Nonresident Vote Dilution Claims: Rational Basis or Strict Scrutiny Review?

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INTRODUCTION

An Illinois resident voting for her US senator no doubt expects that other residents of Illinois also have the same opportunity to cast votes in the election for that office. She probably also assumes that other Illinois residents would have the same stake in the outcome and the same opportunity to vote. But she likely does not expect residents of Michigan or Ohio to cast their own votes in that Illinois election. Similarly, a Chicago school district resident most likely assumes that other residents of the school district can vote in elections for that school board's members. If, however, St. Louis or Cleveland school district residents were to cast votes in the Chicago election, that Chicago resident would likely have grave concerns.

While these are extreme examples, certain voters across the country do in fact face situations in which the voting systems utilized in their communities allow nonresidents of a jurisdiction to vote in that jurisdiction's elections. This can occur when state legislation is implemented in a locality with unique or overlapping boundaries,[1] or when certain communities allow nonresident property owners to vote in local elections.[2] These residents may claim that such voting schemes unconstitutionally dilute the impact of their votes in their jurisdiction's elections.[3] The Supreme Court has proclaimed that the right to vote commands protection from this kind of dilution, noting that "[t]here is more to the right

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1 See, for example, *Locklear v North Carolina State Board of Elections*, 514 F2d 1152, 1153–54 & n 4 (4th Cir 1975) (explaining how state legislation creating school board elections was implemented in one county such that nonresidents of the rural county school district could vote for some of that district's board members).

2 See, for example, *May v Town of Mountain Village*, 132 F3d 576, 578–79 (10th Cir 1997) (describing how the town's charter extended the franchise to both residents and nonresident owners of real property located within the town).

3 See, for example, *Locklear*, 514 F2d at 1153. See also Part II.

to vote than the right to mark a piece of paper and drop it in a box. . . . It also includes the right to have the vote counted at full value without dilution or discount."[4]

This Comment explores the ways in which courts address these nonresident vote dilution claims. Nonresident vote dilution claims are framed as equal protection challenges; resident plaintiffs claim that when nonresidents have the right to vote, residents' votes have less weight in violation of the Constitution's Equal Protection Clause and Supreme Court precedent.[5] Although several appellate courts have grappled with these claims, they have remained largely unexplored in the legal literature.[6]

Two important threshold issues exist here. The first question is whether a nonresident vote dilution claim can be raised at all in the absence of an objective standard against which to measure it. The second threshold issue, always implicated by any cognizable equal protection claim, is the level of review that courts should use to assess the challenged law's constitutionality. Government actions that potentially violate the Constitution's Equal Protection Clause are largely reviewed using either the more deferential rational basis standard or the more robust strict scrutiny standard, with some discrete claims receiving intermediate scrutiny.[7] In individual voting rights cases, a balancing test has developed: courts decide how much scrutiny to use when reviewing a challenged scheme after balancing the burden it places on an individual's right and the countervailing state interest used to justify it.[8]

Nonresident vote dilution claims present unique issues for this framework, as vote dilution is often framed as an aggregate, rather than an individual, burden.[9] This balancing test can therefore be an uncomfortable fit for allegedly dilutive practices, and

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4 *Reynolds v Sims*, 377 US 533, 555 n 29 (1964).

5 See, for example, *May*, 132 F3d at 577, 580.

6 For some exceptions, see Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U Chi L Rev 339, 396–401 (1993) (discussing nonresident vote dilution cases within the larger context of election law's application to local governments); Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 Mich J Intl L 259, 317–22 (1992) (discussing nonresident vote dilution cases in a larger discussion of the construction of political boundaries); Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 Harv L Rev 1491, 1498–1501, 1507–08 (1980) (discussing the equal protection ramifications of nonresident vote dilution cases and advocating for a reduced focus on the level of constitutional review in this sphere).

7 See Part I.D.1. Intermediate scrutiny is generally reserved for claims of gender discrimination. See text accompanying notes 86–88.

8 See Part I.D.2.

9 See notes 24–25 and accompanying text.

the tiers of scrutiny used in earlier cases remain important for considering such claims. The constitutional review used by a court matters: Heightened scrutiny in all instances would likely lead to disenfranchisement of nonresidents because this standard is often considered "fatal in fact."[10] If more deferential rational basis review were used instead, these voting schemes would likely be left in place.[11]

Currently, circuits are in discord as to the appropriate standard of review for these claims, and the Supreme Court has not provided any guidance on the issue. The Fourth Circuit applies strict scrutiny in the nonresident vote dilution context.[12] Most other circuits, however, use a form of rational basis review that specifically measures rationality by the "substantial interest" that nonresidents have in the relevant election; if no substantial interest exists, the nonresident enfranchisement is considered irrational.[13] This Comment attempts to resolve that split.

Part I first explores the general background of the "one person, one vote" principle against vote dilution and its application by the Supreme Court. It then considers the traditional framework used to review claims that government actions violate the Equal Protection Clause and how that framework has been applied in the specific context of election regulations. Part II sets out the circuits' approaches to the review of nonresident vote dilution claims. Part III attempts to resolve the existing split in authority: it reframes the issues at stake and considers them in tandem with similar claims of nonresident disenfranchisement. This final Part argues that, without a proper benchmark against which to measure these nonresident vote dilution claims, decisions about enfranchisement in this arena should be left to the legislature. It then argues that, if courts do reach the merits of these claims, rational basis review aligns with the voting rights framework that the Supreme Court has established in other contexts. It also resolves an inherent tension in the form of rational basis review that most circuits currently deploy—a tension that exists because the factors used to assess rationality seem to contradict each

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10 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972).

11 See Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions under Rational-Basis Review*, 37 NYU Rev L & Soc Change 331, 333 (2013) (describing rational basis review as a "free pass for legislation").

12 See Part II.A.

13 See Part II.B.

other—by proposing that circuits reframe their inquiry to focus on the interconnectedness of resident and nonresident voter communities.

I. VOTING RIGHTS AND CONSTITUTIONAL REVIEW

This Part sets out the background of the Supreme Court's approach to vote dilution. Part I.A first clarifies the type of vote dilution discussed in this Comment. Part I.B then describes the "one person, one vote" principle that the Court has articulated, while Part I.C identifies the exceptions to that principle that the Court has carved out. Finally, Part I.D sets out the standards used to review equal protection claims, both generally and in the voting context specifically.

A. Vote Dilution Generally

Supreme Court jurisprudence treats some rights as fundamental because they "are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[14] The right to vote is largely considered fundamental by the Supreme Court.[15] The Court has therefore protected it from state laws designed to either directly deny or indirectly burden certain individuals' rights to participate in elections.[16] Decisions on the issue extend this protection to several different types of elections, including those that are local in scope.[17] The fundamental nature of the right to vote should, and

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14 *Washington v Glucksberg*, 521 US 702, 720–21 (1997) (quotation marks omitted).

15 See *Yick Wo v Hopkins*, 118 US 356, 370 (1886) (calling voting "a fundamental political right, because [it is] preservative of all rights"). But see Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 Cornell J L & Pub Pol 143, 162–63 (2008) (arguing that while the Court has labeled the right to vote a fundamental one, its treatment of voting rights does not always adhere to that declaration).

16 See, for example, *Dunn v Blumstein*, 405 US 330, 360 (1972) (striking down a Tennessee durational residence law as an unconstitutional limitation on the right to vote); *Kramer v Union Free School District No 15*, 395 US 621, 622 (1969) (striking down a New York law that prevented otherwise-eligible voters from participating in a school board election); *Harper v Virginia Board of Elections*, 383 US 663, 668–70 (1966) (striking down a Virginia law instituting a poll tax as a violation of the Equal Protection Clause).

17 See, for example, *Kramer*, 395 US at 626 (school board election); *Cipriano v City of Houma*, 395 US 701, 702 (1969) (per curiam) (municipal bond election).

often does, lead courts to provide increased constitutional protection when states try to deny it to an individual or a group.[18]

The Supreme Court has not stopped at protecting voters from direct disenfranchisement: it has also upheld challenges to voting schemes that allegedly diluted votes because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[19] Vote dilution can refer to a variety of franchise impairments.[20] Broadly, the term refers to the idea that once a group is extended the franchise in an election, that group's vote must be able to meaningfully contribute to the political process.[21] Groups bringing vote dilution claims argue that they represent some kind of minority—racial, political, or numerical[22]—and that while each individual member of the group is able to physically vote in a particular election, the group as a whole cannot actually influence the election's outcome because its numbers

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[18] See Douglas, 18 Cornell J L & Pub Pol at 148 (cited in note 15) (noting that fundamental rights usually "receive greater constitutional protection" from courts and that the government can "encroach upon" them only to a limited extent).

[19] *Reynolds v Sims*, 377 US 533, 555 (1964). See also, for example, *Wesberry v Sanders*, 376 US 1, 7, 18 (1964) (striking down a statute apportioning congressional districts that resulted in unequal representation between those districts); *Gray v Sanders*, 372 US 368, 370–74, 381 (1963) (holding that, once a class of voters is specified, each vote must be counted equally with each other vote).

[20] While this Comment focuses specifically on vote dilution claims rooted in the Fourteenth Amendment's Equal Protection Clause, other constitutional and statutory bases for vote dilution claims exist. See, for example, *Thornburg v Gingles*, 478 US 30, 47–48 (1986) (noting that § 2 of the Voting Rights Act prohibits racial vote dilution); *Gomillion v Lightfoot*, 364 US 339, 346–47 (1960) (finding that a districting scheme that diluted the strength of minority votes violated the Fifteenth Amendment). Some states have implemented protections against vote dilution as well. See, for example, Cal Elec Code § 14027 (prohibiting election methods that dilute "the rights of voters who are members of a protected class"); 10 ILCS 120/5-5 (requiring that redistricting plans create districts that protect against minority vote dilution); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 S3d 597, 598–600 (Fla 2012) (discussing the Florida Constitution's protections against vote dilution).

[21] See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv L Rev 1663, 1677 (2001) ("Dilution doctrine rests on two assumptions . . . first, that there is more to 'voting' than merely casting a vote, and second, that members of an electoral minority should enjoy an equal opportunity to coalesce effectively despite the mandate of majority rule."); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U Pa L Rev 893, 922 (1997) ("Although these claims go by many different names—'vote dilution,' lack of an 'effective' or 'meaningful' vote, and the inability to 'elect legislators of their choice,' for example—the underlying contention is almost always the same: the voter claims that having the vote is not enough.") (citations omitted).

[22] See Joseph Fishkin, *Weightless Votes*, 121 Yale L J 1888, 1900 (2012) (identifying these three types of vote dilution claims).

are unconstitutionally overwhelmed in some way.[23] Importantly, this vote dilution framework characterizes the right to vote as an aggregate, or group, right, rather than one belonging solely to the individual.[24] This is unusual and has consequences for constitutional review of vote dilution claims because equal protection jurisprudence has evolved in a highly individualistic context.[25]

When a group of voters claims that its voting power is unconstitutionally overwhelmed, the claim could be that the group is overwhelmed either quantitatively or qualitatively.[26] Quantitative vote dilution refers to claims that voters in a particular district are numerically devalued when compared to voters in another district.[27] Qualitative vote dilution instead refers to the impaired "political effectiveness of an identifiable subgroup."[28] Nonresident vote dilution claims implicate qualitative dilution issues. In these cases, residents assert that their votes are diluted because an equal franchise is granted to uninterested voters.[29] These residents claim to be members not of the same racial or political group but merely of an identifiable group who "are required to share their vote with others whose interests are significantly less."[30]

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[23] See *White v Regester*, 412 US 755, 765–70 (1973) (upholding a vote dilution challenge brought by minority voters in two Texas counties due to evidence that "the political processes leading to nomination and election were not equally open to participation by the group in question"). See also Fishkin, 121 Yale L J at 1893–99 (cited in note 22) (describing various ways to conceptualize and equalize the weight of individuals' votes).

