff, *supra* note 7, at 458:

[Domicile law] developed in an era in which people infrequently moved from one location to another. . . . Almost everyone would return to [his] original home when the reason for the absence was over. The notion arose that one was legally identified with his place of birth and did not lose this domicile until he took affirmative steps to establish a new one. . . . [C]riteria, once useful in ascertaining . . . domicile, have become outmoded by changes in modern life

Id.; ABSENTEE REGISTRATION LAWS, *supra* note 16, at 25-26 (improved transportation has increased mobility for business, educational and leisure purposes; unfortunately the absentee voting systems have not yet adequately adjusted to this increase).

event, states may not constitutionally require more than that a person "intend to make the place his home for the time at least."⁶⁷

Although the requisite intent is often expressed as an absence of an intent to live elsewhere,⁶⁸ a "floating intention"—vague possibility of eventually going elsewhere or of returning to the former domicile⁶⁹—will not destroy present domicile.⁷⁰ However, a floating intention does not include an intention to return upon the occurrence of some event which can reasonably be anticipated.⁷¹ Thus, since college graduation is an event which can reasonably be anticipated, an intention to return to a former residence after graduation is not a floating intention and will prevent establishment of a domicile at college.⁷²

IV. Current Application of Domicile Law

When applied to college students, common law domicile principles often have been distorted so that a state or its subdivision can effectuate its policy of either encouraging or discouraging student voting at

67. *Ramey*, 348 F. Supp. at 788 ("[t]he search in each instance is for the state to which the person is most closely related at the time") (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971)). *Accord Shivelhood*, 336 F. Supp. at 1114; *Bright*, 336 F. Supp. at 534 ("it is sufficient if the intention is to remain for an indefinite period") (quoting 25 AM. JUR. 2D *Domicile* § 25 (1964)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971); Annot., 44 A.L.R.3d 797 (1972).

68. See note 57 *supra* and accompanying text.

69. See, e.g., *Gates v. Commissioner*, 199 F.2d 291, 294 (10th Cir. 1952); *Rosenberg*, 37 F.2d at 811; *Knight*, 291 F. 129, 133 (D. Mont. 1923) ("a mere present expectation or hope to return . . . wholly dependent upon future state of mind"); *McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276, 288, 115 S.W. 1028, 1033 (1909) (citing J. STORY, CONFLICT OF LAWS 50 (8th ed. 1872)).

70. See, e.g., *Gates*, 199 F.2d at 294; *Rosenberg*, 37 F.2d at 811; *Knight*, 291 F. at 133; *Hiatt v. Lee*, 48 Ariz. 320, 324, 61 P.2d 401, 402-03 (1936); *Croop v. Walton*, 199 Ind. 262, 270, 157 N.E. 275, 278 (1927); *Shenton*, 178 Md. at 532-33, 15 A.2d at 909; *Reynolds*, 177 N.C. at 422, 99 S.E. at 245; *Redrow v. Redrow*, 94 Ohio App. 38, 44, 114 N.E.2d 293, 296, 51 Ohio Ops. 266, 268 (Ct. App. 1952); *Gardner*, 118 Utah at 500, 222 P.2d at 1057.

71. See, e.g., *Gates*, 199 F.2d at 294; *Knight*, 291 F. at 133 (intent to return upon the "contemplated happening of a contingency" does not change domicile); *Croop*, 199 Ind. at 270, 157 N.E. at 278; *McDowell*, 135 Mo. App. at 288, 115 S.W. at 1031, 1033 (removal from jurisdiction to restore daughter's health with intention of returning upon her recovery did not change domicile); see also 25 AM. JUR. 2D *Domicile* § 27 (1966).

72. See *Ramey*, 348 F. Supp. at 788 (one cannot have a domicile in a place "if he has the intent to return to another that had been his home"); *accord Bright*, 336 F. Supp. at 533 (court implies that presumption that students who intend to return to their former homes do not acquire domicile at college does not violate equal protection).

college.⁷³ Some courts point to factors which tend to show that students are domiciled at college to justify allowing them to vote there.⁷⁴ For example, students spend nine to ten months of the year at college, are counted as residents of their college towns for census⁷⁵ and jury

73. *Compare* *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D.Pa. 1972) (students should be allowed to vote in the college community if they physically live there and intend it as their legal residence) [*and*] *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 350, 294 A.2d 233, 248 (1972) (Weintraub, J., concurring) (“[i]t is for him alone to say whether his voting interests at the residence he selects exceed his voting interests elsewhere”) *with* *Anderson v. Pifer*, 315 Ill. 164, 167, 146 N.E. 171, 173 (1925) (only students free from parental control, who regard college as their home and have no other home to return to in case of sickness may vote at college) [*and*] *Michaud v. Yeomans*, 115 N.J. Super. 200, 278 A.2d 537 (1971) (presumption against students’ acquisition of domicile at college). See note 92 *infra* for cases in accord with the presumption doctrine.

The *Sloane* court failed to mention the domicile principles that (1) one’s acts are to prevail over one’s declarations to the contrary and (2) abandonment of a domicile is a prerequisite to acquisition of a new one. 351 F. Supp. 1299; see notes 58 and 61 *supra* and accompanying text for a discussion of these principles. Whether the court had assumed these principles without discussing them or had deliberately overemphasized the importance of the students’ declarations of their intentions is uncertain; however, it has established unsettling precedent.

The *Worden* court seems to have disregarded the abandonment requirement when it declared all students eligible to vote at college, including those who “plan to return to their previous residences.” 61 N.J. at 348, 294 A.2d at 245.

Several commentators have argued that students should be given the right to vote in their college communities regardless of their actual legal residence. See, e.g., Note, *supra* note 49, at 45 (argues for a reevaluation of voting residence concepts because the federal census, and thus congressional apportionment, hinges residence on presence only); 24 SYRACUSE L. REV. 852, 860 (1973) (cites the incomplete extension of the voting franchise to absentees and the complicated absentee registration procedures to justify position that if students are not permitted to vote at college, they might be completely denied an opportunity to vote); see also Singer, *supra* note 7, at 707-08 (“students who have been in the university town long enough to meet the waiting period, and who seek to register there, should be registered unless the registration agency can show a good reason for not doing so”). This article was written before residency waiting periods in excess of 30 days were declared unconstitutional by the Supreme Court. See notes 51-52 *supra* and accompanying text. Query whether this author’s position would be unchanged had residency waiting periods then been 30 days rather than 6 months or one year.

One commentator has suggested that the burden of proof of domicile should be borne by the state because “it can best bear the brunt of a mistake.” See Note, *Student Voting and the Constitution: New York State Bona Fide Residency Requirements*, 72 COLUM. L. REV. 162, 181 (1972). But see note 43 *supra* and accompanying text (burden of proof presently on party alleging change of domicile).

