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A FEDERAL BASELINE FOR THE RIGHT TO VOTE

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INTRODUCTION

In the last half century, the Supreme Court has recognized a federal right to vote in a state¹ and tied the right to state “citizenship.”² State citizenship is a federal constitutional concept³ that has been defined in the context of diversity jurisdiction to extend to all United States citizens who meet the traditional common law test for “domicile.”⁴ That test embraces all competent adults who have a physical presence in a state and an intention “to make [the state their] home for the time at least.”⁵ One therefore might think it settled that, as a matter of federal law, the right to vote in a state belongs to all adult (and otherwise qualified) United States citizens who satisfy the traditional test for in-state domicile. The only alternatives would be to discount the Court’s statements linking the right to vote to state citizenship, or to read the Constitution to define state

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1. *Infra* Part II.

2. See, e.g., *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (stating right of suffrage is “tied to an individual’s identification with a particular State” as state citizen); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (stating right to vote is individual, personal, and held by state citizens).

3. U.S. Const. amend. XIV, § 1 (defining state citizenship in terms of residency within state by United States citizen); *McPherson v. Blacker*, 146 U.S. 1, 37 (1892) (noting first clause of Fourteenth Amendment defines what it means to be a citizen of a state); see also U.S. Const. art. III, § 2 (describing federal judiciary jurisdiction with reference to state citizenship); *id.* art. IV, § 2, cl. 1 (conferring entitlements on state citizens).

4. See, e.g., *Williamson v. Osenton*, 232 U.S. 619, 624 (1914) (defining state citizenship for diversity purposes in terms of domicile); 15 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 102.34[1] & [2] (3d ed. 2011) (same); 13E Charles Alan Wright et al., *Federal Practice and Procedure* § 3611, at 464–65 (3d ed. 2009) (same).

5. Restatement (Second) of Conflict of Laws §§ 15–16, 18 (1971). The concept is perhaps best understood when explained in negative terms: “The essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere . . .” *Osenton*, 232 U.S. at 624 (citation and internal quotation marks omitted). The concept developed because the law sometimes needs to assign every person within a group to a single jurisdiction for a particular purpose. See Restatement (Second) of Conflict of Laws § 11(2) (“Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicile at a time.”).

citizenship differently in the voting rights and diversity contexts.

Yet many states set their own voting eligibility requirements through laws defining domicile or residence that are inconsistent with the constitutional concept of state citizenship.⁶ Moreover, the Supreme Court has clouded the question of whether states retain definitional power in this area by issuing dicta that appear to endorse the ongoing legitimacy of such state statutes.⁷ Foremost among these are dicta appearing in *Dunn v. Blumstein*, a 1972 decision that forcefully struck down Tennessee statutes conditioning the franchise on the duration of one's in-state residency but twice stated that states may enforce "appropriately *defined* and uniformly applied" bona fide residency requirements.⁸

This piece argues that the traditional definition of domicile that informs the federal constitutional concept of state citizenship preempts narrower state definitions. The issue is not merely academic. Thirteen states presently have binding laws that define the class of persons entitled to vote within the state more narrowly than the federal definition of state citizenship, and other states have promulgated similarly problematic administrative guidance.⁹ Furthermore, statehouses around the country are considering a range of measures designed to encumber or deny the franchise to classes of voters, such as college students, for which domicile determinations can be complicated.¹⁰ Indeed, the New Hampshire House of Representatives recently proposed to redefine domicile to disenfranchise *all* putative voters—regardless of whether they qualify as state citizens under federal law—who move to the state to attend school or engage in military service.¹¹

Part I of this piece summarizes the current legal landscape and recounts recent events in New Hampshire to illuminate the importance of settling whether states may define domicile for voting rights purposes in terms that disenfranchise any class of persons who qualify for state citizenship under federal law. Part II describes the evolution of the federal right to vote and uses this history to contextualize Supreme Court statements that have been (but should not be) read to endorse a state power to define domicile in narrower terms than the federal standard. Part III argues that the federal definition of state citizenship preempts narrower state definitions.

6. See, e.g., *Wit v. Berman*, 306 F.3d 1256, 1261 (2d Cir. 2002) ("The domicile test for determining where citizens may vote dominates the election laws of most states."); 29 C.J.S. Elections § 32 (2011) (canvassing judicial decisions evaluating state election laws defining domicile or residence).

7. *Infra* Part II.