[24] See Fishkin, 121 Yale L J at 1899 (cited in note 22) ("[O]ne person, one vote claims in particular are about the interests of numerical groups—that is, collections of people who happen to live within a given geographic area—in securing representation in proportion to their numbers.") (citation omitted); Gerken, 114 Harv L Rev at 1666–67 (cited in note 21) (calling vote dilution "unusual" because "the individual injury at issue cannot be proved without reference to the status of the group as a whole; no individual can assert that her vote has been diluted unless she can prove that other members of her group have been distributed unfairly within the districting scheme").

[25] See Gerken, 114 Harv L Rev at 1667 (cited in note 21) (noting the "increasingly individualistic, antiessentialist vision of rights expressed in the Supreme Court's [more] recent equal protection cases"). See also id at 1741–42 (describing the trouble that courts can have in addressing issues in connection with statutory vote dilution if they ignore the aggregate nature of the harm it represents).

[26] Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv CR–CL L Rev 173, 176 (1989).

[27] Id. For an example of a quantitative vote dilution claim, see *Reynolds*, 377 US at 540.

[28] Karlan, 24 Harv CR–CL L Rev at 176 (cited in note 26).

[29] See Note, 93 Harv L Rev at 1498–1501 (cited in note 6) (describing these challenges as "exclusion" vote dilution cases).

[30] Melvyn R. Durchslag, Salyer, Ball, *and* Holt*: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 Case W Res L Rev 1, 38 n 167 (1982).

B. The "One Person, One Vote" Principle

Vote dilution claims sometimes invoke the "one person, one vote" principle.[31] The Supreme Court in *Reynolds v Sims*[32] popularized this phrase when it established that "an individual's right to vote . . . is unconstitutionally impaired" under the Equal Protection Clause when it is diluted compared to the votes of other citizens in the same election.[33] The challenge in *Reynolds* concerned an apportionment plan in which Alabama legislature districts had wildly unequal populations, thus diluting the weight of votes in more-populous districts.[34] For example, one county containing approximately 13,000 people was allocated 2 representatives in the Alabama House of Representatives, while a county with a population of approximately 314,000 received only 3.[35]

The Court held that this situation implicated the Fourteenth Amendment.[36] The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[37] According to *Reynolds*, the Equal Protection Clause prohibits such vote dilution in order to ensure that all citizens have a "full and effective" voice in the affairs of their political community.[38] *Reynolds* therefore indicated that one group of voters could not arbitrarily exercise more or less voting power than another.[39]

While *Reynolds* concerned a statewide election, the Court has made it clear that its principle applies to local government elections as well.[40] In fact, whenever a popular election takes place at the state or local level to elect someone to perform governmental functions, the Equal Protection Clause requires that each qualified voter receive an equal chance to participate.[41] At all levels of

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31 See *Gray*, 372 US at 381 (introducing the term "one person, one vote" in Supreme Court jurisprudence).

32 377 US 533 (1964).

33 Id at 568.

34 Id at 540.

35 Id at 545–46.

36 *Reynolds*, 377 US at 565–66.

37 US Const Amend XIV, § 1.

38 *Reynolds*, 377 US at 565.

39 Id at 568.

40 *Avery v Midland County*, 390 US 474, 484–85 (1968) (holding that local government districts having "general governmental powers" over the geographic area served by the elected body cannot deviate from the one person, one vote rule).

41 *Hadley v Junior College District of Metropolitan Kansas City*, 397 US 50, 54–55, 58–59 (1970) (holding that one person, one vote applied to an election of trustees for a

government, then, if a voter does not have this equal chance, her fundamental right to vote has been impaired, no matter what group she belongs to and even if she had the ability to physically access the voting booth and cast her vote.[42]

Although *Reynolds* remains valid precedent, the implications of what "one person, one vote" really guarantees are far from settled. For example, it has not been clearly established what the correct denominator is for these claims; in other words, it is not clear whether there is a truly correct population base to equalize across in ensuring that the equality promised by one person, one vote is fulfilled. The Supreme Court recently confronted this very question in *Evenwel v Abbott*[43] and upheld the validity of using total population in this calculation, as most states do.[44] The appellants in this case had argued that states, when drawing legislative districts to equalize votes, should do so in a way that includes only each district's eligible voters.[45] The respondents argued in turn that the choice to instead use the total population of each district (including children, aliens, and others ineligible to vote) as a baseline is a valid one.[46] The Court affirmed the use of the total population measure, although it did not resolve whether the total eligible voter denominator could also be used.[47]

A more fundamental issue at play in the *Evenwel* appeal was whether this choice of denominator—total eligible voters or total population—was even a proper issue for courts to decide. The three-judge district court opinion reviewed by the Supreme Court answered this question in the negative: "Plaintiffs are asking us to interfere with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or

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junior college district because in "decid[ing] whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election").

42 See Fishkin, 121 Yale L J at 1903 (cited in note 22) ("Rather than reifying a particular set of numerical groups as the set to protect, one person, one vote indirectly protects them all.").

43 136 S Ct 1120 (2016).

44 Id at 1123.

45 See id at 1125 (describing the appellants' argument that their votes would be diluted unless the denominator used to apportion districts was comprised only of the citizen voting age population).

46 Id at 1126 (describing the respondents' argument that jurisdictions can use any baseline "so long as the choice is rational and not invidiously discriminatory").

47 *Evenwel*, 136 S Ct at 1132–33.

exclusion of specific protected groups of individuals."[48] The *Evenwel* opinion instead directly approved the total population baseline, though, perhaps because of its overwhelming use by states[49] and the observation that "the Court has always assumed the permissibility of drawing districts to equalize total population."[50] Not all justices agreed that this was the correct approach, however.[51] Furthermore, the Court left open the possibility that a future legislature could in fact use a different denominator in calculating the voter population to equalize without violating the one person, one vote principle. This is particularly true at the local level, as municipalities are traditionally allowed to experiment in matters of governance as long as the jurisdiction continues to meet constitutional requirements.[52]

The idea that courts cannot even review particular vote dilution claims extends beyond the numerical apportionment context. In *Holder v Hall*,[53] for example, a fractured Court held that when faced with a racial vote dilution claim brought under § 2 of the Voting Rights Act,[54] "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice."[55] In other words, a vote dilution claim under the Voting Rights Act is not justiciable when the plaintiffs cannot point to some norm against which the dilutive practice can be measured.[56] "[W]ithout such a benchmark, measuring the dilutive effects of the system in question would be impossible."[57]

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48 *Evenwel v Perry*, 2014 WL 5780507, *4 (WD Tex) (quotation marks omitted). See also *Burns v Richardson*, 384 US 73, 92 (1966) ("The decision to include or exclude [transient or short-term residents] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.").

49 *Evenwel*, 136 S Ct at 1124.

50 Id at 1131.

51 See id at 1133 (Thomas concurring in the judgment) (arguing that the one person, one vote principle is fundamentally flawed because the states have such leeway in determining how to apportion districts: "The Constitution leaves the choice [of denominator] to the people alone—not to this Court").

52 See *Avery*, 390 US at 485 ("[T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government.").

53 512 US 874 (1994).

54 Pub L No 89-110, 79 Stat 437, 437 (1965), codified as amended at 52 USC § 10301.

55 *Hall*, 512 US at 880 (Kennedy) (plurality).

56 See id at 880–81 (Kennedy) (plurality). See also *White v Alabama*, 74 F3d 1058, 1072–73 (11th Cir 1996) (applying *Hall* to a vote dilution claim and concluding that, because there was no nonspeculative benchmark for the plaintiffs' claim, the case had to be dismissed).

57 Martin Patrick Averill, Note, Holder v. Hall*: Sizing Up Vote Dilution in the '90s*, 73 NC L Rev 1949, 1977 (1995). See also *Reno v Bossier Parish School Board*, 520 US 471,

These principles have consequences for nonresident vote dilution claims. If a legislature decides that nonresidents should vote in a particular election, and that decision does not invidiously discriminate against a protected group, perhaps plaintiffs' vote dilution claims are not reviewable. Similarly, if there is no identifiable benchmark against which a nonresident vote dilution claim can be measured, there is no basis for courts to be involved in deciding whether the legislative choice to implement the nonresident voting scheme is appropriate. These implications are explored in Part III.

C. Interest Exceptions to the "One Person, One Vote" Principle

While the Supreme Court has protected the right to an equally weighted vote, it has also delineated some circumstances in which the one person, one vote principle does not apply. In several decisions invalidating election schemes as incompatible with this principle, the Court also identified certain situations that might not implicate this rule.[58] These situations largely reflect a concern with forcing nongoverning districts that do not affect all residents equally to nonetheless give every one of those residents the same voice in the district's affairs. The implication is that in such districts, those who could be extended the franchise, but have no interest in the outcome of an election, do not necessarily need to have an equally weighted vote, or even any vote at all.

The Court later expanded on this concept in cases involving nongoverning special-purpose districts. In *Salyer Land Co v Tulare Lake Basin Water Storage District*,[59] residents of an area included in a special water district challenged a voting scheme for the district's board of directors that limited the franchise to landowners.[60] The Court concluded that this was acceptable because, as

480 (1997) ("[T]he very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured.").

58 See *Hadley*, 397 US at 56 (acknowledging that *Reynolds* would not apply when those elected would not perform "normal governmental" duties); *Avery*, 390 US at 483–84 (noting that "special-purpose" governments affecting some citizens more than others could give greater voice to those affected without running afoul of the Equal Protection Clause); *Kramer*, 395 US at 632 (leaving open the possibility that "the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' in or 'primarily affected'" by an election).

59 410 US 719 (1973).

60 Id at 724–25.

contemplated by earlier precedent,[61] the water district had a limited purpose that disproportionately affected property owners.[62] Other cases have similarly held that, when one group is primarily burdened and benefitted by an elected body's activities, one person, one vote compliance is unnecessary.[63] Thus, if a district has a narrow purpose distinguishable from that of a typical government, uninterested residents of that district do not need a vote in that district's affairs.[64]

In other contexts, however, the Court has rejected the idea that the differential interests of residents can lead to exemptions from the one person, one vote principle. In *Cipriano v City of Houma*,[65] the Court examined an election scheme giving only property taxpayers the right to vote in municipal elections called to approve the issuance of utility revenue bonds.[66] The government defended the scheme by pointing to the "special pecuniary interest" property owners had in the election.[67] The Court held that this scheme was unconstitutional because, even assuming the government's contention was true, the utility system's operations affected all residents of the district.[68] As the Court has noted elsewhere, "[W]hen all citizens are affected in important ways by a

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61 See *Hadley*, 397 US at 56; *Avery*, 390 US at 484–85.

62 *Salyer*, 410 US at 728. The purpose of the district was to store and distribute water for farming: "It provide[d] no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." Id at 728–29. All costs were assessed against land. Id at 729.

63 See, for example, *Ball v James*, 451 US 355, 370 (1981) (holding that a local power district could restrict the franchise to property owners because only they were committing capital to it through taxation); *Associated Enterprises, Inc v Toltec Watershed Improvement District*, 410 US 743, 744–45 (1973) (per curiam) (holding that a Wyoming watershed district could grant the right to vote to only landowners and weight votes according to landholdings because the district disproportionately affected this group).

64 See, for example, *Town of Lockport, New York v Citizens for Community Action at the Local Level, Inc*, 430 US 259, 271–73 (1977) (recognizing that city and county voters may have different interests in a referendum election, and therefore finding that it did not violate the Equal Protection Clause to treat their votes differently); *Carlson v Wiggins*, 675 F3d 1134, 1140–42 (8th Cir 2012) (upholding a restriction of the franchise to attorneys in an election to fill seats on Iowa's State Judicial Nominating Commission because, in the court's view, the Commission served a narrow function that disproportionately affected attorneys).

65 395 US 701 (1969) (per curiam).