74. See notes 75-79 *infra* and accompanying text.

75. See *Wilkins v. Bentley*, 385 Mich. 670, 689, 189 N.W.2d 423, 431 (1971); *Worden*, 61 N.J. at 347, 294 A.2d at 244.

The Constitution requires congressional apportionment on the basis of the census. See U.S. CONST. art. I, § 2 (“Representatives . . . shall be apportioned among the

several States . . . according to their respective Numbers The actual Enumeration shall be made . . . within every . . . Term of ten years . . . "); U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . ."). Apportionment requires a one-man, one-vote correlation. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See generally Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1. Therefore, it has been argued, student residency in college towns for census purposes, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 174, CURRENT POPULATION REPORTS 2 (1968), should entitle them to vote there. See Guido, *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. REV. 32, 52 (1972) (argues that excluding students from voting at colleges overweights votes of non-students living in those districts and may violate Court's equal apportionment decisions); Note, *supra* note 49, at 60; Note, *States Cannot Constitutionally Impose more Stringent Residency Requirements upon Students than upon any Other Potential Voter*, 60 GEO. L.J. 1115, 1123-24 1972 (emphasizes (1) equal protection argument, (2) students' interest in college community and (3) that one-man, one-vote principle is a compelling reason to allow students to vote at college but that standing requirements prevent them from raising it (citing *Baker v. Carr*, 369 U.S. at 204), but does not discuss the common law principle that abandonment of a domicile is a prerequisite to the establishment of a new one).

The Census Bureau, however, specifically disclaims any inference from its counts as to the domicile of persons. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 3 (100th ed. 1979).

In determining residence, the Bureau of the Census counts each person as an inhabitant of a usual place of residence (i.e., the place where one usually eats and sleeps). While this place is not necessarily a person's legal residence or voting residence, the use of these different bases of classification should produce the same results in the vast majority of cases.

Id. Moreover, in 1971 the Third Circuit determined that being counted by the census in a particular place is not conclusive proof of domicile there. See *Borough of Bethel Park v. Stans*, 449 F.2d 575, 579-80 (3d Cir. 1971); see also Reiff, *supra* note 7, at 467 n.89. In 1950 the Census Bureau decided to begin counting college students at their college addresses rather than at their parents' addresses. *Id.*

The change was made because many college students were not being included on their parents' census forms and the method used for fixing "other groups in society with two 'homes'" for census purposes was "the place in which they generally eat, sleep and work . . ." The change does not reflect any attempt to ascertain domicile. Census standards represent a "photographic picture" of the location of the population taken within a relatively narrow frame of time. Thus, while college students should be counted in this manner, no inference should be drawn as to their actual domicile.

Id. at 469 (citing *Borough of Bethel Park*, 449 F.2d at 578-80). Two years later, the Supreme Court concluded that even precise compliance with census figures will not produce exactly equally-weighted votes because those figures include persons ineligible to vote, such as "nonresident students." See *Gaffney v. Cummings*, 412 U.S. 735, 746-47 (1973):

[The Census] may not actually reflect the body of voters whose votes must be counted and weighed for the purpose of reapportionment, because "census persons" are not voters The proportion of the census population too young to vote or disqualified by alienage or non-residence varies substantially (Above enumerated) figures tell us nothing of the other

duty purposes,⁷⁶ are subject to local laws,⁷⁷ pay local gasoline and sales taxes⁷⁸ and, where renting rooms in private dwellings, indirectly pay property taxes through increased rents.⁷⁹

To the extent that courts have relied upon facts tending to show that students as a class are domiciled at college⁸⁰ in striking down state voting statutes as violative of students' equal protection rights,⁸¹ they may have improperly classified students as bona fide residents.⁸² Persons who maintain two or more residences also may exhibit the same indications of domiciliary status that students do.⁸³ However, coupled with these manifestations of intent to acquire a domicile must be corresponding manifestations of intent to abandon a former domicile or no change occurs.⁸⁴

Although courts and legal scholars agree that domicile principles must be complied with to ensure that only bona fide residents vote,⁸⁵ these principles often have not been applied equally to students and non-students.⁸⁶

ineligibles making up substantially equal census populations among election districts: aliens, non-resident military personnel, non-resident students, for example.

Id.; *cf.* *Ramey v. Rockefeller*, 348 F. Supp. 780, 791 n.7 (E.D.N.Y. 1972) (one-man, one-vote doctrine requires correspondence between the number of people, not voters, living in a district and the number of its representatives). Thus, a student's residence at college, although pertinent for census purposes, should not entitle him, without more, to vote there.

76. *See Wilkins*, 385 Mich. at 689, 189 N.W.2d at 431.

77. *See Sloane*, 351 F. Supp. at 1304; *Wilkins*, 385 Mich. at 689, 189 N.W.2d at 431; *Worden*, 61 N.J. at 347, 294 A.2d at 244.

78. *See Wilkins*, 385 Mich. at 689, 189 N.W.2d at 431-32; *Worden*, 61 N.J. at 347, 294 A.2d at 244.

79. *See Wilkins*, 385 Mich. at 689, 189 N.W.2d at 431-32 (property taxes are ultimately paid by student renters); *cf.* *Phoenix v. Kolodziejski*, 399 U.S. 204, 210 (1970) (significant part of property tax is paid by tenants).

80. *See* notes 75-79 *supra* and accompanying text.

81. *See, e.g., Sloane*, 351 F. Supp. at 1299, 1304; *Worden*, 61 N.J. at 348, 350, 294 A.2d at 245, 248 (discussed at note 73 *supra*); *see also* notes 75-79 *supra* and accompanying text.

82. *See* notes 83-84 *infra* and accompanying text.

83. A person owning two residences pays property, sales, and gasoline taxes in both places and is subject to the local laws of both places. However, he may only vote in one place—his domicile. Where he wishes to vote at the later-acquired residence, he must show that he has abandoned the original residence, at least to the extent that he now calls the later-acquired residence home. *See* notes 57-58 *supra* and accompanying text for a discussion of domicile abandonment.

84. *See* note 58 *supra* and accompanying text.

85. *See* note 7 *supra* and accompanying text.

86. *See* note 36 *supra*. *But see* discussion of *McCoy v. McLeroy*, 348 F. Supp. 1034 (M.D. Ga. 1972), note 55 *supra*.

Non-students have generally been permitted to register upon a minimal showing of intent to remain, coupled with a consistent declaration.⁸⁷ By contrast, students have been held to higher standards of proof of domicile.⁸⁸ To preserve the equal protection rights of students, all registration applicants must be held to the same standard of proof.⁸⁹ Two possible means to this end are evident: either raise the standard of proof as applied to non-students, or lower the standard of proof as applied to students. Although a greater administrative burden accompanies raising the standard of proof as applied to non-students, this solution protects the states' right of ensuring that only bona fide residents vote⁹⁰ and upholds the equal protection rights of students.⁹¹ An examination of the differences among various states' domicile laws applicable to students for the purpose of voting will help to illustrate the necessity for this remedy.

A. "No Gain or Loss" Provisions

One cause for the disparate treatment of students can be traced to the "no gain or loss" statutes of many states, similar to New York's:

87. See, e.g., *Sloane*, 351 F. Supp. at 1304 (non-students were registered after only showing an address within the district and an occupation); *Worden*, 61 N.J. at 348, 294 A.2d at 245 (non-students "were freely registered though their situations indicated that they were comparably short-term residents"); cf. *Whatley v. Clark*, 482 F.2d 1230, 1233 (5th Cir. 1973), (prospective non-student voters were not subject to presumption of nonresidency); *Wilkins*, 385 Mich. at 686, 189 N.W.2d at 431 (court noted that disinterested non-students could vote while many interested students could not); see also note 32 *supra* and accompanying text.