8. 405 U.S. 330, 342 n.13, 343–44 (1972) (emphasis added); see also *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (stating in dictum that question of who can become domiciliary of state for purposes of voting is of "the highest interest" to state governments); *infra* note 92 and accompanying text (discussing *Dunn* and its progeny, which suggest states have power to define residence).

9. *Infra* Part I.

10. *Id.*

11. *Infra* notes 32–34 and accompanying text.

I. THE PROBLEM OF NARROW STATE DOMICILE LAWS

Determining a person's domicile is complicated when the person has moved to a state with no intention either to return to the previous state of domicile or to remain permanently, or even indefinitely, in the new state. Of course, many college students fall within this paradigm. College students also tend to be disfavored voters. Some say this is because they tend to lack a stake in the community whose leaders they are helping to elect.¹² Others might say this is because they tend to vote for Democrats.¹³ In any event, student voting rights—as well as the voting rights of other transient groups such as military personnel—have engendered controversy, as states frequently have adopted definitions of domicile that purport to limit the franchise to those who live in the state and lack an intention someday to move elsewhere.¹⁴ Indeed, Alabama,¹⁵ Delaware,¹⁶ Florida,¹⁷ Georgia,¹⁸ Indiana,¹⁹ Louisiana,²⁰ Massachusetts,²¹ Minnesota,²² Mississippi,²³ Rhode Island,²⁴ Utah,²⁵ Vermont,²⁶ and Wisconsin²⁷ have

12. See *infra* notes 40–41 and accompanying text (citing New Hampshire representative's criticism of college students as "largely monolithic" with potential to drown out voices of permanent residents of community).

13. See *infra* notes 36–38 and accompanying text (citing New Hampshire Speaker's criticism of college students as liberals without life experience who just "vote their feelings").

14. See Richard G. Niemi et al., *Where Can College Students Vote? A Legal and Empirical Perspective*, 8 *Election L.J.* 327, 330–34 (2009) (elaborating on restrictions and arguing that such definitions of domicile burden right to vote of student voters).

15. See *Mitchell v. Kinney*, 5 So. 2d 788, 793 (Ala. 1942) ("Domicile is defined as residence at a particular place accompanied by an intention to remain there permanently, or for an indefinite length of time.").

16. See Del. Code Ann. tit. 15, § 1701 (2007) (extending franchise to "bona fide resident[s]"); *Fritz v. Fritz*, 187 A.2d 348, 349 (Del. 1962) (equating bona fide residence with "domicile" and defining latter as requiring intention to make one's dwelling place resident's "permanent home").

17. See *Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 368 (Fla. 1955) (domicile means "residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time" (quoting *Wade v. Wade*, 113 So. 374, 375 (Fla. 1927))); see also *Op. Div. Elections*, No. DE 78-27, at 2 (Fla. June 2, 1978) available at <http://election.dos.state.fl.us/opinions/new/1978/de7827.pdf> (on file with the *Columbia Law Review*) (setting out similar standard).

18. See Ga. Code Ann. § 21-2-217(a)(1) (2008) (conditioning residence on absence of "any present intention of removing therefrom").

19. See *In re Evrard*, 333 N.E.2d 765, 767–68 (Ind. 1975) (basing residence on intent to make place "permanent residence").

20. See La. Rev. Stat. Ann. § 18:101 (2004) (bona fide residency requires "intent to reside there indefinitely").

21. See *Hershkoff v. Bd. of Registrars of Voters*, 321 N.E.2d 656, 664 (Mass. 1974) (stating residency requires intention to remain "permanently or for an indefinite time" (quoting *Op. of the Justices to the House of Representatives*, 312 N.E.2d 208, 209 (1974))).

22. See Minn. Stat. Ann. § 200.031 (West 2009) (conditioning residence on absence of any "present intention of moving").

23. See *Smith v. Deere*, 16 So. 2d 33, 34 (Miss. 1943) (defining domicile as place where person has "true, fixed, permanent home").