66 Id at 702.

67 Id at 704.

68 Id at 705–06 ("[T]he operation of the utility systems—gas, water, and electric—affects virtually every resident of the city, nonproperty owners as well as property owners.").

governmental decision . . . the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise."[69]

There is a discernable concern in these cases with defining the interest a particular voting group has in influencing an election's outcome. Being merely trivially affected by the outcome clearly does not render someone "interested" in the constitutional sense.[70] That is, different groups can have different levels of interest in the election's outcome, but the Constitution does not always mandate that all groups have the chance to vote. Most elections will affect those beyond the jurisdiction of the political entity being elected, and some kind of limiting principle is necessary to confine the franchise to those who are truly interested in the result.

This relates back to vote dilution claims: Although the one person, one vote cases are not explicitly about vote dilution, the interest exception they create touches directly on that issue. Once uninterested voters are allowed to vote, their participation can dilute the votes of those who are truly interested.[71] In *Salyer*, for example, an unspoken implication of the Court's decision is that, once uninterested residents can vote, interested landowners will have a much smaller voice in matters that most directly affect them.[72] This issue appears in the nonresident vote dilution challenges discussed in Part II.

D. Constitutional Review Standards in the Voting Rights Context

Parts I.A through I.C demonstrate how and when courts will protect the right to vote from unconstitutional dilution in violation of the one person, one vote principle. They also demonstrate

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69 *City of Phoenix v Kolodziejski*, 399 US 204, 209, 213 (1970) (holding that elections to approve general obligation bond issuances cannot be restricted to property owners). See also *Hill v Stone*, 421 US 289, 300–01 (1975) (holding that a municipal bond election scheme, similar to the one at issue in *Cipriano*, was unconstitutional).

70 See, for example, *Southern California Rapid Transit District v Bolen*, 822 P2d 875, 886 (Cal 1992) (explaining that, in a special-district election, while non-property-owning residents would be affected to some extent by the election's result, that did not mean they needed access to the franchise).

71 See Durchslag, 33 Case W Res L Rev at 39 (cited in note 30) ("The less 'interest' the claimants have in decisions of the entity in which they seek the vote, the more likely it is that granting their claim will dilute the vote of those who already possess it.").

72 See *Salyer*, 410 US at 730–31 (noting that, because landowners face substantial assessments from the water district that nonlandowners do not share, it is reasonable to assure them a dominant voice in the district's governance). This dominance would be diluted if nonlandowners were also given a voice in this process. See Durchslag, 33 Case W Res L Rev at 40 (cited in note 30).

that there are circumstances in which the state may differentiate between classes of voters with differing interest levels in an election without running afoul of the Equal Protection Clause. But what tools do courts use to distinguish between these circumstances?

Usually, the standard of review used to analyze a state's action is dispositive.[73] When courts review laws for potential equal protection violations, including those violations related to fundamental rights infringements,[74] the main standards of review used are rational basis, strict scrutiny, and intermediate scrutiny.[75] As described below, the rigidly tiered system of review that developed in traditional equal protection cases has evolved into a more flexible approach when potential infringements of individual voting rights are involved.

1. Constitutional review standards generally.

Before determining the validity of a law facing an equal protection challenge, a court needs to identify the appropriate level of constitutional review to use in its analysis.[76] Challenged laws or actions that do not "burden[ ] a suspect group or a fundamental interest" are reviewed using the rational basis standard.[77] When applying this standard, a court asks if there is a rational relationship between the state action and some legitimate government purpose: if such a rational relationship exists, then the state's action will not "run afoul" of the Constitution.[78] Courts reason that, if no suspect infringement exists, the democratic process is a sufficient means of addressing "improvident" legislation; the judicial

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73 See, for example, *San Antonio Independent School District v Rodriguez*, 411 US 1, 16–17 (1973).

74 For an example of a fundamental rights infringement, see *Skinner v Oklahoma*, 316 US 535, 541 (1942) (striking down a sterilization law as an equal protection violation that infringed on a fundamental right).

75 See *Rodriguez*, 411 US at 16–17 (articulating the dominant tiered framework). See also Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 Fla Coastal L Rev 421, 433–36 (2009) (explaining the different levels of review courts use in constitutional challenges).

76 See *Bjornestad v Hulse*, 229 Cal App 3d 1568, 1587 (1991).

77 *Vance v Bradley*, 440 US 93, 96–97 (1979).

78 *Heller v Doe*, 509 US 312, 320 (1993). See also *Bradley*, 440 US at 97 (noting that when no suspect burden exists, the Court "will not overturn [ ] a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational").

system need not be involved.[79] Rational basis review is quite deferential to the state in this regard.[80] Because of this, common wisdom articulates rational basis review as a "free pass for legislation."[81]

If a law involves a suspect classification or infringes on a fundamental interest, however, courts use the more exacting strict scrutiny review standard.[82] In these situations, the rationale goes, courts must step in to ensure that legislatures are not acting in a way that prevents the democratic process from addressing improper legislation.[83] Under strict scrutiny review, "the state must show the law serves a *compelling* governmental interest and that any distinction drawn is *necessary* to further that interest."[84] Strict scrutiny has been called "'strict' in theory and fatal in fact" because any law reviewed using this standard is unlikely to survive the heightened level of review that it represents.[85]

A third tier of scrutiny, intermediate scrutiny, also exists. This tier applies to equal protection challenges based on gender classifications, among others,[86] and requires that such classifications "serve important governmental objectives and [ ] be substantially related to the achievement of those objectives."[87] Because of

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79 *Bradley*, 440 US at 97.

80 See *Bjornestad*, 229 Cal App 3d at 1587, citing *McGowan v Maryland*, 366 US 420, 425–26 (1961).

81 Yoshino, 37 NYU Rev L & Soc Change at 333 (cited in note 11). Although this formulation holds true in most cases, the rational basis standard has been applied more robustly in some contexts. See, for example, *City of Cleburne, Texas v Cleburne Living Center, Inc*, 473 US 432, 446, 450 (1985) (applying rational basis review to a zoning ordinance that excluded homes for the mentally ill and holding that the ordinance violated the Equal Protection Clause).

82 See *Johnson v California*, 543 US 499, 505 (2005) (noting that racial classifications must be reviewed using strict scrutiny); *Harper*, 383 US at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

83 See *City of Richmond v J.A. Croson Co*, 488 US 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of [suspect classifications] by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

84 *Bjornestad*, 229 Cal App 3d at 1587, citing *Blumstein*, 405 US at 342–43 (emphases added).

85 Gunther, 86 Harv L Rev at 8 (cited in note 10). As with rational basis review, this usual rule is not an invariable one. See, for example, *Grutter v Bollinger*, 539 US 306, 326, 334–35 (2003) (applying strict scrutiny to a law school affirmative action scheme and holding that it satisfied this test as a "narrowly tailored" plan).

86 See *Clark v Jeter*, 486 US 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

87 *Craig v Boren*, 429 US 190, 197 (1976).

intermediate scrutiny's focus on equal protection challenges to gender-based classifications, it has not been applied to the voting rights context.[88]

2. Constitutional review standards in the voting rights context.

The vote dilution claims considered in this Comment are equal protection claims, thus implicating the standards of review discussed above.[89] But laws involving voting rights present unique issues of constitutional review. In traditional equal protection litigation, a tiered system of review exists.[90] As discussed below, that is not necessarily the case with litigation involving election laws that burden an individual's right to vote.

Early cases considering voting rights used this tiered system. Therefore, laws that outright denied the right to vote, or classified voters along suspect lines, received strict scrutiny review. In *Kramer v Union Free School District No 15*,[91] the Court applied strict scrutiny to a school board election regime that excluded some otherwise-qualified voters in the school district, holding that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary to promote a compelling state interest*."[92] The plaintiff in this case was an unmarried adult resident of the relevant school district who owned no land within the district and had no children who attended the district's schools.[93] He was denied the ability to vote in the district's elections based on a state law requiring that otherwise-eligible voters own property in the school district, be married to a property owner, or be the parent or guardian of a child enrolled in the local school district in order to participate.[94] The Court held that this law was unconstitutional because it failed to meet the

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88 See *Clark*, 486 US at 461; Greenblatt, 10 Fla Coastal L Rev at 450–52 (cited in note 75).

89 See Gerken, 114 Harv L Rev at 1665–66 (cited in note 21) (describing the equal protection framework for vote dilution claims). But see notes 53–57 and accompanying text and Part III.A (noting that these claims may not be cognizable).

90 See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan L Rev 1105, 1116–17 (1989). See also Part I.D.1.

91 395 US 621 (1969).

92 Id at 627 (emphasis added).

93 Id at 624–25.

94 Id at 623.

requirements of strict scrutiny.[95] Importantly, the plaintiff was already a resident of the relevant jurisdiction: the distinction between voters and nonvoters rested on something other than residence, thus subjecting the law to strict scrutiny.[96] Other decisions have similarly held that voter classifications in non-special-district elections based on characteristics other than age, citizenship, or residency will receive this stricter constitutional review.[97]

Crucially, though, not every law affecting the right to vote has been reviewed using this standard: classifications based on citizenship, age, and residency requirements do not receive strict scrutiny. Election laws usually classify people in this way, and "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[98] *Holt Civic Club v City of Tuscaloosa*[99] provides an apt example. The Court applied rational basis review to claims that individuals who were residents of an unincorporated community near Tuscaloosa, and subject to that city's police power, should have been extended the franchise in municipal elections.[100] The Court did not find strict scrutiny applicable because the plaintiffs did not live within the Tuscaloosa city limits; they could not avail themselves of that standard merely because the city's municipal decisions affected them.[101] Other decisions similarly clarified that rational basis review applies to laws that classify voters based on nonsuspect categories,[102] to election laws in the context of nongoverning districts,[103] and to laws that create

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95 *Kramer*, 395 US at 633.

96 See id at 622.

97 See, for example, *Stone*, 421 US at 297–98 (applying strict scrutiny to a voter classification based on property ownership in a non-special-purpose election); *Kolodziejski*, 399 US at 209 (same); *Cipriano*, 395 US at 704 (same).

98 *Burdick v Takushi*, 504 US 428, 432–33 (1992).

99 439 US 60 (1978).

100 Id at 62–63, 70.

101 See id at 68–70 (describing how one person, one vote applies only to individuals residing within a single geographic boundary). See also id at 70 ("The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants' case, like their homes, falls on the farther side.").

102 See, for example, *Mixon v Ohio*, 193 F3d 389, 405 (6th Cir 1999) (applying *Holt* and *Kramer* to a voting-related residency restriction and holding that rational basis applied). See also *Kramer*, 395 US at 625 (confirming that "[s]tates have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot").

103 See, for example, *Salyer*, 410 US at 731 (applying rational basis review to a special-purpose district election); *Ball*, 451 US at 371 (same).

minor deviations from perfect one person, one vote compliance.[104] While cases like *Holt* do not involve nonresident vote dilution claims, they are closely related. Nonresidents bringing cases like *Holt* argue that something about their interest in an election's outcome necessitates their inclusion in the franchise. As described in Part III.B, the level of constitutional review given to these claims has implications for the level of review given to nonresident vote dilution claims.

The Court developed a more flexible approach for reviewing election law challenges in *Anderson v Celebrezze*[105] and *Burdick v Takushi*.[106] This approach is premised on the idea that the state always has an interest in regulating elections to ensure that they proceed fairly and in an organized fashion.[107] In enacting these regulations, an individual's ability to vote will inevitably be impaired in some way that makes it more difficult or even impossible to freely exercise the franchise.[108] How severely this ability is impaired depends on the specific facts surrounding the election regulation at issue.[109]

The Supreme Court thus articulated a test designed to capture this aspect of election regulations and structure the appropriate level of constitutional review accordingly. Under the *Anderson-Burdick* approach, to decide the correct level of scrutiny to apply, a court reviewing a challenge to an election-related restriction must weigh the individual's constitutional right at stake against the exact interest the state puts forward to justify the burden on the right.[110] The court must take into account "the extent to which those interests make it necessary to burden the plaintiff's rights."[111] After considering these factors, if the court decides that

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[104] See, for example, *Brown v Thomson*, 462 US 835, 842–43 (1983) (describing the rule that population deviations of less than 10 percent between districts are minor and justifiable if they "may reasonably be said to advance a rational state policy") (brackets omitted).