88. See note 55-56 *supra* and accompanying text.

89. The student who has abandoned his pre-college domicile in favor of his college residence is domiciled at college. See note 58 *supra* and accompanying text. Although this type of person may arguably be among the minority of college students, holding him to a higher standard of proof of domicile than is required of non-students is repugnant to the fourteenth amendment's equal protection clause. See cases cited in note 95 *infra*.

Constitutionally, all students should be presumed to be as eligible to vote as college-area residents as are non-students. Students who allege a change of domicile must show it by their acts, see note 60 *supra* and accompanying text, which are given greater weight than their statements, see note 61 *supra* and accompanying text. Where the facts do not show an abandonment of the pre-college domicile, the student should not be allowed to vote at college. Where the facts do show such an abandonment, the equal protection clause requires that he be allowed to vote at college. See note 156 *infra* and accompanying text for suggested scope of and procedure for questioning voting applicants.

90. To lower the standards of proof as applied to students increases the risk that non-domiciliaries will vote. See note 87 *supra* and accompanying text.

91. If all applicants are held to the same standard of proof, no claim of equal protection can be seriously entertained.

“[f]or the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while a student of any institution of learning.”⁹² These provisions seem to raise a presumption against student domiciliary status in the college community.⁹³ However, any presumption against a student’s capacity to establish a domicile at college is not factually justified⁹⁴ and therefore violates equal protection.⁹⁵

The New York State Court of Appeals, in *Palla v. Suffolk County Board of Elections*,⁹⁶ declared that the state’s “no gain or loss” provi-

92. N.Y. ELEC. LAW § 5-104(1) (McKinney 1978); see note 2 *supra* for citations of remaining 11 states with “no gain or loss” provisions.

New York’s “no gain or loss” provision was first interpreted in *Silvey v. Lindsay*, 107 N.Y. 55, 59-61, 13 N.E. 444, 445-46 (1887). The court held that the provision disqualifies no one from voting, but “simply eliminates from those circumstances [of domicile] the fact of presence in the institution named” *Id.* at 61, 13 N.E. at 446. Thus, a student desiring to vote was required to prove domicile by means other than his presence. *Id.*

The *Silvey* court’s language was interpreted as having established a rebuttable presumption against bona fide student residency at college. See Note, *supra* note 73, at 163-64. Later New York cases adhered to that presumption. See, e.g., *In re Goodman*, 146 N.Y. 284, 287, 40 N.E. 769, 770 (1895) (“the facts to establish such a change [of domicile] . . . should be very clear and convincing to overcome the natural presumption” that the student’s domicile has not changed); *In re Blankford*, 241 N.Y. 180, 149 N.E. 416 (1925); *In re Garvey*, 147 N.Y. 117, 41 N.E. 439 (1895); *Hoffman v. Bachman*, 187 Misc. 799, 804, 65 N.Y.S.2d 107, 111 (Sup. Ct. Onondaga County 1946) (the “established law over the years” created a natural but rebuttable presumption that a person who has left home to attend college is on a “temporary sojourn as a student”).

93. *Wilkins*, 385 Mich. 670, 189 N.W.2d 423. *But see Ramey*, 348 F. Supp. at 786; *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 48, 286 N.E.2d 247, 252, 334 N.Y.S.2d 860, 867 (1972) (discussed in note 106 *infra*).

94. See note 30 *supra* and accompanying text.

95. See *Whatley*, 482 F.2d at 1234; *Auerbach v. Kinley*, 499 F. Supp. 1329, 1342 (N.D.N.Y. 1980); *United States v. Texas*, 344 F. Supp. 1245, 1257, 1261 (S.D. Tex. 1978), *aff’d mem.*, 439 U.S. 1105 (1979); *Sloane*, 351 F. Supp. at 1304-05; *Newberger v. Peterson*, 344 F. Supp. 559, 563 (D.N.H. 1972) (state’s “intention to remain indefinitely” test violates equal protection); *Bright v. Baesler*, 336 F. Supp. 527, 534 (E.D. Ky. 1971); *Wilkins*, 385 Mich. at 694, 189 N.W.2d at 434; *Worden*, 61 N.J. at 348, 294 A.2d at 245; *accord Shivelhood v. Davis*, 336 F. Supp. 1111, 1115 (D. Vt. 1971) (students must not be required to answer a supplemental questionnaire unless all others are also required to do so; it must not be designed only to apply to students); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971) (presumption that students are domiciled at parents’ homes violates twenty-sixth amendment); *Paulson v. Forest City Community School Bd.*, 238 N.W.2d 344, 350 (Iowa 1976) (students establish domicile in the same manner as non-students). *But see Ramey*, 348 F. Supp. at 786; *Lloyd v. Babb*, 296 N.C. 416, 442-43, 251 S.E.2d 843, 860-61 (1979); *Palla*, 31 N.Y.2d at 48-49, 286 N.E.2d at 252-53, 334 N.Y.S.2d at 868 (“no gain or loss” provision “raises no presumption for or against student residency” even though students may constitutionally be “subject to a unique line of inquiry”).

96. 31 N.Y.2d 36, 286 N.E.2d 247, 334 N.Y.S.2d 860 (1972).

sion "raises no presumption for or against residency."⁹⁷ *Palla* suggests that this statute means that presence *alone* at college is insufficient to establish domicile there.⁹⁸ However, the common law domicile principles,⁹⁹ of which the *Palla* court was no doubt aware, clearly require an intent to make the asserted domicile one's home.¹⁰⁰ Thus, these principles would obviate the need for a "no gain or loss" provision as interpreted by *Palla*.¹⁰¹

The precise wording of the "no gain or loss" provisions is significant. While New York officials can argue that that state's provision merely requires more than presence at college to establish domicile,¹⁰² the wording of the similar provisions of two other states does not support such an argument.¹⁰³ Typical is Oregon's constitution: "[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while a student of any Seminary of Learning."¹⁰⁴ The statute makes no mention of presence, thereby precluding the argument that it means simply that presence alone is not sufficient to establish domicile.

Six of the states with "no gain or loss" provisions have included "solely" before "by reason of his presence or absence."¹⁰⁵ This addition to the "no gain or loss" provisions of the other states would clarify the meaning of those provisions and would better support the judicial interpretation that the provision is neutral.¹⁰⁶ Further, if the legisla-

97. *Id.* at 48, 286 N.E.2d at 252-53, 334 N.Y.S.2d at 868.

98. *Id.* at 47-48, 286 N.E.2d at 252, 334 N.Y.S.2d at 867 ("physical presence, without more, . . . is . . . evidence merely of an intention to reside temporarily [for the purpose of attending college]") (citing New York's "no gain or loss" provision).

99. See notes 38-42 & 57-58 *supra* and accompanying text.

100. See notes 57-58 *supra* and accompanying text.

101. This is true if the asserted intentions of students are to be given as much credence as those of non-students.

102. In fact the *Palla* court goes further by stating that "facts supportive of . . . a [claimed] change must be wholly independent of . . . presence at . . . college" 31 N.Y.2d at 48, 286 N.E.2d at 252, 334 N.Y.S.2d at 868.