24. See R.I. Gen. Laws § 17-1-3.1 (2003) (defining residence in terms of domicile and

laws that, if strictly enforced, would withhold domiciliary status from college students (and others) with a present intent to move in the future. Moreover, other states have taken administrative measures that dissuade students with such an intention from voting within the state.²⁸

Because the concept of domicile seeks to assign to each person a single, primary jurisdiction for the purpose in question (here, voting),²⁹ laws that define domicile in terms of an indefinite intention to remain are problematic. They subvert the purpose of the domicile concept by leaving without a voting domicile those who have abandoned their prior jurisdiction but lack an intention to remain permanently or indefinitely in their new jurisdiction.³⁰ Thus, any intent-based definition of domicile crafted so that all persons within a larger group have a place to vote necessarily will focus on *present* intention; it will accord domiciliary status to anyone with a physical connection to a state and an intention to live there for the time being who lacks a *present* intention to be domiciled elsewhere. Inevitably, then, we arrive at the traditional definition of domicile if the right to vote in a state is to be held by all who are otherwise eligible and live within one of the states.³¹

Recent events in New Hampshire illustrate this point. New Hampshire law defines “domicile for voting purposes” as “that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes relevant to participating in democratic self-government.”³² But on January 11, 2011, Republican state Representative Gregory M. Sorg introduced a bill to “change[] the definition of domicile as it applies to eligibility to vote and to hold certain offices.”³³ The bill proposed replacing the provision just quoted with text containing a conclusive presumption that students and military personnel who move to New Hampshire to attend school or serve are not domiciled

defining domicile to require “an intention to reside for an indefinite period”).

25. See Utah Code Ann. § 20A-2-105 (LexisNexis 2010) (stating residence requires “a present intention to continue residency within Utah permanently or indefinitely”).

26. See Vt. Stat. Ann. tit. 17, § 2122 (Supp. 2011) (stating residence requires “an intent to maintain a principal dwelling place . . . indefinitely”).

27. See Wis. Stat. § 6.10 (2004) (conditioning residence on absence of “any present intent to move”).

28. See Niemi et al., *supra* note 14, at 337–41 (detailing state administrative measures that tend to discourage student voting).

29. *Supra* note 5.

30. See Niemi et al., *supra* note 14, at 332–34; see also *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (acknowledging citizen has right to vote only in state of citizenship); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (acknowledging states may restrict franchise to bona fide residents).

31. See *supra* note 5 and accompanying text.

32. N.H. Rev. Stat. Ann. § 654:1(I) (2008).

33. H.B. 176, 162d Gen. Court, 2011 Sess. (N.H. 2011). The text of the bill, its docket, and other relevant information are available at http://www.gencourt.state.nh.us/bill_status/Bill_docket.aspx?lsr=717&sy=2011&sortoption=&txtsessionyear=2011&txbillnumber=hb176.

within the state for purposes of voting.³⁴ As just explained, the effect of this legislation would be to disenfranchise students and military personnel domiciled in New Hampshire under the traditional test, who necessarily could no longer claim domicile in the states from which they migrated.

On the same day that Representative Sorg introduced his bill, Republican House Speaker William O'Brien was captured on videotape discussing the legislation at a political event.³⁵ In explaining why the bill was part of his caucus's legislative agenda, Speaker O'Brien cited voter fraud and decried the effects of student voting in the college towns of Hanover, Keene, and Plymouth.³⁶ Speaker O'Brien said that these towns had "lost the ability to govern themselves" because college students are "basically doing what I did when I was a kid and foolish, voting as a liberal."³⁷ He elaborated: "That's what kids do. They don't have life experience and they just vote their feelings."³⁸ The video of Speaker O'Brien delivering these remarks began to circulate widely and drew national attention to the New Hampshire bill.³⁹

On February 24, 2011, the New Hampshire House Election Law Committee held a public hearing on the bill. Representative Sorg defended the measure, explaining that it was necessary to keep the "transient inmates of [a] college" from "drown[ing] out" the votes of permanent inhabitants with "a long-term stake in the future of their community."⁴⁰ Provocatively, Sorg also denigrated student voters as:

[A] largely monolithic demographic group . . . comprised of people with a dearth of experience and a plethora of the easy self-confidence that only ignorance and inexperience can produce, whose youthful idealism is focused on remaking the world—with themselves in charge, of course—rather than with the mundane humdrum of local government.⁴¹

34. *Id.* According to defense department records, only 376 active duty military and 116 Coast Guard personnel are assigned to New Hampshire. See U.S. Dep't of Defense, New Hampshire Facts and Figures, America's Defense and You: Public Outreach, <http://www.defense.gov/specials/outreachpublic/nh.html> (on file with the *Columbia Law Review*) (last visited Feb. 18, 2012). Thus, the proposed legislation would largely affect students of voting age.

35. N.H. Democratic Party, O'Brien Wants to Limit Voting Rights, YouTube (Jan. 14, 2011), <http://www.youtube.com/watch?v=zHLkeEoaMQI>.