[105] 460 US 780 (1983).

[106] 504 US 428 (1992).

[107] See *Anderson*, 460 US at 788, citing *Storer v Brown*, 415 US 724, 730 (1974).

[108] See *Anderson*, 460 US at 788 (describing how "complex election codes . . . inevitably affect[ ]—at least to some degree—the individual's right to vote").

[109] See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 Ind L J 1289, 1324–25 (2011) (using the example of laws regulating poll closing times to demonstrate how "[n]o single, binary 'litmus-paper test'" can adequately separate constitutional versions of such regulations from unconstitutional versions).

[110] *Anderson*, 460 US at 789.

[111] Id.

the individual's important right is burdened by severe restrictions, then the regulation at issue must be "narrowly drawn to advance a state interest of compelling importance."[112] In other words, strict scrutiny applies.[113] If the law imposes only reasonable restrictions on the right to vote, though, more deferential review will apply, and the important interest that states always have in regulating elections will generally provide the requisite rational justification.[114]

The *Anderson-Burdick* test thus seems to reject the traditional tiers of review used in equal protection analysis. Instead, courts must undertake a "direct balancing" of a plaintiff's injury against the state's asserted interest in order to determine the correct level of scrutiny to apply.[115] Questions remain, though, about how this balancing is actually implemented and the extent to which it truly dispenses with the tiered review system.[116] Commentators acknowledge that case law is not always clear as to whether *Anderson* and *Burdick* created a true sliding scale involving intermediate review for nonsevere yet nontrivial restrictions, or whether they merely identified a two-tiered system in which only severe burdens receive strict scrutiny.[117] In cases since *Burdick*, courts have not been consistent in their use of this

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[112] *Burdick*, 504 US at 434, quoting *Norman v Reed*, 502 US 279, 289 (1992).

[113] See, for example, *Libertarian Party of Ohio v Blackwell*, 462 F3d 579, 593 (6th Cir 2006) (finding that a restriction imposed by state election law created a severe burden and that strict scrutiny therefore applied); *Partnoy v Shelley*, 277 F Supp 2d 1064, 1078 (SD Cal 2003) (holding that a state recall election voting scheme substantially burdened the plaintiffs' rights and applying strict scrutiny).

[114] See *Burdick*, 504 US at 434, citing *Anderson*, 460 US at 788. See also *Crawford v Marion County Election Board*, 553 US 181, 190–91 (2008) (Stevens) (plurality) (reaffirming the use of this balancing test).

[115] Muhammad At-Tauhidi, Note, *Access v. Integrity: Determining the Constitutionality of Voter ID Laws under* Anderson v. Celebrezze, 17 Temple Political & CR L Rev 215, 229 (2007). Note that this does not necessarily invalidate the use of strict scrutiny in cases like *Kramer*; the classification in that case was invidious because it was based on something other than age, citizenship, or residence. The Court has not overruled this precedent. Id at 231.

[116] See Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 Denver U L Rev 1023, 1052 n 148 (2009) (collecting scholarship describing *Burdick* as "confusing" and "muddying").

[117] See, for example, Fishkin, 86 Ind L J at 1324 (cited in note 109) (describing the different ways to read the *Burdick* test); Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U Pa L Rev 313, 330 (2007) (noting the ambiguity in *Burdick* on this question). See also *Crawford*, 553 US at 204 (Scalia concurring in the judgment) (reading *Burdick* as creating a two-tiered approach to reviewing election laws); id at 190 n 8 (Stevens) (plurality) (disagreeing with the concurrence that *Burdick* created a "novel deferential 'important regulatory interests' standard").

sliding scale analysis.[118] But the more flexible balancing approach does have support in some of the Supreme Court's jurisprudence. In *Burdick* itself, the Court noted that the "rigorousness of [its] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation" burdens constitutional rights.[119] This balancing approach has thus remained viable in circuit court decisions.[120]

Furthermore, it is unclear if vote dilution claims even fit into this framework, considering the aggregate conception of the vote dilution burden.[121] The *Anderson-Burdick* test requires courts to balance the burden on an *individual's* right to vote against the state's precise proffered interest. In cases of vote dilution, the individual's burden is completely undifferentiated from other members of the group: "[N]o group member is injured more or less than any other."[122] A plaintiff who actually had the ability to cast a vote in the election may additionally struggle to convince a court that her right to vote has been burdened at all. Courts considering a single plaintiff may therefore fail to adequately assess the burden placed on that plaintiff by the relevant election regulation—especially if that plaintiff had the actual ability to physically cast a vote—and thus underweight the size of the burden that such a plaintiff truly suffers.[123] Nonetheless, at least one nonresident

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[118] See Douglas, 18 Cornell J L & Pub Pol at 170 (cited in note 15) (describing confusion in lower courts resulting from the Court's inconsistent approach to the treatment of voting rights).

[119] *Burdick*, 504 US at 434. See also Elmendorf, 156 U Pa L Rev at 330 n 66 (cited in note 117) ("[I]f the Court had really meant to consign all nonsevere burdens to rational basis scrutiny, it probably would have said as much.").

[120] See, for example, *Voting for America, Inc v Steen*, 732 F3d 382, 393–95 (5th Cir 2013) (finding that a burden on voting rights was nonsevere but then carefully analyzing the regulatory interests put forward by the state to assess the relevant law's validity); *Price v New York State Board of Elections*, 540 F3d 101, 109–12 (2d Cir 2008) (applying *Burdick* as a balancing test requiring a stronger state justification when the individual burden is nontrivial).

[121] See notes 24–25 and accompanying text.

[122] Gerken, 114 Harv L Rev at 1704 (cited in note 21).

[123] See Ellis, 86 Denver U L Rev at 1064–67 (cited in note 116) (noting in the voter identification law context that applying the *Anderson-Burdick* balancing test is challenging for courts because it is difficult for courts to adequately assess the size of the burden that such laws only indirectly pose for individuals). For an example of a court underweighting the effects of vote dilution, see *Earnshaw v Jackson*, 1996 WL 474363, *4–5 (D Md) (holding that the plaintiff had no remedy for his equal protection claim based on a failure to purge voter rolls because every Maryland citizen had her votes diluted in the exact same proportion by this failure to purge: therefore, "no one voting in the November 1994 election . . . was treated differently from any other similarly situated voter").

vote dilution case has used this framework,[124] and another recent case held that *Anderson* and *Burdick* apply to other one person, one vote challenges.[125] This framework thus provides a potential way to review nonresident vote dilution claims.

II. NONRESIDENT VOTE DILUTION CLAIMS: WHAT STANDARD OF REVIEW APPLIES?

This Part explores how courts have applied the above framework to nonresident vote dilution claims. As previously described, these claims can arise when state statutes create election schemes that result in overlapping jurisdictions at the local level, or when a jurisdiction's governing document allows nonresident property owner voting.[126] These claims are underexplored, likely because of a pervasive view that "[*o*]*ver* inclusiveness [of the franchise] is a lesser constitutional evil than *under* inclusiveness."[127]

Of course, this view focuses on the interests of those nonresidents who might be disenfranchised by the plaintiffs' requested relief rather than on the interests of the plaintiffs themselves. This in turn obscures analysis of the interest that plaintiffs are trying to protect: their right to fully weighted votes.[128] Plaintiffs in these cases argue that

> [t]o empower someone who otherwise would have nothing at stake with a vote in a strategic political arena is to endow that person with wealth—the value of the benefits obtainable

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[124] See *Day v Robinwood West Community Improvement District*, 693 F Supp 2d 996, 1005 (ED Mo 2010) (noting that "[c]ourts confronting equal protection claims asserting vote dilution resulting from expansion of the voter base have generally employed a standard at the rational basis end of the *Anderson* spectrum") (citation omitted).

[125] See *Nation v San Juan County*, 150 F Supp 3d 1253, 1266 (D Utah 2015) (concluding that the *Anderson-Burdick* test must be applied to one person, one vote challenges as it "best represents the careful analysis here required under *Reynolds*"). See also *Obama for America v Husted*, 697 F3d 423, 430 (6th Cir 2012) (noting that "*Anderson* explicitly imported the analysis used in equal protection cases . . . thus creating a single standard for evaluating challenges to voting restrictions").

[126] See notes 1–2 and accompanying text. See also Briffault, 60 U Chi L Rev at 396–401 (cited in note 6) (describing these as "expanded electorates" cases).

[127] *Brown v Board of Commissioners of the City of Chattanooga, Tennessee*, 722 F Supp 380, 398 (ED Tenn 1989). See also Richard L. Hasen, *The Democracy Canon*, 62 Stan L Rev 69, 76 (2009) (describing a statutory construction canon that creates a presumption favoring a broader right to vote); Note, 93 Harv L Rev at 1502–07 (cited in note 6) (exploring courts' constitutional review of nonresident vote dilution claims along with inclusionary vote dilution claims and concluding that their differential treatment can be explained by a desire to maximize voter participation).

[128] See Note, 93 Harv L Rev at 1500–01 (cited in note 6).

> in exchange for her or his vote—at the expense of other participants who do have interests inextricably at stake.[129]

This argument itself poses problems, as it presupposes that in the absence of the inclusion of nonresidents, an ideal district exists in which residents' votes would have the proper weight. If this ideal benchmark does not exist, then perhaps these claims are not cognizable at all.[130] Instead, the design of the electorate would properly be left to the legislature.[131]

Despite potential cognizability issues, though, various circuit courts have decided to review the merits of nonresident vote dilution claims. Importantly, in considering the merits of these claims, courts have subjected them to different levels of constitutional review. Plaintiffs usually invoke the Fourteenth Amendment to make their arguments, implicating the threshold question of how closely a court should review the challenged election regulation. As discussed above, the standard of review in an equal protection challenge can be dispositive.[132]

The rest of this Part explores how courts have made these decisions and reviewed these claims. Part II.A discusses the Fourth Circuit's application of strict scrutiny. Part II.B discusses the circuits using a more deferential rational basis–like standard of review, although this test is not the free pass seen in many other equal protection contexts.

A. Strict Scrutiny in the Fourth Circuit

Locklear v North Carolina State Board of Elections[133] established the Fourth Circuit's application of strict scrutiny in the nonresident vote dilution context.[134] The *Locklear* plaintiffs challenged a North Carolina statute establishing the voting structure for school boards in the state.[135] Robeson County, North Carolina, had six school districts, each with its own school board (five city

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129 Frank I. Michelman, *Dunwody Distinguished Lecture in Law: Conceptions of Democracy in American Constitutional Argument; Voting Rights*, 41 Fla L Rev 443, 461–62 (1989).

130 See *Hall*, 512 US at 880 (Kennedy) (plurality) (discussing the need for a "reasonable alternative practice as a benchmark" in a § 2 voting suit). For a discussion of the difficulty *Hall* recognizes in identifying this benchmark, see notes 53–57 and accompanying text.

131 See Part III.A.

132 See Part I.D.1.

133 514 F2d 1152 (4th Cir 1975).

134 See id at 1154.

135 Id at 1153.

boards and one county board); each board had exclusive jurisdiction over its own schools.[136] The county school board made some decisions that affected city residents—such as coordinating transportation—but did not control the city districts.[137] Members of each of the city boards were elected exclusively by voters residing within that city's school district, but city residents could also vote for some county board members.[138] The plaintiffs were county school district residents who argued that this voting scheme unconstitutionally diluted their own votes for the county board.[139]

The Fourth Circuit interpreted *Kramer* and *Reynolds* as requiring strict scrutiny review.[140] It viewed *Kramer* as the requisite authority for any case involving infringement of voting rights.[141] While acknowledging that *Kramer* did not involve vote dilution claims, it held that the case's application of strict scrutiny was still relevant because of *Reynolds*'s language regarding the injury that vote dilution poses to voting rights.[142] In applying this standard, the court described the asserted governmental interest as the city voters' interest in the county board's management: the state pointed to cooperative agreements between the county and city boards whereby the county board administered the transportation system and other resources for both county and city students.[143] The Fourth Circuit did not find the interests of city residents in these programs compelling enough to justify their participation in the county board elections.[144] Furthermore, even if these cooperative agreements did signify a compelling interest, the court indicated that allowing city residents to vote would still be constitutionally impermissible.[145] Allowing city residents to vote in county school district elections "give[s] them a voice in the operation of the county schools in those noncooperative aspects of

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136 Id.