103. See note 104 *infra* and accompanying text; ALA. CODE § 17-3-6 (1970).

104. OR. CONST. art. II, § 4 (1981). This creates a rebuttable presumption against student residency at college. *Zimmerman v. Zimmerman*, 175 Or. 585, 603, 155 P.2d 293, 300 (1945) ("no gain or loss" provision listing military personnel and students interpreted as it applies to military personnel).

105. See note 2 *supra*.

106. Federal and state courts in New York have recently asserted that the provision is neutral. See *Ramey*, 348 F. Supp. at 786 ("[t]he words say to us only that presence . . . as a student . . . is not *alone* sufficient to supply, nor is absence . . . *alone* sufficient to lose, the required mental element"); *Palla*, 31 N.Y.2d at 48, 286 N.E.2d at 252, 334 N.Y.S.2d at 867 ("the statute is entirely neutral and has always been construed as such"); *accord* *Whittington v. Board of Elections*, 320 F. Supp.

tures of the states with "no gain or loss" provisions really intend that student status have no bearing on the domicile issue, they should amend those provisions to read as that of Wisconsin: "[s]tudent status shall not be a consideration in determining residence for the purpose of establishing voter eligibility,"¹⁰⁷ or that of California: "[t]his ['no gain or loss' provision] shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality where he or she domiciles while attending that institution, when in fact the student has abandoned his or her former domicile."¹⁰⁸

B. Other Statutes Restricting Student Voting

Although the "no gain or loss" provisions do not completely bar students from establishing a voting residence at college,¹⁰⁹ they are not the only statutory hurdle these students must overcome.¹¹⁰ For example, a student wishing to establish a voting residence in an Indiana college town must intend to make that place his "permanent" home.¹¹¹ Texas has a similar statute precluding a student from acquiring a domicile at college "unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student."¹¹² Although this statute was held violative of equal protection,¹¹³ a local Texas election official continued to require only students to complete a questionnaire.¹¹⁴ Based upon this and other

889, 891, 893 (N.D.N.Y. 1970) ("no gain or loss" statute is neutral). But see note 92 *supra* for a discussion of the rebuttable presumption against student residency established by earlier New York courts' interpretations of the "no gain or loss" provision.

107. WIS. STAT. § 6.10(12) (1982 Supp.) See also 61 Op. Wis. Att'y Gen. 256 (1972).

108. CAL. ELEC. CODE ANN. § 206 (West 1977); cf. COLO. REV. STAT. § 1-2-104 (1973).

109. See note 2 *supra*.

110. See notes 111-12 *infra* and accompanying text.

111. See IND. CODE ANN. § 3-1-21-3(1) (Burns 1982) ("[a] person shall not be considered to have gained a residence in any county into which he has come for . . . educational . . . purposes merely without the intention of making such county his permanent home").

112. See TEX. ELEC. CODE ANN. art. § 5.08(k) (Vernon Supp. 1982) ("[a] student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student").

113. See *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973).

114. See *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (election official permanently enjoined from using student questionnaire), *aff'd mem.*, 439 U.S. 1105 (1979). The state's chief election officer "unequivocally" stated that the statute struck down "created a 'special classification' that served no purpose other than to discourage students from voting." *Whatley*, 482 F.2d at 1234.

evidence¹¹⁵ that the official continued to apply a presumption of student non-residency, the Supreme Court recently affirmed an order permanently enjoining him from using the questionnaire.¹¹⁶

C. Effect on the Student

While a student may possess the requisite intent to effect a change of domicile to the college community "for the time at least,"¹¹⁷ he may also possess such an intent when he intends to move from there at a definite time.¹¹⁸ However, since acquisition of a domicile is contingent upon abandonment of a former domicile,¹¹⁹ domicile common law arguably precludes a student who intends to return to his previous residence upon graduation from acquiring a domicile at college, under the presumption that he has not completely abandoned that former residence.¹²⁰

V. Meaningful Enfranchisement of College Students Requires that Uniform National Domicile Standards Be Applied in Each State

The domicile laws of four states provide substantially that if a person "moves into another state with the intention of making it his residence he loses his residence in this state."¹²¹ In two of these states, this result occurs even though the person intends to return at some future time.¹²²

115. *United States v. Texas*, 445 F. Supp. at 1259 (voting registrar refused to register students who previously lived outside of county and had not secured a post-college job in the county).

116. *Id.* at 1261.

117. See note 67 *supra* and accompanying text.

118. See, e.g., *Ramey*, 348 F. Supp. at 788; *Newberger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972); *Paulson*, 238 N.W.2d at 349 (a person may be considered domiciled in a place even if he intends to remain there "for a definite . . . length of time") (upholding IOWA CODE ANN. § 47.4(4) (West 1973)); *Worden*, 61 N.J. at 348, 294 A.2d at 245 (court ordered election officials to register those students who desired to vote at college, including "those who plan to return to their previous residences"); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 comment b (1971). *But see Palla*, 31 N.Y.2d at 50, 286 N.E.2d at 254, 334 N.Y.S.2d at 870 (restricting right to vote to students who intend New York as their "permanent home").

119. See note 58 *supra* and accompanying text.

120. See notes 71-72 *supra* and accompanying text.

121. See MONT. CODE ANN. § 13-1-112(6) (1981); accord MINN. STAT. ANN. § 200.031(d) (West Supp. 1982) ("[i]f an individual goes into another state or precinct with the intention of making it his home, or files an affidavit of residency there for election purposes, he loses his residence in his former precinct"); OHIO REV. CODE ANN. § 3503.02(E) (Page 1972); PA. STAT. ANN. tit. 25, § 2814(e) (Purdon 1963).

122. OHIO REV. CODE ANN. § 3503.02(F) (Page 1972); accord MINN. STAT. ANN. § 200.031(e) (West Supp. 1982).

Persons from these four states lose their domicile, and thus their voting right, upon removal from the state with an intention of residing in another state. However, if they are students, their move to a state with a "no gain or loss" provision is not necessarily sufficient to establish a voting residence there.¹²³ Such students may be effectively barred from voting anywhere.¹²⁴ Additionally, students faced with this dilemma may decide that challenging the law is not worth the effort.¹²⁵ These obstacles are clearly contrary to the congressional intent to enfranchise students.¹²⁶

Under Michigan law, students domiciled in that state become disenfranchised if they leave a domicile in Michigan to attend an out-of-state college. A person's domicile for Michigan voting purposes is at "that place at which such person resides the greater part of the time"¹²⁷ This definition disenfranchises students originally

123. See notes 92-102 *supra* and accompanying text.

124. The danger of not being permitted to vote may be even greater when the vote is to be cast by absentee ballot. See notes 133-44 *infra* and accompanying text for a discussion of absentee voting laws and procedures that restrict and impede absentee voting by students.

125. See S. REP. NO. 26, 92nd Cong., 1st Sess. 12 (1971) (discussed at note 126 *infra*); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 578, 488 P.2d 1, 9, 96 Cal. Rptr. 697, 704-05 (1971) (discussed at note 147 *infra*); ABSENTEE REGISTRATION LAW, *supra* note 16, at 50 (restrictive registration systems probably reduce "the number of qualified absentees who bother to register").