36. *Id.*

37. *Id.*

38. *Id.*

39. See The Colbert Report: Voter ID Laws (Comedy Central television broadcast July 20, 2011), available at <http://www.colbertnation.com/the-colbert-report-videos/392598/july-20-2011/voter-id-laws> (mocking notion that concerns about voter fraud motivate such measures).

40. Public Hearing on H.B. 176 Before the H. Election Law Comm., 162d Gen. Court, 2011 Sess. (N.H. 2011) (statement of Rep. Gregory M. Sorg) (on file with the *Columbia Law Review*).

41. *Id.*

Many witnesses opposed the bill, and the House eventually tabled it.⁴² Yet the House continues to consider measures designed to limit student voting in college towns.⁴³ Given the present political climate, the constitutional issues raised by this episode and by restrictive state domicile laws remain highly salient.

II. THE “FUNDAMENTAL” RIGHT TO VOTE, STATE POWER TO REGULATE ELECTIONS, AND APPROVING SUPREME COURT REFERENCES TO STATE DOMICILE LAWS

The text of the Constitution does not by its own terms confer on United States citizens a right to vote. It does, however, recognize a de facto individual right to vote in federal elections by providing that the electors in each state qualified to vote for members of the most numerous branch of the state legislature also shall be qualified to elect members of the federal House of Representatives⁴⁴ and Senate.⁴⁵ The Constitution also explicitly assumes that the states will confer on their own citizens a right to vote in state elections in provisions where it prescribes apportionment penalties in the House of Representatives for states that deny the franchise to certain specified state inhabitants,⁴⁶ and explicitly forbids the states from using race,⁴⁷ sex,⁴⁸ failure to pay a poll tax,⁴⁹ and failure to attain an age greater than eighteen years⁵⁰ to deny or abridge the franchise to United States citizens who are otherwise eligible to vote.⁵¹ Thus, regulations infringing a citizen’s ability to vote have long been recognized to implicate important constitutional concerns.⁵²

But is there an individual right to vote in federal and state elections

42. See Docket of HB176, New Hampshire General Court Bill Status System, http://www.gencourt.state.nh.us/bill_status/Bill_docket.aspx?lsr=717&sy=2011&sortoption=&txtsessionyear=2011&txbillnumber=hb176 (on file with the *Columbia Law Review*) (last visited Feb. 17, 2012).

43. See Norma Love, NH Bills Would Require New Voters to Be Residents, *Boston.com* (Oct. 23, 2011), http://www.boston.com/news/local/main/articles/2011/10/23/nh_bills_would_require_new_voters_to_be_residents/ (on file with the *Columbia Law Review*) (noting discussions amongst New Hampshire legislators as to whether to require that voters obtain New Hampshire driver’s licenses and register their vehicles in state).

44. U.S. Const. art. I, § 2, cl. 1.

45. Id. amend. XVII, § 1.

46. Id. amend. XIV, § 2.

47. Id. amend. XV, § 1.

48. Id. amend. XIX.

49. Id. amend. XXIV, § 1.

50. Id. amend. XXVI, § 1.

51. See *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976) (stating Constitution protects “the right to vote only of citizens”).

52. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating right to vote, although not “strictly” a “natural right,” “is [still] regarded as a fundamental political right, . . . preservative of all rights”). More recently, the Court has suggested that the right to vote is protected by the First and Fourteenth Amendments. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

that is “fundamental” within the meaning of modern constitutional doctrine? Citing a number of landmark Warren Court voting rights decisions, Dean Erwin Chemerinsky’s excellent constitutional law casebook—the text from which I teach—states that there is and that, therefore, laws interfering with the franchise are subject to strict judicial scrutiny.⁵³ Certainly, this is the conventional account,⁵⁴ and it enjoys support in the Supreme Court’s cases. The Court has on several occasions used the adjective “fundamental” to describe the right to vote,⁵⁵ and it has applied strict scrutiny to state laws that have interfered with, diluted, or denied the franchise to individuals.⁵⁶

Yet it oversimplifies to call the individual right to vote “fundamental” and to leave it at that. In the past two decades, the Court has emphasized that, because the states must have latitude in their constitutionally assigned duty to conduct and oversee elections, strict scrutiny does not apply to *every* voting regulation that impacts the right to vote.⁵⁷ The Court has glossed the doctrine established in its early voting rights decisions with a threshold inquiry that requires courts entertaining challenges to state election laws to determine whether the burden on the right to vote is “severe.”⁵⁸ If so, the court is to apply the close judicial scrutiny employed in cases such as *Wesberry v. Sanders*,⁵⁹ *Reynolds v. Sims*,⁶⁰ and *Kramer v. Union Free School District No. 15*.⁶¹ But if not—if “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the . . . rights of voters”—“the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”⁶² Not surprisingly, the fact

53. Erwin Chemerinsky, *Constitutional Law* 1080–81 (3d ed. 2009) (noting “the Court repeatedly has declared that the right to vote is a fundamental right protected under equal protection” (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

54. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 *Cornell J.L. & Pub. Pol’y* 143, 149–50 (2008) (collecting quotations from prominent election law scholars describing right to vote as “fundamental”).