137 *Locklear*, 514 F2d at 1153, 1155–56.

138 Id at 1153. County residents could still vote for the county board members for which city residents also voted. Id. County residents who did not reside in the city school districts could not vote for members of those city boards. Id.

139 Id at 1152–53.

140 See id at 1154 ("[W]e conceive the legal question to confront us to be whether a *compelling* state interest justifies permitting residents of city school units to participate in the election of these seven members of the county board. If not, the franchise is constitutionally over-inclusive.").

141 See *Locklear*, 514 F2d at 1154.

142 Id, citing *Reynolds*, 377 US at 555.

143 *Locklear*, 514 F2d at 1155.

144 Id.

145 See id at 1156 (noting that beyond the cooperative agreements, the county board was responsible for only the schools in its own jurisdiction).

their operation in which there is no showing that they have any interest."[146]

Locklear's analysis anticipates the approaches of other circuits to these claims, in that it explicitly balances nonresidents' interest in the election against the interests of residents bringing the challenge (as the state's asserted interest was the interest that nonresidents had in the election's outcome).[147] A decisive aspect of the Fourth Circuit's analysis was the overwhelming consequence of giving city residents a vote as compared to their true interest in the election's outcome. While there were joint functions for the cities and the county that the county board administered, the fact that city residents could vote for county board members based solely on those functions made the nonresident voters' interest less compelling and unable to withstand closer judicial review.

A 2012 district court decision considering a preliminary injunction in the redistricting context signaled the continuing vitality of *Locklear*'s strict scrutiny approach. The court in *NAACP–Greensboro Branch v Guilford County Board of Elections*[148] confronted a request for a preliminary injunction to prevent the implementation of a redistricting scheme in combination with a new election schedule that would leave some county commissioner districts underrepresented for a two-year period.[149] While this presented a quantitative dilution claim rather than a nonresident vote dilution one, the court followed *Locklear*'s reasoning and applied strict scrutiny.[150] Because it was "not able to discern a compelling state interest that would permit this type of dilution," the court amended the implementation of the relevant law.[151]

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146 Id.

147 See *Locklear*, 514 F2d at 1155 ("We do not think that the city voters' interest . . . amounts to a compelling state interest.").

148 858 F Supp 2d 516 (MD NC 2012).

149 Id at 522, 525.

150 Id at 524.

151 Id.

B. Rational Basis Review Employed by Other Circuits

Courts within the Second,[152] Fifth,[153] Sixth,[154] Seventh,[155] Eighth,[156] Tenth,[157] and Eleventh[158] Circuits, as well as several state courts,[159] have eschewed *Locklear*'s strict scrutiny approach in favor of a more deferential rational basis–like review of nonresident vote dilution claims. These courts all use the same review standard—the inclusion of nonresident voters must be rational, and the test of rationality is whether nonresidents have a substantial interest in the election. The "substantial interest" requirement creates a form of rational basis review that is more stringent than the version typically applied in equal protection cases.

The Sixth Circuit has most explicitly rejected *Locklear*'s strict scrutiny approach. In *Duncan v Coffee County, Tennessee*,[160] a case with very similar facts to *Locklear*, it held that *Locklear*'s definition of nonresidents' interest had merit but its standard was incorrect: "[T]he benchmark for determining whether the inclusion of 'out-of-district' voters in another district's elections unconstitutionally dilutes those votes is whether the decision is *irrational*."[161] This case concerned three school districts in Coffee County, Tennessee, corresponding to the city of Tullahoma, the city of Manchester, and rural Coffee County.[162] The two cities were allowed to vote for the county school district's board, and residents of rural Coffee County brought an equal protection claim alleging that the inclusion of Tullahoma residents unconstitutionally diluted their own votes in the county school board election.[163]

The *Duncan* court first held that Coffee County was not *required* to enfranchise Tullahoma residents in Rural Coffee

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152 See, for example, *Collins v Town of Goshen*, 635 F2d 954, 959 (2d Cir 1980).

153 See, for example, *Creel v Freeman*, 531 F2d 286, 289 (5th Cir 1976).

154 See, for example, *Duncan v Coffee County, Tennessee*, 69 F3d 88, 94 (6th Cir 1995).

155 See, for example, *Cantwell v Hudnut*, 566 F2d 30, 37 (7th Cir 1977).

156 See, for example, *Day v Robinwood West Community Improvement District*, 693 F Supp 2d 996, 1005–06 (ED Mo 2010).

157 See, for example, *May v Town of Mountain Village*, 132 F3d 576, 582 (10th Cir 1997).

158 See, for example, *Levy v Miami–Dade County*, 254 F Supp 2d 1269, 1289 (SD Fla 2003).

159 See, for example, *Burriss v Anderson County Board of Education*, 633 SE2d 482, 486–87 (SC 2006); *Bjornestad v Hulse*, 229 Cal App 3d 1568, 1592 (1991).

160 69 F3d 88 (6th Cir 1995).

161 Id at 94 (emphasis added).

162 Id at 90.

163 Id at 91.

County School District elections because they were nonresidents.[164] But the court also noted that the school district could extend the franchise as long as no *unconstitutional* dilution of rural Coffee County residents' votes occurred.[165] *Duncan* then rejected the "compelling interest" requirement of *Locklear*, noting the administrative concerns inherent in that approach: if a compelling state interest were needed to justify any expansion of the voter base, then all expansions, however innocuous, would be subject to constitutional attack.[166]

Although the court in *Duncan* applied rational basis, it imbued that test with more meaning than merely searching for any reasonably conceivable set of facts that would support the extension of the franchise to nonresidents.[167] It explored whether nonresident enfranchisement is rationally related to a legitimate state purpose by considering whether the nonresidents had a "substantial interest" in the outcome of the election.[168] It also laid out a four-factor test, based on its reading of important factors in other nonresident vote dilution cases, to use in determining whether this substantial interest exists: "(1) [t]he degree to which one district is financing the other; (2) [t]he voting strength of the non-resident voters; (3) [t]he number of, or potential for, cross-over students; [and] (4) [t]he existence of any joint programs."[169]

In applying this test to the facts of the case before it, the court found dispositive the facts that Tullahoma sent substantial amounts of its property and sales tax revenues to the Rural Coffee County School District, and that there was "only the slimmest possibility that Tullahoma residents [could] control the Coffee County School Board."[170] Based largely on these two factors, the *Duncan* court held that city residents had a substantial interest in the election; it was therefore rational for the state to extend them the franchise.[171]

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164 *Duncan*, 69 F3d at 94.

165 Id (noting that vote dilution is a "term of art" and providing the example that lowering the voting age, by increasing the number of eligible voters, "expand[s] the voting rolls . . . [b]ut it does not do so unconstitutionally").

166 Id at 95. For a similar sentiment expressed by the Supreme Court, see *Burdick*, 504 US at 433.

167 For a case applying the very lenient "reasonably conceivable" rational basis standard, see *McGowan v Maryland*, 366 US 420, 426 (1961).

168 *Duncan*, 69 F3d at 94.

169 Id at 96.

170 Id at 96–97.

171 Id at 98.

Duncan is representative of other federal and state cases that similarly use rational basis, defined by a substantial interest requirement, as the review standard for nonresident vote dilution claims.[172] Without the presence of this substantial interest, courts reason, it would be irrational to allow nonresidents to vote.[173] Plaintiffs have the burden of showing that the extension of the franchise to nonresidents is irrational because there is no such substantial interest.[174]

While not all courts in these circuits articulate the same factors as *Duncan*, they focus on similar externalities in evaluating the interest of nonresidents in an election's outcome. Two elements, similar to the most dispositive factors in *Duncan*, carry the most weight in these cases. The first is the financial interest nonresidents have in the district at issue. If nonresidents represent a significant portion of the district's tax base, or contribute financially in some other way, this weighs strongly in favor of a substantial interest in the election.[175] Cases involving the enfranchisement of nonresident property owners particularly emphasize this factor.[176] The second is the possibility that nonresidents can overwhelm the resident population's vote and dominate

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[172] See, for example, *Day*, 693 F Supp 2d at 1005–06 (defining the test as whether residents have a "substantial interest" in the election); *Bjornestad*, 229 Cal App 3d at 1592–93 (same); *Sutton v Escambia County Board of Education*, 809 F2d 770, 772 (11th Cir 1987) (same).

[173] See, for example, *Levy*, 254 F Supp 2d at 1289 ("Non-residents may have a lesser interest, or a different interest, but they at least must have some interest to overcome any concerns of irrationality."); *Duncan*, 69 F3d at 94 ("A decision to include 'out-of district' voters in the election is not irrational if Coffee County can show that those voters have a substantial interest in the Rural Coffee County School District election.").

[174] See *Davis v Linville*, 864 F2d 127, 129 (11th Cir 1989) (per curiam).

[175] See, for example, *Levy*, 254 F Supp 2d at 1290 (citing the tax revenue flowing from incorporated cities in Miami-Dade County to the unincorporated area as one basis for extending the franchise to city residents in county elections); *Davis*, 864 F2d at 130 (citing the county school district's receipt of sales and property tax revenue as a substantial interest); *Collins*, 635 F2d at 959 (holding that nonresidents' financial interest in a water district constituted a substantial interest); *Cantwell*, 566 F2d at 35 ("Taxpayers who participate in paying for capital expenditures have an interest in how facilities and equipment are used."); *Creel*, 531 F2d at 289 (citing "the substantial investment by Jasper residents in the vocational school and in the [Walker] county board building" as a substantial interest in the Walker County school board elections); *Clark v Town of Greenburgh*, 436 F2d 770, 772 (2d Cir 1971) (finding that the tax village residents paid to support 5 percent of the budget for the unincorporated area was evidence of a sufficient interest in the town's elections).

[176] See, for example, *Day*, 693 F Supp 2d at 1006 (holding that their property taxes gave nonresident landowners a substantial interest in a community improvement district's board elections); *May*, 132 F3d at 582 (holding that a charter allowing nonresident

the election. Domination in this context means that the scheme virtually guarantees that nonresident voters will control the election to the exclusion of residents.[177] The more this possibility exists, the less likely it is that a court will allow nonresidents to keep the franchise.[178] While not accorded as much influence, courts also consider the other interests expressed in the *Duncan* factors, including stakeholder crossover from the nonresident district to the district at issue[179] and the existence of concrete benefits for nonresidents flowing from the decisions made by the elected body.[180]

Importantly, this substantial interest requirement makes rational basis–like review more robust than the traditional "free pass" that the standard is usually considered to represent. Courts have used these factors to hold that nonresidents have no substantial interest, thus rendering their enfranchisement irrational.[181] The fact-intensive nature of this inquiry has also led

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landowners to vote in town elections was constitutional because these voters owned a majority of the property in the resort town); *Bjornestad*, 229 Cal App 3d at 1594 ("Landowners bear the weight of financial responsibility for [the water district].").

177 See, for example, *Board of County Commissioners of Shelby County, Tennessee v Burson*, 121 F3d 244, 250 (6th Cir 1997) (failing to name a specific threshold but holding that the relevant voting scheme "would unconstitutionally dilute the votes of residents . . . by placing the overwhelming majority of ballots in the hands of out-of-district voters").

178 See, for example, *Davis*, 864 F2d at 129 ("[C]ity residents did not appear to have dominated previous elections."); *Sutton*, 809 F2d at 774 (holding that the lack of domination by city residents in county school board elections supported the extension of the franchise to those city residents).