126. See notes 10, 29 & 49 *supra* and accompanying text.

The Voting Rights Act of 1970 gave 18-year-olds the right to vote in all federal, state and local elections. The Supreme Court limited the Act to federal elections, ruling that federal legislation regulating the voting age in state and local elections violated states' tenth amendment rights. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (5-4 decision). This decision prompted the enactment of the twenty-sixth amendment.

In considering the unsatisfactory result of dual-age voting in those states whose laws did not permit 18-year-olds to vote, the Senate report on the twenty-sixth amendment stated:

[F]orcing young voters to undertake special burdens—obtaining absentee ballots, or travelling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.

S. REP. NO. 26, 92d Cong., 1st Sess. 12 (1971).

127. In Michigan, residence is defined as:

[T]hat place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging. If a person have more than 1 residence . . . that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act.

MICH. COMP. LAWS § 168.11(a) (West Supp. 1982-1983).

domiciled in Michigan who consider themselves domiciliaries of that state while attending college in a state that will not allow them to vote due to their "nonresident" status there.¹²⁸ It also disregards the common law principle that a domicile may not be acquired until a former domicile has been abandoned.¹²⁹

These examples indicate that conflicting state standards might disenfranchise students.¹³⁰ To avoid such a result, uniform standards for determining voting residence must be applied in all states.¹³¹ This proposal will be discussed later in this Comment.¹³²

VI. Absentee Ballot Voting Laws

The absentee voting laws and procedures of many states present serious obstacles¹³³ to the full realization of the congressional intent¹³⁴ to enfranchise college students. For example, in Delaware, Illinois, New Jersey, and Oklahoma absentee registration is not authorized for students.¹³⁵ Two absentee voting studies have found that this requirement presents a formidable and unnecessary obstacle to voting for a

128. See Reiff, *supra* note 7, at 464 n.74.

129. Merely by residing the greater part of the time at a later-acquired residence does not necessarily mean that one has abandoned the earlier-acquired residence. See note 58 *supra* and accompanying text for a discussion of the abandonment requirement.

130. See notes 121-29 *supra* for examples of how conflicting state domicile laws might disenfranchise students.

131. Whether the federal government has authority to legislate uniform standards for determining voting residence when conflicting state standards make disenfranchisement of voters possible is an open question. See notes 158-61 *infra* and accompanying text for a discussion of state and federal authority in this area.

132. See notes 158-61 *infra* and accompanying text.

133. See notes 135-38, 140 & 143-44 *infra* and accompanying text. See also ABSENTEE REGISTRATION LAWS, *supra* note 16, at 1, 31-39 (absentee registration and absentee voting procedures of some states result in excluding a large number of eligible voters from voting; efficient absentee voting administration is impaired by inadequate and outdated equipment and procedures and inadequate funding and staffing). The study recommends (1) centralizing state administration of registration and voting, (2) including a distinct staff to handle absentee voting and (3) installing a computer system with terminals in each election district. *Id.* at 57. It also calls for comprehensive federal absentee standards. *Id.* at 64-65. Accord NATIONAL MUNICIPAL LEAGUE, MODEL CIVILIAN ABSENTEE VOTING LAW 10 (4th Tentative Draft 1959) [hereinafter cited as MODEL VOTING LAW] (state-centralized handling of absentee ballots would reduce fraud possibilities and increase efficiency).

134. See notes 10 & 29 *supra* and accompanying text.

135. See DEL. CODE ANN. tit 15, § 1901 (1981); ILL. ANN. STAT. ch. 46, § 4-10 (Smith-Hurd Supp. 1982) (in counties of less than 500,000 pop.); *id.* § 5-9 (Smith-Hurd Supp. 1982) (in counties of more than 500,000 pop.); N.J. STAT. ANN. § 19:31-6 (West 1964); OKLA. STAT. ANN. tit. 26, § 4-111 (West 1982).

student who moves to a college far from his home before registering.¹³⁶ In Missouri, absentee voting is not authorized in elections wherein only township officers are elected¹³⁷ and in North Dakota absentee voting is not permitted in special elections.¹³⁸

Although most states do provide for absentee voting in general, primary, municipal, district, and special elections,¹³⁹ administrative procedures that students must follow¹⁴⁰ might dissuade them from voting.¹⁴¹ Moreover, persuading county election boards to cooperate

136. See ABSENTEE REGISTRATION LAWS, *supra* note 16, at 55 (recommending voters' option of registration by mail); MODEL VOTING LAW, *supra* note 133, at 6 (recommending voters' option of registration by mail with verifiable proof required for initial registration). "An absentee law, no matter how broad, that does not permit mailed registration, may not function properly." *Id.*

137. See 96 Op. Mo. Att'y Gen. (1953).

138. See *State ex rel. Lanier v. Hall*, 74 N.D. 426, 429, 434, 23 N.W.2d 44, 46, 49 (1946).

139. See, e.g., *People ex rel. Seegren v. Sackett*, 351 Ill. 363, 377, 184 N.E. 646, 653 (1933) (park district elections); *Crowe v. Emmert*, 305 S.W.2d 272 (Ky. 1957) (primary elections); *Binetti v. Swenson*, 3 N.J. Super. 227, 229, 66 A.2d 42, 43 (1949) (military service absentees in special elections); *Phillips v. Slaughter*, 209 N.C. 543, 183 S.E. 897 (1936) (municipal elections); *Woods v. State*, 133 Tex. 110, 126 S.W.2d 4 (1939) (municipal elections). See generally 26 AM. JUR. 2D *Elections* § 246 (1966) (explicitly stating this as majority rule). *But see* Annot., 97 A.L.R.2d 257, §§ 10-14 (1964) ("some questions have been raised" about applicability of absentee voting laws to elections other than general and primary).

140. See, e.g., TENN. CODE ANN. § 2-6-102(3) (1979) (student must supply proof of full-time enrollment at college, signed by the chief administrative officer).

Some states require that the absentee voter's affidavit on his ballot be notarized or certified. See, e.g., IOWA CODE ANN. § 53.2 (West Supp. 1982); IND. STAT. ANN. §§ 3-1-22-6, -7 (1982); see also ABSENTEE REGISTRATION LAWS, *supra* note 16, at 90. Once an absentee voter has been registered, however, the utility of requiring that his ballot be notarized is far outweighed by the inconvenience to him. See *id.* at 90. A comparison of his ballot's signature with that on his registration form better serves to prevent fraudulent voting. *Id.* at 68; MODEL VOTING LAW, *supra* note 133, at 8, 13; cf. CAL. ELEC. CODE §§ 1007, 1015 (West 1977 & Supp. 1982) (once person is registered, a signature comparison is deemed sufficient when he applies for an absentee ballot and when he marks his ballot).

New York requires that applications for absentee ballots be on forms supplied by the Board of Elections. See N.Y. ELEC. LAW § 8-44(2)(a) (McKinney Supp. 1982-1983). There is no legitimate reason why applications for absentee ballots can not be acceptable in any written form if sufficient information is contained therein to permit verification of registration. See ABSENTEE REGISTRATION LAWS, *supra* note 16, at 66 (recommending such a change).