55. See, e.g., *Burdick*, 504 U.S. at 433 (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“By denying some citizens the right to vote, such laws deprive them of ‘a fundamental political right, . . . preservative of all rights.’” (quoting *Reynolds*, 377 U.S. at 562)); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . .”).

56. E.g., *Kramer*, 395 U.S. at 626–27; *Harper*, 383 U.S. at 666; *Reynolds*, 377 U.S. at 562.

57. See *Burdick*, 504 U.S. at 433–34 (noting “the mere fact that a State’s system ‘creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny,’” and that “[i]nstead, . . . a more flexible standard applies.” (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972))).

58. *Id.* at 434.

59. 376 U.S. 1.

60. 377 U.S. 533.

61. 395 U.S. 621.

62. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); see also Christopher S. Elmendorf, *Structuring Judicial Review of Electoral*

that the Court sometimes applies such “light-touch judicial review” to state laws that burden individual voting rights⁶³ has caused commentators to question whether it is useful to continue to regard the right to vote as fundamental.⁶⁴

In any event, it suffices to note that the states have a great deal of authority to regulate in ways that impact the individual right to vote, notwithstanding its supposedly “fundamental” nature. For example, unlike most other fundamental rights (which typically protect all “persons” from unconstitutional conduct by *any* state),⁶⁵ the right to vote belongs only to “citizens,”⁶⁶ protects only against the laws of the state in which a citizen resides,⁶⁷ and vests only in those citizens who are eighteen years of age or older.⁶⁸ In addition, the Court has upheld a number of state laws that might reasonably be thought problematic if the right to vote were qualitatively similar to other fundamental rights: a state law imposing a literacy test on voters,⁶⁹ a state law disenfranchising felons,⁷⁰ and (more recently) a state law requiring state citizens to present a photo identification in order to vote.⁷¹ Clearly, the states have significant regulatory discretion in exercising their prerogative to hold and supervise elections, even if it remains appropriate to attach the label “fundamental” to the right to vote.

One final preliminary point also provides necessary context. While the Warren Court’s decisions carefully scrutinizing state laws impacting the franchise are now well-established parts of our constitutional order, they constituted a significant break with historical assumptions.⁷² It is fascinating to read today the foundational cases in which the Court arrived at the conclusion that an individual right to vote is specially safeguarded by the Constitution, and to see just how controversial and strongly contested this conclusion was—particularly by Justice Harlan, who issued or joined several dissents that passionately argued that the states have

Mechanics: Explanations and Opportunities, 156 U. Pa. L. Rev. 313, 322–23 (2007) (elaborating on how *Burdick* test operates in practice).

63. Elmendorf, *supra* note 62, at 327.

64. See Douglas, *supra* note 54, at 144–46 (noting “dichotomy” that “most people believe that the right to vote is one of the most important rights in our democracy, but courts do not always treat the right as such”).

65. See U.S. Const. amend. XIV, § 1 (“No State shall . . . deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.” (emphasis added)).

66. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976).

67. See, e.g., *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (stating citizen has right to vote only in state of citizenship); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966) (stating states may constitutionally restrict franchise to bona fide residents).

68. U.S. Const. amend. XXVI, § 1.

69. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 52–53 (1959).

70. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

71. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (plurality opinion).

72. See Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 37 (3d ed. 2007) (noting Court “dramatically changed its approach to the formal right to participate”).

broad constitutional authority to regulate elections so long as they do not discriminate on grounds of race or sex.⁷³ And it is equally fascinating to read the older cases relied upon in these dissents, and to see just how notably ungenerous they were in describing the scope of the “privilege” to vote.⁷⁴