179 See, for example, *Levy*, 254 F Supp 2d at 1290 ("[T]he [nonresident area] and the [resident district] share not only revenue and services, but also the same governing body, administration, and employees."); *Sutton*, 809 F2d at 773–74 (finding that a substantial crossover between city and county school districts demonstrated the substantial interest of city residents in the county election); *Rutledge v Louisiana*, 330 F Supp 336, 339–40 (WD La 1971) (basing its decision to allow city residents to vote in parish school board elections in part on the strong student crossover between the two school systems).

180 See, for example, *Burriss*, 633 SE2d at 489 (discussing the spillover effects from the county educational system that benefitted all nearby students); *Levy*, 254 F Supp 2d at 1289 (holding that the provision of municipal services by the county's governing body benefitting nonresidents pointed to a substantial interest of those nonresidents in the governing body's election).

181 See, for example, *Burson*, 121 F3d at 250 (holding that the voting plan at issue "would unconstitutionally dilute the votes of residents in the Shelby County School District by placing the overwhelming majority of ballots in the hands of out-of-district voters"); *Hosford v Ray*, 806 F Supp 1297, 1303 (SD Miss 1992) (holding that the extension of the franchise to Canton residents in the Madison County superintendent of education elections was irrational because they did not have a substantial interest in the election); *Brown*, 722 F Supp at 399 (holding that the Chattanooga city charter unconstitutionally diluted resident votes); *Phillips v Andress*, 634 F2d 947, 951 (5th Cir 1981) (holding that the extension of the franchise in county school board elections to city residents with a separate municipal school board was irrational); *County of Tripp v State*, 264 NW2d 213,

judges in some of these cases to dissent because their analysis of the relevant factors differed from the majority, further indicating that this kind of government action is not deferentially reviewed in all cases.[182]

Clearly, in the nonresident vote dilution context, the standard of review is less dispositive than it can be in other equal protection spheres. Rational basis review does not invariably result in the judicial deference to state objectives that is usually seen in other equal protection contexts. The interest balancing that these circuits deploy thus seems to resemble the *Anderson-Burdick* balancing test that the Supreme Court articulated for determining the constitutionality of individual voting burdens.[183] Although *Anderson-Burdick* balancing determines the correct level of review, and while the substantial interest test described here involves the application of only one kind of review, in both contexts considerations of the burdens at issue can lead to more robust analysis than typically seen with rational basis review.

III. A NEW APPROACH TO NONRESIDENT VOTE DILUTION CLAIMS

As described in Part II, courts have not been consistent in their review of nonresident vote dilution claims. The Fourth Circuit closely scrutinizes the state's asserted interest in enfranchising nonresidents, while other courts use rational basis review to assess these voting schemes. Once these cases are properly situated within Supreme Court precedent, however, the question whether strict scrutiny or rational basis applies becomes more complicated than merely choosing between these two tiers.

An initial threshold question not addressed by most of the courts considering nonresident vote dilution is whether such claims are cognizable at all. In the analogous situation of racial vote dilution, cases like *Hall* establish that a benchmark must exist against which the alleged dilution can be measured. If there is no such benchmark, a court need not address the merits of the issue because there is no identified burden on plaintiffs and their group voting power.

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219 (SD 1978) (finding that "[t]here is no rational basis, much less a compelling state interest," for the process used to enfranchise nonresidents when they could overwhelm the election).

182 See, for example, *Sutton*, 809 F2d at 775–84 (Clark dissenting); *Cantwell*, 566 F2d at 39–40 (Fairchild dissenting).

183 See Part I.D.2.

Assuming that these claims are cognizable, though, the second threshold question of constitutional review is implicated. To resolve the existing split, nonresident vote dilution cases can be considered alongside nonresident disenfranchisement cases such as *Holt*. Nonresident disenfranchisement claims involve nonresidents challenging their exclusion from the franchise: these claims usually receive rational basis review.[184] Some commentators have questioned whether these two claims can be reviewed together, as one claim questions the expansion of the franchise and the other challenges its restriction.[185] This clearly implicates different burdens on an individual's access to the franchise. But both kinds of claims involve questions about the legitimacy of residency restrictions, and they are considered together here through that residency restriction framework.

The rest of this Part explores potential answers to these threshold questions. Part III.A argues that courts can decline to review a legislature's choice to enfranchise nonresidents if no invidious discrimination is involved. Part III.B alternatively argues that, if courts find nonresident vote dilution claims cognizable, considering them purely as residency restrictions demonstrates that the burdens involved are not severe enough to warrant wholesale strict scrutiny. Instead, the substantial interest version of rational basis that most circuits employ should guide analysis of nonresident vote dilution claims. Part III.C then considers the practical implications of this substantial interest review. Future courts faced with nonresident vote dilution claims should focus on whether the border creating a resident/nonresident distinction artificially separates a unified political community. If the court considers members of both groups to in fact be members of such a unified political community, the inclusion of nonresidents in the franchise would be rational.

A. Leaving the Decision to the Legislature

Before addressing the standard of review issue, courts considering nonresident vote dilution cases must determine whether the residents bringing these actions have stated valid claims. If

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[184] See, for example, *Holt*, 439 US at 70 ("[T]he equal protection issue presented by appellants becomes whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some *rational relationship to a legitimate state purpose*.") (emphasis added). But see *Little Thunder v South Dakota*, 518 F2d 1253, 1256 (8th Cir 1975) (applying strict scrutiny to a nonresident disenfranchisement claim).

[185] See, for example, Note, 93 Harv L Rev at 1501–02 (cited in note 6).

residents raising these issues cannot show that the challenged voting schemes are dilutive, then courts do not have to decide which scrutiny level to use. While the decisions discussed above reached the constitutional review stage, it is unclear whether the situations they analyzed represent truly cognizable instances of vote dilution.

Considering contexts outside of nonresident vote dilution demonstrates that there are multiple reasonable ways for legislatures to create electorates. In the local sphere, governments are allowed to be innovative and experiment in creating municipalities that are responsive to local conditions.[186] In the state-level legislative district sphere, legislatures may be able to use different population metrics to equalize voter populations to comply with one person, one vote, even after *Evenwel*.[187] Including more or fewer voters in the denominator of these voter population calculations does not by itself necessarily create a constitutional issue absent some other problem with the district's creation.[188] A court faced with a nonresident vote dilution claim could therefore conclude that, in this sphere as well, "[t]he decision to include or exclude any [ ] group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[189]

The benchmark issue that is so critical in the statutory vote dilution context is also highly relevant to nonresident vote dilution claims. In *Hall*, which involved a challenge to the size of a governing body, the Court held that "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison."[190] The Court noted that sometimes this benchmark will be an obvious one that can easily be used to measure the dilutive effects of the challenged practice.[191] But courts cannot speculate about what the ideal benchmark is: there has to be a

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[186] See *Hadley v Junior College District of Metropolitan Kansas City*, 397 US 50, 59 (1970) ("We see nothing in the Constitution to prevent experimentation.").

[187] See *Evenwel*, 136 S Ct at 1123, 1132–33 (holding that states "may" draw legislative districts using total population and declining to resolve the question whether states may also use the voter-eligible population metric when doing so).

[188] See, for example, *White v Regester*, 412 US 755, 765–67 (1973) (invalidating districts drawn in a manner that invidiously discriminated based on race); *Gomillion v Lightfoot*, 364 US 339, 346–47 (1960) (same).

[189] *Burns v Richardson*, 384 US 73, 92 (1966).

[190] *Hall*, 512 US at 881 (Kennedy) (plurality).

[191] Id (Kennedy) (plurality). See also *Rodriguez v Harris County, Texas*, 964 F Supp 2d 686, 725 (SD Tex 2013) (describing how plaintiffs usually demonstrate the undiluted benchmark by proposing hypothetical redistricting schemes on illustrative maps).

"principled reason" why one alternative is chosen as *the* measurement for the dilutive practice.[192] This principled benchmark alternative is necessary for courts to determine whether vote dilution is actually occurring.[193] While *Hall* was decided in the racial vote dilution context under the Voting Rights Act, its reasoning can be applied here as well.[194]

The substantial interest test deployed by most circuits to analyze these claims arguably poses this benchmark issue. Presumably, if required to demonstrate an appropriate benchmark electorate that would not dilute their votes, plaintiffs would argue that the reasonable alternative practice includes only residents of the relevant jurisdiction.[195] But courts using the substantial interest version of the rational basis test are instead considering as ideal electorates those that include residents plus other substantially interested people. Although not using these ideal electorates as benchmarks in the same way as in racial vote dilution cases, courts are indicating that they similarly operate as reasonable alternatives that do not dilute votes.[196]

It is not immediately clear why this kind of nonresident enfranchisement would be the best benchmark to use, though. States defending against nonresident vote dilution claims might point to the concerns brought out by the *Duncan* factors to establish why including substantially interested nonresidents is appropriate in constructing an ideal, nondilutive district.[197] They could also point to cases articulating the scope of the interest exception

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[192] *Hall*, 512 US at 881 (Kennedy) (plurality). See also *Concerned Citizens for Equality v McDonald*, 63 F3d 413, 418 (5th Cir 1995) (holding that the proffered language from the Texas state constitution was too amorphous to constitute a "readily identifiable benchmark") (quotation marks omitted).

[193] See *Hall*, 512 US at 880 (Kennedy) (plurality) ("The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.").

[194] See generally, for example, Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 Tex L Rev 1153 (1996) (comparing various property-based and residency-based voting schemes to the Voting Rights Act vote dilution body of law).

[195] See, for example, *Hosford v Ray*, 806 F Supp 1297, 1307–08 (SD Miss 1992) (granting resident plaintiffs their requested relief to enjoin nonresidents from voting in the relevant election for superintendent of education—thus creating a district composed only of resident voters).

[196] See id at 1303 (holding that, "[w]here no substantial interest exists, a practice of allowing municipal separate school district electors to vote for the county superintendent of education [ ] dilutes the vote of those residents who reside within the county, but outside the municipal separate school district"); *Sutton v Escambia County Board of Education*, 809 F2d 770, 772 (11th Cir 1987) (stating that nonresidents without a substantial interest must be excluded from voting).

[197] See *Duncan*, 69 F3d at 96.

to the one person, one vote rule and the focus in such cases on allowing all interested voters to have a voice in elections.[198] But resident plaintiffs could in turn point to *Holt* and its focus on the importance of residency in determining who exercises the franchise in any particular election to argue that their claims are valid.[199] Both conceptions of benchmark electorates are arguably reasonable ones. As in *Hall*, there is not necessarily any "principled reason" why one of these systems should be chosen over the other as the ideal nondilutive practice. Because that is the case, courts facing nonresident vote dilution claims can remain entirely uninvolved in their merits. If there is no benchmark representing an undiluted ideal, there is no vote dilution, and therefore plaintiffs do not have a cognizable claim for which the court can grant relief.

If courts stay out of nonresident vote dilution claims, decisions regarding the inclusion of nonresidents in an electorate will instead be left to the legislature's discretion. Residents would therefore need to use the political process to change the composition of the relevant electorate and exclude nonresidents. The Supreme Court has noted that, in the context of redistricting, courts might need to become involved when legislators have no incentive to effect change.[200] This could be an argument for continued judicial consideration of these claims: nonresidents might capture relevant decisionmakers through lobbying efforts or otherwise frustrate attempts to disenfranchise them despite their potentially minimal interest levels.

There are two main reasons to believe that these considerations would not pose problems in this context. First, if the extension of the franchise to nonresidents involves invidious discrimination based on a suspect category like race, resident-plaintiffs could always bring an equal protection claim on that basis.[201] Second, the unique circumstances in which nonresident vote dilution claims typically arise provide protection against legislator capture. In

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198 See *Cipriano*, 395 US at 705–06 (invalidating a voting scheme that excluded interested voters from an election of general importance). See also *Salyer*, 410 US at 727–30 (using property owners' interest as a touchstone in upholding the voting scheme in a special-purpose district).