141. See *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 578, 488 P.2d 1, 9, 96 Cal. Rptr. 697, 704-05 (1971):

Although our statutes provide for absentee registration as well as absentee voting (Elec. Code, § 213), it is likely that individuals forced to vote in elections they care and know little about will be inclined not to register or vote at all Forcing young voters to register at fictional residences would therefore frustrate the legislative intent "to promote and encourage voter registrations"

with requests by student voter registration organizations¹⁴² for ample amounts of registration forms can be a difficult task.¹⁴³

Permeating all of the encumbrances and restrictions on the full enfranchisement of students is the generally accepted principle that absentee voting is a privilege and not a right.¹⁴⁴ It appears that if a person wants to vote in his college community, he must be prepared to bear possibly onerous administrative burdens or be prepared to travel home to exercise that right.¹⁴⁵ The principle that absentee voting is a

Id.; S. REP. No. 126, 92d Cong., 1st Sess. (1971); ABSENTEE REGISTRATION LAWS, *supra* note 16, at 50 (restrictive registration system probably reduce "the number of qualified absentees who bother to register"); *accord* United States v. Texas, 445 F. Supp. 1245, 1254 (S.D. Tex. 1978), *aff'd mem.*, 439 U.S. 1105 (1979) (quoting S. REP. No. 126, 92d Cong., 1st Sess. (1971)).

142. Many colleges participate in mass voter registration drives. Students must then procure absentee ballots through individual application. *See* note 143 *infra* and accompanying text.

143. For example, the New York Student Voter Registration Drive faced obstacles such as non-compliance or partial and tardy compliance of many of the larger counties' election boards with the request of the State Election Board in 1976 that 100,000 mail registration forms be delivered to a central location for distribution by the group to each of the almost 200 campuses in the state.

Typical responses of county boards were that forms were too expensive to send out in large quantities, that all of the students who were interested in voting had already registered, or that the board had already given out an adequate number of forms.

Due to the problems in receiving an adequate number of forms and an absentee ballot procedure that is unfairly complicated, a large number of students who attempted to exercise their legal right to vote were disenfranchised. During late September and all of October, the Drive received over 500 individual complaints from students who either had not been registered or had not been allowed to cast an absentee ballot. It should be noted that this figure does not reflect the number of people who were so frustrated by the system that they thought a complaint would be futile.

D. Hopkins, Testimony before the N.Y. State Assembly Select Committee on Election Law (Nov. 22, 1976) (as reprinted by the New York Student Voter Registration Drive) (on file at Fordham Law School Library).

144. *See, e.g.*, Anderson v. Canvassing and Election Bd. of Gadsden County, 399 So. 2d 1021, 1023 (Fla. Ct. App. 1981); Hallahan v. Mittlebeeler, 373 S.W.2d 726, 727 (Ky. Ct. App. 1963); Wichelmann v. City of Glencoe, 200 Minn. 62, 66, 273 N.W. 638, 640 (1937); State *ex rel.* Bushmeyer v. Cahill, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978); State *ex rel.* Van Horn v. Lyon, 119 Mont. 212, 217-18, 173 P.2d 891, 893 (1946); McMaster v. Wilkinson, 145 Neb. 39, 47, 15 N.W.2d 348, 353 (1944); DeFlesco v. Mercer County Bd. of Elections, 43 N.J. Super. 492, 495, 129 A.2d 38, 40 (1957); Colaneri v. McNab, 90 Misc. 2d 742, 744, 395 N.Y.S.2d 980, 983 (Sup. Ct. Suffolk County 1975); Portmann v. Board of Elections, 60 Ohio App. 54, 59, 19 N.E.2d 531, 534, 13 Ohio Ops. 420, 422 (Ct. App. 1938); Brown v. Dakota Pub. Serv. Co., 68 S.D. 169, 174, 299 N.W. 569, 573 (1941); Fugate v. Buffalo, 348 P.2d 76, 83-84 (Wyo. 1960). *See generally* Annot., 97 A.L.R.2d 264, § 3 (1964); 26 AM. JUR. 2D Elections § 243 (1966).

145. Administrative negligence causing delay in supplying absentee ballots may result in disenfranchisement of absentees. For example, in *Colanari v. McNab*, a

privilege and not a right frustrates the congressional intent to enfranchise students.¹⁴⁶

Although absentee ballot systems may not provide for voting in all elections and administrative procedures may tend to discourage absentee voting at all, election officials are not justified in allowing all students to vote as domiciliaries of the college community. A state's *duty* to ensure that all voters of the relevant district are bona fide residents may not be compromised.¹⁴⁷ Therefore, as to students who are not bona fide residents of their college communities, the absentee voting franchise should be extended to all elections and the system should be administered more efficiently.¹⁴⁸

VII. Recommended Solution

A. Clarify the Fundamental Principles of Law

All legislation and governmental publications pertaining to college student voting rights must be carefully drafted to state clearly the precise legal connotations of the words "domicile" and "residence" in the voting context.¹⁴⁹ Such a clarification is essential to inform students properly of their voting rights.¹⁵⁰

A recent proposal¹⁵¹ that states print an "Explanation to Registrants" in a pamphlet for distribution to first-time registrants should

printing error and judicial restraining orders postponing mailing of ballots to accommodate independent nominating petitions caused delay resulting in absentee voters receiving ballots only four and five days before elections and the return of 150 marked ballots (58 of which could have tied the election) after the deadline. The court refused to void the election, declaring that, as matter of law, ballots were not mailed late because the Board of elections substantially complied with the law requiring mailing of ballots "as soon as practicable." 90 Misc. 2d 742, 395 N.Y.S.2d 980 (Sup. Ct. Suffolk County 1975). In *Portmann v. Board of Elections*, the court found the wording of a referendum misleading and ordered it resubmitted to voters. However, the court stated, absentee voters who had voted in the first submission but were unable to vote in the second may be disenfranchised because "[t]hey must take the situation as they find it. If they have absented themselves . . . at the time the issue is presented properly, they have [done so] at their own risk." 60 Ohio App. 54, 60, 19 N.E.2d 531, 534, 13 Ohio Ops. 420, 422 (Ct. App. 1938).

146. See notes 10 & 29 *supra* and accompanying text for discussions of the congressional intent to enfranchise students.

147. See note 7 *supra* and accompanying text. *But see Jolicoeur*, 5 Cal. 3d at 578, 488 P.2d at 9, 96 Cal. Rptr. at 704-05 (suggesting that forcing students to vote by absentee ballot will discourage them from voting at all, thereby frustrating congressional intent to encourage voting) (dictum).

148. See note 172 *infra* for a recommended solution.

149. See notes 38-42, 57, 58 & 64-71 *supra* and accompanying text for an explanation of domicile and residence.

150. See notes 10 & 29 *supra* for a discussion of the congressional intent to encourage student voting.

151. See Reiff, *supra* note 7, at 474-79.

be implemented.¹⁵² This pamphlet would contain (1) an explanation of the requirements for and consequences of changing voting residence and (2) examples of persons, including college students, eligible and ineligible to vote in a given locale.¹⁵³ The literature would be distributed on college campuses in September of each year so that sufficient time is allowed for processing requests for registration applications.¹⁵⁴

In addition, election officials must be better educated concerning domicile law. Since they are required to apply domicile principles in determining voter eligibility,¹⁵⁵ election officials must be better informed on what it takes to be eligible to vote in a certain place and how to consistently and equitably apply these rules. Procedures and presumptions used in determining domicile should be equally applied to students and non-students.¹⁵⁶

B. Create Uniform Voter Residency Standards

To avoid the possibility of disenfranchising students due to conflicting state laws,¹⁵⁷ uniform standards for determining voting residence

152. *Id.* The pamphlet would be useful to non-students as well as to students.