Now consider the statements in *Dunn v. Blumstein* recognizing a state’s authority to define bona fide residency requirements against this background.⁷⁵ *Dunn* was the last in a series of four cases decided between 1965 and 1972—the other three were *Carrington v. Rash*,⁷⁶ *Kramer v. Union Free School District No. 15*,⁷⁷ and *Evans v. Cornman*⁷⁸—that struck down on equal protection grounds state laws denying the franchise to disfavored classes of citizens who resided within the state.⁷⁹ In *Carrington*, the challenged law disenfranchised all members of the military in Texas who had resided elsewhere when they enlisted.⁸⁰ In *Kramer*, the challenged law disenfranchised from certain local school district elections those who did not own taxable property within the district or have custody of children in district schools.⁸¹ In *Evans*, the challenged law disenfranchised residents of the National Institutes of Health—a federal enclave located within the State of Maryland.⁸² And in *Dunn*, the challenged law disenfranchised those who had not yet resided in Tennessee for one year and in their county of residence for three months.⁸³

In all four cases, the Court concluded that there was inadequate justification for the unequal treatment accorded the disenfranchised state residents⁸⁴ vis-à-vis other state residents with respect to the right to vote

73. E.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 635 (1969) (Stewart, J., joined by Black & Harlan, JJ., dissenting); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

74. See, e.g., *Pope v. Williams*, 193 U.S. 621, 632 (1904) (stating right to vote “is not a privilege springing from citizenship of the United States”); *id.* (“[T]he privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the [Fifteenth Amendment].”); *id.* at 633 (“The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.”); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (“[T]he Constitution of the United States does not confer the right of suffrage upon any one . . .”).

75. 405 U.S. 330, 342 n.13, 343–44 (1972).

76. 380 U.S. 89 (1965).

77. 395 U.S. 621 (1969).

78. 398 U.S. 419 (1970).

79. All four cases are examples of the Court applying heightened scrutiny under the Equal Protection Clause because the challenged law classifies in a way that interferes with a fundamental right.

80. 380 U.S. at 89 n.1.

81. 395 U.S. at 622.

82. 398 U.S. at 419–20.

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

84. Importantly, no defendant in any of these cases disputed that plaintiffs were state residents with standing to challenge the state’s denial of the franchise. It therefore made

and, in *Dunn*, the right to migrate interstate.⁸⁵ In the course of reaching these conclusions, the Court rejected arguments that the laws constitutionally advanced adequate state interests in preventing the “takeover” of the local civilian community by the concentrated voting of military personnel;⁸⁶ preventing the takeover of the local civilian community by “transients” without a long-term interest in community affairs;⁸⁷ limiting the franchise to those who are primarily or substantially interested in or affected by local election decisions;⁸⁸ preserving the purity of the ballot box against fraud or “colonization” by recent arrivals whose identity as bona fide state residents would be difficult to confirm;⁸⁹ and limiting the franchise to “knowledgeable voters.”⁹⁰ As explained above, this series of holdings helped to work a profound change in historical assumptions about the power of the states with respect to elections. Little wonder, then, that the Court was at pains in each case to assure the states that it was not *completely* federalizing the process by which elections were to be held.⁹¹ Thus, at least at the threshold, statements such as those in *Dunn* can be seen as mere reassurance that the states remain perfectly entitled to enforce their own uniform procedures for determining *whether* a voter is a bona fide resident.

III. THE FEDERAL RIGHT TO VOTE BELONGS TO STATE CITIZENS

But *Dunn* says more than that the states may enforce procedures for determining whether a voter is a bona fide resident; it says (or at least has been read to say)⁹² that the states may “define” what it is for a person to be a bona fide state resident. Thus, the central question of this piece arises: May a state constitutionally adopt a definition of domicile for voting purposes that is narrower than the traditional definition which informs the federal concept of state citizenship? The answer to this

sense for the Court to evaluate the statutes under equal protection principles. Compare Part III, *infra* (explaining why equal protection rationale does not work if question is whether states have power to define domicile in terms that render state citizens under federal law nonresidents for voting purposes).

85. *Dunn*, 405 U.S. at 343–60; *Evans*, 398 U.S. at 422–26; *Kramer*, 395 U.S. at 630–33; *Carrington*, 380 U.S. at 93–97.

86. *Carrington*, 380 U.S. at 93.

87. *Id.*

88. *Evans*, 398 U.S. at 422–26; *Kramer*, 395 U.S. at 630–33.

89. *Dunn*, 405 U.S. at 345–54.

90. *Id.* at 354–60.

91. See *Evans*, 398 U.S. at 422 (“States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” (citation and internal quotes omitted)); *Kramer*, 395 U.S. at 625 (“States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot.”); *Carrington*, 380 U.S. at 91 (“Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot.”).