199 *Holt*, 439 US at 68–70.

200 See *Evenwel*, 136 S Ct at 1123 (describing how the Court initially declined to enter the "political thicket" of redistricting but eventually took an active role in the area). But see id at 1140 (Thomas concurring in the judgment) ("[T]he Court has been wrong to entangle itself with the political process.").

201 See *Miller v Johnson*, 515 US 900, 904 (1995) (noting that the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking").

cases in which state statutes are implemented locally to create the problematic voting system,[202] residents could lobby the state to change the relevant law. State legislators likely have a larger group of constituents beyond the nonresidents who might want to maintain the status quo voting scheme. Because of this disconnect between the contested electorate and the decisionmakers who could effect a change in that electorate, the possibility that these decisionmakers could be captured by the nonresident interest group is greatly reduced. In cases in which the governing documents of particular localities allow nonresident voting, residents most likely had a say in the decision to enfranchise nonresidents.[203] Having made this decision through the political process, allowing a vocal minority of residents to appeal to the courts to change it would pervert that well-functioning process. Those dissenters could instead appeal to their fellow residents in an effort to once again change the governing documents for the locality. Thus, leaving the decision to enfranchise nonresidents to the legislature would provide adequate remedies for those residents seeking a change in the electorate.

B. Nonresident Vote Dilution Claims as Residency Restrictions

Courts should treat nonresident vote dilution claims as noncognizable. But some courts in the future may decide to reach their merits despite this. If that is the case, then the second threshold question—the correct standard of constitutional review—is implicated. The existing split on this question can be resolved by considering nonresident vote dilution claims alongside closely related claims of nonresident disenfranchisement.

Kramer established that any voting restriction not based on residency, age, or citizenship is subject to strict scrutiny.[204] The inverse of this principle is that, when an election regulation premises the franchise on a residency requirement, challenges to that regulation by nonresidents are reviewed using a rational basis standard.[205] Even when nonresidents may have some interest in

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[202] See, for example, *Locklear*, 514 F2d at 1153 & n 4 (explaining how state legislation created the nonresident vote dilution issue); *Duncan*, 69 F3d at 91 (same).

[203] See, for example, *May v Town of Mountain Village*, 132 F3d 576, 582 (10th Cir 1997) (noting that the jurisdiction's residents specifically voted to approve the charter extending the franchise to nonresident property owners).

[204] See *Kramer*, 395 US at 633. See also text accompanying notes 91–97.

[205] See *Holt*, 439 US at 70. See also notes 99–101 and accompanying text.

an election, courts typically uphold their exclusion from the franchise after applying the requisite rational basis review.[206] Residents generally have greater knowledge of and interest in the governance of a particular area, thus explaining the rationality of these voting schemes.[207]

That does not mean that the denial of the franchise to nonresidents unfailingly survives constitutional review, however. *Holt*, for example, recognized that, in "a situation in which a city has annexed outlying territory in all but name," the disenfranchisement of those in that outlying territory would be unconstitutional.[208] Courts have in fact found that nonresidents' disenfranchisement in those situations is unconstitutional after applying strict scrutiny,[209] remaining alert to the possibility that this disenfranchisement involves nothing more than the removal of a truly interested group from the voting population.[210] Nonresident disenfranchisement claims thus turn on interest levels just as nonresident vote dilution cases do. Usually residency status will effectively divide groups of voters into those who are sufficiently interested members of the electorate and those who are not. When

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[206] See, for example, *English v Board of Education of Town of Boonton*, 301 F3d 69, 79 (3d Cir 2002) (applying rational basis review and holding that nonresidents did not need proportional representation on a district's school board because "the mere fact that a municipality's actions may have an impact—even a substantial impact—on non-residents does not entitle those non-residents to vote in the municipality's elections"); *Hawkins v Johanns*, 88 F Supp 2d 1027, 1046 (D Neb 2000) ("While one can argue whether Nebraska made the right choice, the relationship between the governmental purpose and the challenged statutes [excluding nonresidents from voting] is neither arbitrary nor irrational."); *St. Louis County, Mo v City of Town and Country*, 590 F Supp 731, 738 (ED Mo 1984) (applying rational basis review because "[t]hose who reside outside the jurisdiction here do not have [a] constitutional right to vote, so a compelling state interest need not be shown for not allowing them to vote").

[207] See *Broyles v Texas*, 618 F Supp 2d 661, 687 (SD Tex 2009) (providing "a number of rational bases" for nonresidents' exclusion from the franchise in local elections, including their reduced knowledge of local affairs and smaller interest in the welfare of a jurisdiction).

[208] *Holt*, 439 US at 72 n 8.

[209] See, for example, *Little Thunder*, 518 F2d at 1256 (holding that strict scrutiny applied to a nonresident disenfranchisement claim when voters with a substantial interest in the election were denied the franchise). See also id ("Geographic residency requirements are permissible when they are designed to insure that only voters who have a *substantial interest* in the outcome of elections will participate.") (emphasis added); *Evans v Cornman*, 398 US 419, 425–26 (1970) (holding that residents of a federal enclave in Maryland needed the franchise in elections within the state because "[i]n nearly every election . . . appellees have a stake equal to that of other Maryland residents").

[210] See *Evans*, 398 US at 423, quoting *Carrington v Rash*, 380 US 89, 94 (1965) ("All too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.") (quotation marks omitted).

nonresidents have an extremely strong interest in an election's outcome, though, laws disenfranchising them receive higher scrutiny.

Nonresident vote dilution cases can be similarly analyzed. Normally, residency is an appropriate limiting principle for extension of the franchise. Many of the districts in these cases therefore did not need to allow nonresidents to vote in their elections, but they did so anyway.[211] In some cases, this was a state decision in which resident voters indirectly had a voice; in others, residents themselves decided that allowing nonresidents to vote in some fashion was perfectly appropriate.[212] Once a state's decision to extend the franchise this way is implemented, subjecting that franchise to strict scrutiny in every case would render its existence tenuous at best.[213] The Supreme Court has repeatedly emphasized that states need the opportunity to create reasonable election regulations.[214] To then say, as the Fourth Circuit does, that every time a state enfranchises interested nonresidents this choice will face the prospect of being overruled by stringent constitutional review seems antithetical to the Court's previously articulated rationale for a balancing test in the voting rights context.[215]

As noted in Part II, though, an analysis focusing solely on the interests of nonresidents ignores the very problem that nonresident vote dilution claims are trying to address. Pure rational basis review would not properly account for this problem because it

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[211] See, for example, *May*, 132 F3d at 582 (noting that the jurisdiction's residents specifically voted to approve the charter granting nonresident property owners the franchise). See also *Locklear*, 514 F2d at 1153 n 4 (noting that, while state legislation mandated the relevant school board election procedure, considerable local variation existed as to nonresident enfranchisement under that statute).

[212] See *May*, 132 F3d at 578–79; *Locklear*, 514 F2d at 1153 & n 4.

[213] To say this applies to a state's decision is to say it applies to a local government's decision as well. See *Avery v Midland County*, 390 US 474, 480 (1968) ("The actions of local government are the actions of the State.") (emphasis omitted).

[214] See, for example, *Crawford v Marion County Election Board*, 553 US 181, 189–90 (2008) (Stevens) (plurality) (reaffirming that "evenhanded" election regulations are constitutional); *Burdick*, 504 US at 433 ("[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); *Anderson*, 460 US at 788 (citing the state's "important regulatory interests" in elections as sufficient to justify "reasonable, nondiscriminatory restrictions").

[215] See *Duncan*, 69 F3d at 95 (rejecting *Locklear*'s use of strict scrutiny because it would leave all expansions of voter rolls vulnerable to constitutional attack). See also Note, 93 Harv L Rev at 1502 n 77 (cited in note 6) (arguing that in the vote dilution context, "[s]trict scrutiny would lead to the rejection of every state electoral distribution and hence be unworkable").

is so deferential to a state's proffered interest.[216] The "substantial interest" definition of rational basis deployed by most courts in nonresident vote dilution claims, however, does account for the issue.[217] By explicitly considering the interests of all parties in the relevant election, this "substantial interest" rational basis test ensures that constitutional review of these claims is neither a free pass nor fatal in fact. The test ensures that when nonresidents are sufficiently interested in an election's outcome, their enfranchisement does not result in problematic vote dilution, as all interested voters are given a voice in the election. If plaintiffs in these cases can prove that their votes are severely diluted by uninterested nonresidents, then courts can scrutinize the election scheme more closely. Otherwise, courts can defer to the state's decision to enfranchise those with a substantial interest in the election's outcome.

The notion of what a "substantial" interest is will of course vary from case to case. There will be some situations in which nonresident interest will be substantial enough to defeat a dilution claim but would not be enough to prevail on an enfranchisement claim. The cases arising in school district contexts in particular highlight this issue: more often than not, the status quo may be left in place using this framework.[218] Still, this rational basis standard represents a better way for courts to review nonresident vote dilution claims and account for this range of interests than the strict scrutiny used in the Fourth Circuit.

C. Redefining the Substantial Interest Requirement

Deciding that the substantial interest definition of rational basis is the correct way to review nonresident vote dilution claims does not fully answer the question of what courts reaching the merits of these cases should do going forward. Courts confronting

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[216] See, for example, *Crawford*, 553 US at 194–96 (Stevens) (plurality) (stating that voter fraud prevention in Indiana provided a rational basis for requiring voter identification at the polls despite the lack of evidence "of any such fraud actually occurring in Indiana at any time in its history").

[217] See, for example, *Board of County Commissioners of Shelby County, Tennessee v Burson*, 121 F3d 244, 249 (6th Cir 1997); *Hogencamp v Lee County Board of Education of Lee County*, 722 F2d 720, 722 (11th Cir 1984); *Clark v Town of Greenburgh*, 436 F2d 770, 772 (2d Cir 1971).

[218] Compare, for example, *Duncan*, 69 F3d at 98 (using nonresident interest in school board elections as the basis for dismissing a vote dilution claim), with *English*, 301 F3d at 82 (holding that nonresidents did not need to be enfranchised because "New Jersey has legitimate reasons for limiting the input of a [nonresident school] district in the [ ] district's board's decisions").

these claims will need to engage in a fact-specific inquiry that investigates the substantiality of nonresidents' interests and the burden placed on residents' rights to undiluted votes when these interests are given effect.[219] The *Duncan* factors are an imperfect means of engaging in this analysis, though.

1. Tension in the current substantial interest test.

This inquiry into the substantiality of nonresidents' interests raises questions about the interests that are sufficiently substantial to render nonresident enfranchisement rational. After all, "[a] city's decisions inescapably affect individuals living immediately outside its borders,"[220] and so not all interests of nonresidents can be substantial in a constitutionally important way.[221] Courts have typically used factors similar to those in *Duncan* to assess the substantiality of nonresidents' interests and the rationality of allowing nonresident inclusion in the franchise.[222] The two factors that are most important to this inquiry are nonresidents' financial interests and the level of nonresident domination over the election's results.[223] The financial interest factor is particularly strong throughout nonresident vote dilution cases[224] as well as Supreme Court precedent in analogous circumstances.[225] Even more dispositive in some cases is the domination factor. To the extent nonresidents can quantitatively overwhelm the election and dilute the votes of residents so much that residents can potentially no longer control the election's outcome, courts will find

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[219] See notes 181–82 and accompanying text. See also Durchslag, 33 Case W Res L Rev at 39 (cited in note 30) (arguing that "'interest,' implicitly or explicitly, must be the touchstone of the Court's analysis" in vote dilution cases).

[220] *Holt*, 439 US at 69.

[221] See *Clark*, 436 F2d at 772 ("[V]oter 'interest' . . . will always vary from group to group and issue to issue, but this does not 'dilute' the vote of any group in the constitutional sense."). See also *Southern California Rapid Transit District v Bolen*, 822 P2d 875, 886 (Cal 1992) ("Although nonproperty owning residents of the [local] districts are 'affected' by the outcome of the referendum, they are no more affected than any other resident of the greater Los Angeles metropolitan area.").