153. *Id.* Such a pamphlet is currently in use in Delaware and has been well received. *Id.* at 475 n.129.

154. Distribution early in the fall semester is especially important in the case of absentee voting because registration is a prerequisite to the issuance of an absentee ballot in all but three states. *See* ABSENTEE REGISTRATION LAWS, *supra* note 16, at 42-48 (North Dakota does not require registration; Ohio requires registration only in counties of over 16,000; Wisconsin requires registration only in municipalities of over 5,000 or by local option for others).

155. *See* note 4 *supra* and accompanying text.

156. Initially, only routine questions must be allowed, two of the first being "Do you intend that this be your only home for the time at least?" and "How long have you lived here?" The minimum duration not justifying suspicion is a matter of local discretion. This period may not be unreasonably long. *See* *Dunn v. Blumstein*, 405 U.S. 330 (1971) (Court suggests that three month period may be unreasonable). The same standards must be applied to all voters. If an applicant's answer justifies suspicion, other questions reasonably calculated to ascertain domicile should be asked until the registrar has a reasonable basis for concluding whether or not the applicant is eligible to register. *Cf. Bright*, 336 F. Supp. at 533 ("the questions should reasonably relate to proof of domicile"); *United States v. Texas*, 445 F. Supp. at 1255 (quoting *Bright*).

The facts that a student (1) lives in a college dorm and (2) is supported by parents are not enough to preclude a finding of domicile at college, *Shivelhood*, 336 F. Supp. at 1115, but these facts may be considered with other relevant evidence. *Id.* Lack of an in-state driver's license or car registration is irrelevant unless the applicant has a license or registration in another state. *Id.*; *accord* *United States v. Texas*, 445 F. Supp. at 1256 (quoting *Shivelhood*).

157. *See* notes 121-29 *supra* and accompanying text for a discussion of how conflicting state laws might result in disenfranchisement of student voters.

must be applied in all states. Federal voting legislation is preferable to state legislation because a uniform law would eliminate the possibility of such conflicts.

An unresolved constitutional question is the extent of federal authority to legislate with respect to state and local elections.¹⁵⁸ States possess broad discretion in the control of state electoral procedures.¹⁵⁹ However, state power to regulate elections is subject to the fourteenth amendment's equal protection clause.¹⁶⁰ Under this clause courts have struck down unequal treatment of students and non-students in voting rights cases.¹⁶¹ It is possible that these cases and prior Supreme Court cases that have limited, through the fourteenth amendment, state power over state elections¹⁶² have significantly circumscribed state

158. The scope of the federal government's authority under the fourteenth amendment to legislate with respect to elections is uncertain. See *Oregon v. Mitchell*, 400 U.S. at 154 (Harlan, J., concurring in part and dissenting in part) (fourteenth amendment "does not authorize Congress to set voter qualifications, in either state or federal elections"); *id.* at 278 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part) (framers of fourteenth amendment intended it to be broadly construed; it is "too vague and imprecise to provide us with sure guidance"); *id.* at 135 (Black, J.) (fourteenth amendment does not give Congress authority to regulate state elections).

See note 162 *infra* for examples of how the Court has circumscribed state authority over state elections. See also text accompanying note 163 *infra*.

159. See, e.g., *Oregon v. Mitchell*, 400 U.S. at 124-25 (opinion of Black, J.) (Constitution's framers intended states "to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections"); *id.* at 201 (opinion of Harlan, J.) (fourteenth amendment did not limit state power over voter qualifications); *Carrington*, 380 U.S. at 91 ("States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised") (quoting *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50 (1959)). See also U.S. CONST. amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

160. See, e.g., *Evans v. Cornman*, 398 U.S. at 422 ("[o]nce the franchise is granted . . . lines may not be drawn which are inconsistent with the Equal Protection Clause") (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. at 655); *Kramer v. Union Free School Dist.*, 395 U.S. at 629 (same); *Carrington*, 380 U.S. at 92-94.

161. See notes 30 & 55 *supra* and accompanying text.

162. See *Kolodziejski*, 399 U.S. at 208-09 (state had no compelling interest in restricting right to vote for or against approval of general obligation bonds to real property taxpayers); *Evans*, 398 U.S. at 422, 426 (state had no compelling interest in preventing residents of federal enclave located within state borders from voting in state elections); *Cipriano*, 395 U.S. at 704, 706 (state had no compelling interest in restricting right to vote for or against approval of municipal revenue bonds to real property taxpayers); *Kramer*, 395 U.S. at 627-28 (state had no compelling interest in restricting right to vote in school district elections to real property taxpayers and parents of schoolchildren); *Carrington*, 380 U.S. at 96 (state's absolute denial of right to vote as domiciliaries to military personnel violated equal protection).

power over the electoral process to the point where a reevaluation of the scope of federal and state authority is compelled.¹⁶³ Hence, Congress arguably has the power, under the fourteenth amendment, to enact uniform voting residency standards if states' domicile and election laws conflict and result in disenfranchisement of students. Additional support can be found in the enforcement clause of the twenty-sixth amendment.¹⁶⁴ However, these arguments are tenuous due to the broad discretion traditionally accorded states, under the tenth amendment,¹⁶⁵ in the control of the electoral process.¹⁶⁶

C. Formulate a Uniform Absentee Voting Law

Since not all students are eligible to vote as residents at college,¹⁶⁷ absentee voting laws should be revised to ensure absentee voting rights. Federal absentee voting legislation is preferable to state legislation because a uniform law would eliminate the possibility that absentee voters might be disenfranchised due to conflicting states' laws.

The constitutionality of federal legislation, under the fourteenth amendment, regulating absentee voting in state and local elections presents the same uncertainty as in the case of uniform voting residency standards.¹⁶⁸ However, Congress arguably has the authority to pass uniform absentee voting laws under the twenty-sixth amendment if the current state absentee laws and procedures impose restrictions and burdens on student voting that rise to the level of an abridg-

163. See note 162 *supra* for descriptions of how *Kramer, Cipriano, Evans, Kolodziejski* and *Carrington* have circumscribed states' power over state and local elections. See also Note, *supra* note 73, at 170 (author suggests this possibility); cf. Gardner & Ebers, *Federal Protections of Individual Rights in Local Elections*, 13 J. MAR. L. REV. 503, 533 (1979-80) (federal court review of state electoral processes has decreased state power in this area).

164. See U.S. CONST. amend XXVI, § 2 ("[t]he Congress shall have the power to enforce this act by appropriate legislation"). The twenty-sixth amendment is probably more solid ground for federal authority in this area because, unlike the fourteenth amendment, this amendment speaks specifically of voting, and its legislative history indicates that encouraging college-student voting was a major reason for its enactment. See notes 10 & 29 *supra* for discussions of the congressional intent to encourage student voting.