92. See, e.g., *Williams v. Salerno*, 792 F.2d 323, 327 (2d Cir. 1986) (reading *Dunn* to acknowledge state power to define residence); *Levy v. Scranton*, 780 F. Supp. 897, 901–02 (N.D.N.Y. 1991) (same); *Ramey v. Rockefeller*, 348 F. Supp. 780, 787 (E.D.N.Y. 1972) (three-judge district court) (same).

question is no.

To see why, recall that an affirmative answer would require either a disregard of Supreme Court references linking the right to vote to state citizenship or a construction of the Constitution that would define state citizenship differently in the voting rights and diversity contexts.⁹³ Neither alternative makes sense. Legally, it would be self-defeating if federal law were to recognize a right to vote that is specially protected against state intrusion, but then leave it to each state to define the class of persons which holds the right.⁹⁴ Because of the desire for national uniformity in the protection afforded by constitutional rights, federal law typically defines not only their scope and breadth, but also the class of persons that holds them.⁹⁵ There is no reason for a different rule to apply to the federal right to vote in a state. In using the concept of state citizenship to assign citizens to states for purposes of voting, the Court has sensibly defined the class that holds the right in a way that promotes national uniformity.⁹⁶ The Court's statements should be taken at face value.

Common sense similarly dictates that the definition of state citizenship developed in the diversity context should also apply to the federal right to vote. Certainly, the same term can have different meanings when it is used for different purposes.⁹⁷ But why would federal law simultaneously consider a United States citizen a citizen of State A for purposes of diversity jurisdiction but State B for purposes of voting? Both circumstances call for application of the traditional definition of domicile because, in both circumstances, the law seeks to assign each citizen to a single state that may be considered the "technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."⁹⁸ Moreover, history and precedent support treating as

93. *Supra* notes 1–5 and accompanying text.

94. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43–47 (1989) (rejecting argument that definition of "domicile" for purposes of federal Indian Child Welfare Act be defined by state law because doing so would undermine presumptive desire for national uniformity in application of Act).

95. Federal law defines, for example, those persons entitled to heightened judicial scrutiny under the Equal Protection Clause when disadvantaged by state laws, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007) (stating all persons affected by race discrimination entitled to strict judicial scrutiny of challenged measure); those persons protected by the guarantee against state punishment without conviction, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (stating persons who have not been adjudged guilty by state in accordance with due process safeguards may not be subjected to punishment with which Eighth Amendment is concerned); and those persons with standing to raise a Fourth Amendment challenge to a police search, *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (stating only persons with legitimate expectation of privacy with respect to invaded space have Fourth Amendment rights with respect to space).

96. See *supra* notes 29–31 and accompanying text (discussing use of state citizenship for purposes of voting assignment).

97. See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 319 (2006) (noting dangers of assuming that same term always bears same meaning).

98. *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (explaining why concept of domicile informs definition of state citizenship in diversity context).

coterminous the concepts of state citizenship under the Fourteenth Amendment's Citizenship Clause—presumably the source of the definition of state citizenship applicable to the right to vote⁹⁹—and Article III. After all, the Citizenship Clause was ratified to modify the definition of *who* constitutes a state citizen adopted in *Dred Scott v. Sandford*—a diversity case¹⁰⁰—but did *not* modify the domicile principle that previously had been read into the concept of state citizenship under Article III.¹⁰¹

In terms of policy, it bears repeated emphasis that the argument for national uniformity is very strong in this context. Again, state enforcement of restrictive domicile definitions inevitably would disenfranchise those United States citizens who are domiciled within the state under the federal test but do not satisfy a narrower state test. Suffice it to say that, while this once would have been constitutional, it cannot now be squared with the fact that the franchise is a highly protected federal right that, as a presumptive matter, should be uniformly held by similarly situated individuals.

One final question merits discussion: Why insist that the federal definition of state citizenship preempts state domicile definitions when the Equal Protection Clause is available to protect against discriminatory state laws that disenfranchise without satisfying an adequate state interest? In other words, why cut with the dull knife of preemption when we might follow the narrower path carved in two lower court decisions—*Newburger v. Peterson*¹⁰² and *Ramey v. Rockefeller*¹⁰³—that struck down on equal protection grounds state election laws with definitions of domicile that worked to disenfranchise college students? The answer is that *Newburger* and *Ramey* are not as narrow as they appear.