[222] See notes 168–80 and accompanying text.

[223] See notes 170, 175–78, and accompanying text.

[224] See, for example, *May*, 132 F3d at 579 (finding that nonresidents had a substantial interest because they paid "over eight times more in property taxes than the residents"). But see, for example, *King County Water District No 54 v King County Boundary Review Board*, 554 P2d 1060, 1067 (Wash 1976) ("To allow the municipal franchise to all persons with a pecuniary interest would not permit of a manageable standard.") (emphasis omitted).

[225] See, for example, *Salyer*, 410 US at 728–29 (noting that in the water district at issue, landowners had costs assessed according to water benefits received, making the exclusive enfranchisement of property owners rational).

that the election scheme is irrational despite nonresidents' other interests.[226]

But tension exists between these two factors. If nonresidents financially support a district through property taxes or otherwise, it is not clear why their potential control of the school board would be irrational. In *Duncan*, for example, nonresidents sent 15 percent of their property tax revenue and 30 percent of the portion of their sales tax revenue earmarked for education to the county school district; this totaled 21 percent of all funds spent in the Rural Coffee County School District.[227] These numbers are not insignificant, and it is not irrational to conclude that these nonresidents should have the ability to strongly influence, or even control, the decisions of the body that they financially support. The Sixth Circuit instead found the scheme rational specifically because they did not have this control.[228]

Another *Duncan* factor raises a similar conflict with the domination issue. The third factor focuses on stakeholder crossover between jurisdictions: more crossover favors allowing nonresidents to vote. In the school context, if a significant number of nonresident children attend another district's schools, perhaps nonresidents have a large enough stake in school governance to numerically dominate in school board elections. With this factor, the ability of nonresidents to dominate an election might actually argue in favor of their enfranchisement. But courts largely do not confront this tension.[229] The next Section therefore proposes an alternative to the *Duncan* factors that makes the same substantial interest inquiry without this inherent disconnect.

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[226] See, for example, *Hogencamp*, 722 F2d at 721 (finding the relevant voting scheme unconstitutional in part because "[a]t the time of this lawsuit [nonresident] city votes had decided three of the last five elections for county school board"). See also *Locklear*, 514 F2d at 1156.

[227] See *Duncan*, 69 F3d at 96–97.

[228] Id at 97.

[229] See, for example, *Davis v Linville*, 864 F2d 127, 129–30 (11th Cir 1989) (finding that the *absence* of nonresident domination in the superintendent election made nonresident enfranchisement rational, while also finding considerable student and tax crossover between jurisdictions). But see *Bjornestad v Hulse*, 229 Cal App 3d 1568, 1593 (1991) (noting in response to the plaintiffs' domination argument that "the overwhelming number of nonresident landowners also argue *in favor* of the recognition of their substantial interest" in the district) (emphasis added).

2. Refocusing the inquiry on the jurisdiction's boundaries.

Courts can reframe their substantial interest analysis in applying rational basis review to focus on the jurisdiction's boundaries. They can ask whether these boundaries arbitrarily create "residents" and "nonresidents" where a single political community has been unnecessarily fragmented for purposes of the relevant election.[230] If such fragmentation exists, the nonresident enfranchisement will be rational because it extends the franchise to other interested members of that unified community.

Using the true contours of a political community rather than geographic borders to determine the composition of an electorate is not a new idea. The dissent in *Holt* argued forcefully against granting a "talismanic significance"[231] to geography in favor of a focus on the "reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application."[232] Geographic borders still matter to this framework, as they generally circumscribe the universe of people that could be included in the interested political community for purposes of the relevant election.[233] In nonresident vote dilution cases, the nonresidents are not an amorphous group of potentially interested observers that could reside anywhere else in the state: they are usually residents of a defined locality associated in some way with the jurisdiction where the contested election is being held.[234] But considering the political community would refocus the judicial inquiry to whether the specific geographic borders separating residents from nonresidents are irrational in the context of the specifically challenged election. This is not to say that the court would need to physically redraw the boundaries of the relevant district; instead, the court would recognize that, for this purpose, the existing boundaries are inadequate.

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230 For a standard focusing on arbitrariness in election laws, see, for example, *Avery*, 390 US at 484 ("The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.").

231 *Holt*, 439 US at 81 (Brennan dissenting).

232 Id at 82 (Brennan dissenting).

233 See Briffault, 60 U Chi L Rev at 387–88 (cited in note 6) (describing how in *Holt* the Court focused on one boundary—the corporate limits of Tuscaloosa—while ignoring the defined extraterritorial zone containing the disenfranchised plaintiffs).

234 See *Duncan*, 69 F3d at 91. Nonresident vote dilution cases involving enfranchisement of nonresident property owners would be an exception, although even in those cases those enfranchised are a limited group directly connected to the jurisdiction at issue through property ownership. See *May*, 132 F3d at 578.

Commentators have echoed the argument that a locality's geographic borders should be de-emphasized in considering a local electorate's composition. They note that the shared sense of community that a group enjoys is sometimes more important than geographic boundaries in determining the contours of the franchise.[235] These shared interests are important, as ideally they would justify including all who share those values in the same electorate.[236] This ensures that the "political community" limit is not underinclusive, excluding those who are outside of the geographic line but share a sufficient identity with those inside of that line.

This "political community" understanding of the substantial interest inquiry also has support in the nonresident vote dilution cases. Even as courts explicitly list the same factors as those in *Duncan*, their inquiry also touches on the implication of those factors—the more closely interconnected the nonresident and resident groups are, the more likely it is that nonresidents have a stake in the relevant election's outcome.[237] In other contexts, courts have similarly recognized that districts cannot be created to fence out an interested portion of the population.[238] As one commentator has noted, the process of defining a territory can be a tool through which states classify people "without inquiring as to why they should be so classified or why there are inequalities between

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[235] See Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 Fla L Rev 545, 555–56 (1989) ("Citizenship, however, is a purely formal category. A citizen of a given community need not reside in it to vote [in it]."). See also Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 Stan L Rev 931, 943–44 (2010) (arguing that cities should annex unincorporated neighborhoods that have been arbitrarily "mapped out" of the city, if the neighborhoods contain interested residents).

[236] See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan L Rev 1115, 1126 (1996) (describing how localities are usually assumed to be "groups of people with shared concerns and values, distinct from those of the surrounding world").

[237] See, for example, *Cantwell v Hudnut*, 566 F2d 30, 35 (7th Cir 1977) ("[A]s a result of the economic and social, as well as political, interrelationships between the districts . . . all residents of the county share a community of interests."); *Rutledge v Louisiana*, 330 F Supp 336, 339 (WD La 1971) (noting that the parish and city school systems "clearly cannot be characterized as 'foreign' or totally separate"). See also *Hogencamp*, 722 F2d at 722 (citing the total independence of the school districts as the basis for excluding nonresidents from the relevant election).

[238] See *Holt*, 439 US at 72 n 8 (noting that "a situation in which a city has annexed outlying territory in all but name" might receive different legal treatment); *Evans*, 398 US at 425 ("Of the other differences asserted between Maryland residents who live on federal enclaves and those who do not, most are far more theoretical than real.").

those places."[239] That is, states may use factors, such as geography, that are unconnected to the interests shared by groups of people in order to classify them into different populations. Courts confronted with nonresident vote dilution claims can more explicitly address this problem by focusing on the boundaries drawn between "residents" and "nonresidents." If those labels are inappropriate based on the interrelationship between jurisdictions, it cannot be irrational to allow "nonresidents" to vote in an election in which they truly do have a substantial interest.

Defining the political community without relying solely on geographic parameters is not a self-evident task. In many, perhaps most, cases, the two might be coextensive. As scholars have noted, local boundaries are often drawn particularly because they circumscribe a group of interested individuals who wish to associate with each other.[240] Nonresident vote dilution cases would therefore arise only infrequently, when the normal process of boundary drawing arguably did not fully capture the communal membership of the area for purposes of the contested election. When they do arise, however, identifying the political community could be a difficult exercise, particularly as local governments often exercise extraterritorial authority.[241]

Courts facing this situation can use the *Duncan* factors to guide this inquiry, as financial or social interrelationships provide insight into the nature of the relevant community.[242] Reframing the substantial interest question in this way dissipates the identified tension by considering the substantial interests of both nonresidents and residents. Currently, as the *Duncan* factors are construed, if nonresidents can dominate an election, their enfranchisement is irrational. But refocusing the inquiry on the nature of the boundaries between the two groups changes that construction. If there are only insignificant ties between the two groups such that they are truly separate, then nonresident domination in elections is irrational. Courts would therefore have to consider

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[239] Kenneth A. Stahl, *Local Government, "One Person, One Vote," and the Jewish Question*, 49 Harv CR–CL L Rev 1, 38 (2014).

[240] See Briffault, 48 Stan L Rev at 1128 (cited in note 236) ("By circumscribing discrete bits of territory, [geographic] boundaries describe particular place-based communities.").

[241] See Richard Briffault, Town of Telluride v. San Miguel Valley Corp.*: Extraterritoriality and Local Autonomy*, 86 Denver U L Rev 1311, 1323 (2009) (discussing the extraterritorial power of local governments).

[242] See Briffault, 48 Stan L Rev at 1126 (cited in note 236).

the significance to the challenged election of geographic boundaries circumscribing a particular local government.[243] But if the boundary divides a unified interested group into nonresidents and residents, it is irrational for purposes of creating the electorate, and the "nonresident" enfranchisement is, in turn, rational. The supposed "domination" of nonresidents would merely represent the presence in the electorate of an interested subgroup, and the factor would weigh in favor of nonresident enfranchisement. This renewed inquiry thus accounts for the burdens and interests of all relevant groups.

There are two important limits to the scope of this analysis. First, the boundaries being considered might be irrational in relation to the challenged election scheme but perfectly rational for other purposes and other elections.[244] Therefore, courts would not need to change the boundaries of the jurisdiction wholesale but merely recognize their inapplicability to the specific election being considered. Second, and relatedly, this framework would not be as useful for larger-scale governmental units or across larger geographic areas. The local sphere, where experimentation in governance is encouraged,[245] will be able to take these considerations into account more easily. This is therefore where courts should focus this analysis.

This political community framework has implications beyond nonresident vote dilution cases. Focusing on geographic boundaries and their relationship to political communities also implicates nonresident disenfranchisement cases. In *Holt*, for example, focusing on the commonalities shared between residents and nonresidents of the relevant jurisdiction might have made the claim more palatable for the Court. By refocusing this inquiry, nonresidents seeking the vote in elections could find it easier to succeed in their arguments.

CONCLUSION

This Comment considers how courts should review the equal protection issues raised by nonresident vote dilution claims. While one circuit has reviewed such claims using the more rigorous strict scrutiny framework, other circuits instead use a more

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[243] See Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 Stan L Rev 1173, 1194 (1996).

[244] See Briffault, 48 Stan L Rev at 1115 (cited in note 236) (noting that local governments "make decisions with respect to a range of public policies and services").

[245] See *Avery*, 390 US at 485.

deferential rational basis–like standard that asks if nonresidents are substantially interested in the relevant election. When these claims are considered in the larger framework of Supreme Court equal protection and voting cases, the question whether these claims are even cognizable becomes important. The lack of an appropriate nondilutive benchmark in these cases likely means that courts should not even consider these claims of vote dilution. But if courts do reach the merits, rational basis review is the more appropriate default standard. Furthermore, courts should reframe their analysis to focus on the appropriateness of the boundaries separating voter communities into resident and nonresident groups.

These cases are important because they explore what it means to be a member of a political community. Using rational basis review, courts must consider what it means to be substantially interested in an election and, more fundamentally, what it means to belong to a cohesive group of voters. By focusing on the utility of jurisdictional borders on the local level, courts going forward can expand on this notion and reframe conceptions of what interests are considered substantial under the Constitution.