165. See note 159 *supra* for the text of the tenth amendment.

166. See note 159 *supra* for a discussion of state authority over elections; see note 158 *supra* and accompanying text for a discussion of the uncertainty of federal authority in this area.

167. Only those students who have abandoned their pre-college domiciles are eligible to vote at college. See notes 57-58 *supra* and accompanying text.

168. See notes 158-63 *supra* and accompanying text for a discussion of federal and state authority in the area of voting residency standards.

ment.¹⁶⁹ If Congress has authority to legislate uniform voting residency standards or uniform absentee voting laws, the supremacy clause¹⁷⁰ requires that conflicting state laws must fall.¹⁷¹

D. Undertake a Joint Federal-State Study on Absentee Voting Law

Whether or not Congress has authority to legislate in these areas, a comprehensive, joint federal-state study of the problems of absentee voting laws, state voting residency laws and viable solutions is strongly recommended.¹⁷²

169. The twenty-sixth amendment authorizes Congress to pass legislation to prevent abridgment, as well as denial, of the right of persons 18 years of age or older to vote. U.S. CONST. amend. XXVI, §§ 1, 2. To "abridge" means to "diminish, curtail, deprive, cut off, reduce." *Jolicoeur*, 5 Cal.3d at 571, 488 P.2d at 4, 96 Cal. Rptr. at 700; cf. *Worden*, 61 N.J. at 333-34, 294 A.2d at 237 (twenty-sixth amendment's legislative history evidences a purpose of encouraging younger persons to vote "by the elimination of all unnecessary burdens and barriers") (citing S. REP. NO. 26, 92d Cong., 1st Sess. 14 (1971), discussed in note 126 *supra*). However, opponents of federal legislation would argue that (1) no one is forced to attend college, thus preventing him from voting in person, and (2) absentee voting is a *privilege* provided by the states, not a *right*. See note 144 *supra* and accompanying text for a discussion of absentee voting's status as a privilege.

Whether Congress may legislate to better accommodate college students desiring to vote by absentee ballot is as much a policy question as it is a constitutional question. Our nation's increasing mobility rate, see note 66 *supra* and accompanying text, and increasing percentage of absentee voters, see note 174 *infra* and accompanying text, make absentee voting a larger concern than it was when people did not move frequently. If states do not make the absentee franchise more efficient and complete, perhaps the federal government owes a duty to absentee voters to do so.

170. See U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

171. See, e.g., *Oregon v. Mitchell*, 400 U.S. at 249; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-17 (1964); *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 406-07 (1872); cf. *Walgren v. Howes*, 482 F.2d at 95, 102-03 (1st Cir. 1973) ("[state] laws governing non-Federal elections . . . will have to be changed to prevent conflict with the . . . intent of [the twenty-sixth] amendment") (quoting 117 CONG. REC. 7565 (1971) (remarks of Congressman Randall)). This is true whether the conflict is legislative or judicial. *Oregon v. Mitchell*, 400 U.S. at 249.

172. Consider the following suggested absentee voting scheme: For students who desire to retain the right to vote as domiciliaries of their pre-college residences, election officials in each district in which a college is located should be provided with a list of the election officials, at least one for each state, to which applications for registration can be sent. A preferable and more expedient alternative is the creation of one type of registration form for the whole country, so that students can obtain the form at college. However, getting a 50-state consensus as to the proper form may be difficult.

Our society's increased mobility¹⁷³ has made absentee voting much more common.¹⁷⁴ If the right to vote is not to be compromised by the societal changes that have resulted in the absence of significant numbers of students, and non-students, from their home districts on election day, our election laws must be changed to better help these voters cast their ballots.

VIII. Conclusion

While no presumption may be made constitutionally that students, as a group, are not domiciled at college for voting purposes, it is equally clear that states must require that voters be bona fide residents of the area in which they vote. The only constitutional resolution that can be drawn is that equal standards must be applied to all persons in determining their qualification to vote. As inquiries beyond the routine questions asked by election officials may not be administratively practical if made of each applicant,¹⁷⁵ those officials must be empowered to objectively distinguish those applicants whose domiciliary status is suspect and, by asking only relevant questions unrelated to status as a student, determine who is in fact a resident for voting purposes. For such a plan to work, election officials must be carefully taught the domicile principles outlined herein and must apply them in good faith.¹⁷⁶ Also, electors must be informed of the prerequisites to

To ensure that students who are interested in voting as domiciliaries of their pre-college residences have the opportunity to cast an informed ballot, they should receive, from their local election boards, campaign information from those candidates for local, state and federal offices who desire that students have pertinent information about them. The lack of information available to college students about the candidates and issues in the election district of their pre-college residences may be a significant contributing factor in their decisions not to vote by absentee ballot. See discussion of *Shivelhood*, *supra* note 30, and discussion of *Jolicoeur*, *supra* note 141.

The boards of elections should be allowed to prescribe reasonable bulk limits on the campaign information. The cost of the publications, as well as the postage, should be borne by the candidates. Information about referenda should also be sent to students.

173. See note 66 *supra* and accompanying text.

174. The percentage of absentee voting has risen from approximately 1 or 2% in the 1920's to approximately 5.5% (national average) in 1972 (over 4.1 million voters). See ABSENTEE REGISTRATION LAWS, *supra* note 16, at 5. In most presidential elections, 5.5% can be decisive. *Id.*

175. See *United States v. Texas*, 445 F. Supp. at 1250 (testimony of 70 voting registrars that they "do not have the personnel . . . to conduct detailed inquiries with reference to each applicant").

176. Cf. *Auerbach*, 499 F. Supp. at 1343 (no additional proof may be required of students "beyond that required of all other applicants unless [election registrars] have reasonable grounds on which to base a belief that the individual applicant's claim of

establishing a new domicile and of the corresponding consequences of doing so.

Absentee voting procedures must be made more efficient and the franchise made more complete. Federal absentee legislation for all elections is preferable to state legislation.¹⁷⁷ However, since such federal legislation is of questionable constitutionality,¹⁷⁸ this Comment recommends that the federal and state governments jointly study this problem and propose a uniform absentee voting system¹⁷⁹ to be adopted voluntarily by each state.¹⁸⁰

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residency is untrue"); *Sloane*, 351 F. Supp. at 1305; *Bright*, 336 F. Supp. at 534 ("[n]othing may be presumed or implied from the fact that a registration applicant is a student").

177. A uniform absentee voting law enacted by the federal government would eliminate the possibility that absentee voters might be disenfranchised due to conflicting states' laws.

178. See note 158 *supra* and accompanying text.

179. The two studies cited in notes 16 & 133 *supra* provide a good framework within which to study this problem.

180. Two caveats must be remembered and considered together for a proper determination of this issue: (1) election officials must be required to exercise good faith in applying common law domicile principles to determine who is eligible to vote in each district; see note 175 *supra* and accompanying text; (2) college student status should have no bearing upon whether a person is entitled to exercise a voice, through the ballot, in the government of the community to which he or she has the greatest attachment. See note 89 *supra* and accompanying text.