In both cases, college students challenged state election laws that defined domicile for voting purposes in terms that conditioned the right to vote on a physical presence in the state and an intention to remain permanently.¹⁰⁴ Both cases cited *Dunn* and its predecessor cases¹⁰⁵ to hold that, because so many people plan to migrate to a different state at some

99. The right to vote is an associational right protected by the First Amendment and made applicable against the states by the Fourteenth Amendment. See *supra* note 52 and accompanying text (citing *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992), for proposition that right to vote is protected by First Amendment).

100. See 60 U.S. (19 How.) 393, 400–03 (1856) (describing jurisdictional basis for case); see also *Saenz v. Roe*, 526 U.S. 489, 502 n.15 (1999) (acknowledging Citizenship Clause overruled definition of state citizenship from *Dred Scott*).

101. See *Robertson v. Cease*, 97 U.S. 646, 648–50 (1878) (rejecting argument that use of term “reside” in Citizenship Clause meant that domicile no longer is required to establish citizenship for purposes of Article III); see also Restatement (Second) of Conflict of Laws § 31 cmt. b (1971) (equating state citizenship with domicile without qualification, and stating that, under Citizenship Clause, citizen of United States also “is a citizen of the State in which he is domiciled”).

102. 344 F. Supp. 559 (D.N.H. 1972) (three-judge district court) (Coffin, J.).

103. 348 F. Supp. 780 (E.D.N.Y. 1972) (three-judge district court) (Friendly, C.J.).

104. See *id.* at 783 n.1 (considering New York election law); *Newburger*, 344 F. Supp. at 560 (considering New Hampshire election law).

105. See generally *supra* Part II.

point in their lives, the Equal Protection Clause does not permit enforcement of the statutory permanence requirement.¹⁰⁶ But the reasoning underlying each decision is necessarily broader. Indeed, the only way to avoid seeing the holdings as hopelessly circular is to understand that they necessarily proceed from the premise that the plaintiffs were state citizens who could not be disenfranchised by state domicile definitions *precisely because* the right to vote presumptively belongs to *all* state citizens under *federal* law. In other words, *Newburger* and *Ramey* tacitly rely on the structural argument advanced in this piece.

To see why this is so, recall that the statutes challenged in each case did not deny the franchise to a class of individuals (such as felons) otherwise presumptively entitled to vote; rather, they provided general definitions of domicile for voting purposes and therefore defined membership in the *entire class presumptively entitled to vote within the state*. Thus, the statutes effectively defined who were citizens of the state for purposes of voting. But this immediately gives rise to a question: If states legitimately possess this definitional prerogative, how could any such definition violate the Equal Protection Clause by excluding some class of persons?

The only answer possible is that the excluded class has a viable claim of entitlement to vote in the state based on some other law to which the challenged law is subordinate. *Newburger* and *Ramey* viscerally appreciated this in assuming that the plaintiffs had standing and proceeding to the merits of their equal protection claims.¹⁰⁷ Unfortunately, however, neither case identified the source of superior (read, *federal*) law that put the plaintiffs within the class entitled to assert a right to vote in the state. Nor, therefore, did either opinion recognize that equal protection was an inadequate basis on which to ground a holding. For the problem with the statutes analyzed in *Newburger* and *Ramey* was not that they lacked a sufficient justification for denying the federal right to vote to a class of persons acknowledged to be state citizens; the problem was that the statutes sought to define the excluded class as noncitizens for purposes of the federal right to vote, even though the class qualified for state citizenship under federal law. This is a problem of constitutional preemption, not equal protection.

CONCLUSION

The federal right to vote presumptively belongs to *all* United States citizens who also are state citizens within the meaning of federal law. This is not to say, of course, that it is a simple matter to assess the state

106. See *Ramey*, 348 F. Supp. at 787–89 (rejecting argument that permanence requirement fostered constitutionally permissible state interest in having voters vote with long-term interests in mind); *Newburger*, 344 F. Supp. at 562–63 (rejecting arguments that permanence requirement fostered constitutionally permissible state interests in ensuring voters be knowledgeable, intelligent, and have long-term interests in mind).

107. *Ramey*, 348 F. Supp. at 788; *Newburger*, 344 F. Supp. at 562–63.

citizenship of persons such as students and other transient members of the population. It is not. Nor does the acquisition of state citizenship dispose of all questions framed (perhaps unhelpfully) in terms of state “residence.”¹⁰⁸ But courts and legislators should appreciate that the right to vote proceeds from a federal baseline, and that federal law preempts the states from defining domicile in terms that disenfranchise a class of state citizens.

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108. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 452–54 (1973) (suggesting students who attend state university may not be considered bona fide residents for purposes of in-state tuition discounts if they come to state “solely for educational purposes”).