NOTE

DEATH BY DENOMINATOR: RECONSIDERING CONSTITUTIONAL INTRA-STATE DEFERENCE IN AN AGE OF "EMERGENCY MANAGEMENT"

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Michigan's "Local Financial Stability and Choice Act" (PA 436) empowers state-appointed "emergency managers" to take outright control of local governments for a period of at least eighteen months, upon a finding of a "financial emergency." In the case of *Phillips v. Snyder*, the United States Court of Appeals for the Sixth Circuit rejected, among other claims, arguments that PA 436 violated the Fourteenth Amendment by infringing upon the voting rights of the constituents and taxpayers of these local governments. The Sixth Circuit found "there is no fundamental right to have local officials elected" and rejected strict scrutiny. The Sixth Circuit clarified that while the Fourteenth Amendment protected the "right to vote on an equal footing with other citizens in a given jurisdiction," to its mind, the relevant "jurisdiction" was simply each municipality where citizens complained of a voting rights infringement. Finding the citizens of cities challenging PA 436 could vote "on an equal footing" with others in their city, the Sixth Circuit upheld the law, applying only rational basis review.

This Note analyzes and critiques the Sixth Circuit's decision in *Phillips*. This Note identifies the "denominator problem" in *Phillips*'s reasoning—that is, the fact that a municipality-level analysis forecloses any opportunity for litigants to demonstrate that municipalities are being treated unfairly, save for the extraordinary situation of clear animus or racial discrimination. This Note argues that even if one is willing to accept this enormous deference where there are clear legislative lines, this municipal-level analysis is far too deferential where state laws permit discretionary enforcement. This is especially true in an era where tensions between state and local governments are at what may be an all-time high, and partisan divides between statehouses and discrete geographical constituencies are clearer than ever. This Note tries to address this problem by proposing a state-level balancing analysis for such laws, ensuring that state discretionary power is not insulated from judicial review where it affects interests as vital as selecting local officials on an equal basis with others in the state.

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INTRODUCTION

As the commentator Kenneth Stahl recently noted: "Throughout the United States, city residents are coming to the uncomfortable realization that they have no right to local democracy."[1] Local governments' efforts to address issues such as environmental protection, gun safety, workers' rights, and health care in recent years have been met with strong opposition by state governments—leading to sometimes draconian restrictions on local autonomy.[2] These restrictions vary greatly, ranging from funding restrictions[3] to outright obstruction

1. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 133 (2017).

2. This trend has been well-documented by a number of recent scholarly pieces. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999–2008 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1471–73 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1169–83 (2018); Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2226 (2017).

3. *See, e.g.*, Adam Edelman, *Spurred by Trump, States Battle Sanctuary Cities*, NBC NEWS (Aug. 7, 2017, 5:09 AM), https://www.nbcnews.com/politics/immigration/spurred-trump-states-battle-sanctuary-cities-n787651 [https://perma.cc/7TXR-C2HW].

through pre-emptive state legislation.[4] In some cases, battles between states and municipalities have devolved into startlingly public skirmishes, with state legislation blatantly designed to quash specific proposed or enacted local measures.[5]

Power struggles between states and their constituent municipalities are by no means new.[6] However, Michigan's "Local Financial Stability and Choice Act" (PA 436)[7] presents a novel and potentially concerning development in intra-state power dynamics.[8] PA 436 effectively provides a framework for state governments to *entirely* suspend local autonomy with ease. While many cities all across the United States have experienced some degree of state interference, whether direct or indirect,[9] some Michigan residents have watched as state-appointed "emergency managers" took *complete* control of their local government.

PA 436 empowers Michigan's governor to "appoint an emergency manager [(EM)] to address a financial emergency within" a local government—effectively dissolving elected local executive and legislative offices for a period of at least eighteen months.[10] Emergency managers ("EMs") have "broad powers," and local elected officials cannot exercise "any of the powers of [their] offices except as . . . specifically authorized in writing by the emergency manager."[11] Or, in the words of the U.S. District Court for the Eastern District of

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4. *See* Stahl, *supra* note 1 (discussing examples "including [measures blocking] ordinances dealing with smoking, hydraulic fracturing, [and] the minimum wage . . ."); *see also* Fresh Air*, From Fracking Bans to Paid Sick Leave: How States Are Overruling Local Laws*, NPR, (Apr. 6, 2016, 2:23 PM), http://www.npr.org/2016/04/06/473244707/from-fracking-bans-to-paid-sick-leave-how-states-are-overruling-local-laws [https://perma.cc/4P58-4TX8].

5. *See* Mike Cason, *Gov. Robert Bentley Signs Bill to Block City Minimum Wages, Voiding Birmingham Ordinance*, AL.COM (Feb. 25, 2016), http://www.al.com/news/index.ssf/2016/02/bill_to_block_city_minimum_wag_2.html [https://perma.cc/79CY-3ULF].

6. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (involving Colorado state constitutional amendment preempting legislation protecting individuals on the basis of sexual orientation); *see also* Stahl, *supra* note 1, at 145; Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1125–27 (2012) (discussing nineteenth century trend of "ripper bills," which gave states authority over local affairs).

7. MICH. COMP. LAWS §§ 141.1541–.1575 (2018).

8. *Cf.* Ashley E. Nickels, *Approaches to Municipal Takeover: Home Rule Erosion and State Intervention in Michigan and New Jersey*, 48 ST. & LOC. GOV'T REV. 194, 201 (2016), http://journals.sagepub.com/doi/pdf/10.1177/0160323X16667990 [https://perma.cc/SS2K-JQHA] (describing Michigan as having "the most aggressive state intervention policy" in regards to municipal takeovers).

9. *See* Stahl, *supra* note 1; Fresh Air, *supra* note 4.

10. § 141.1549(1).

11. § 141.1549(2).

Michigan: "In essence, PA 436 . . . replace[s] locally elected officials . . . with an appointed EM."[12]

While ostensibly aimed at remedying the genuinely troubling problem of the fiscal instability of municipalities, PA 436 raises more fundamental questions about the proper scope of local autonomy—both as a matter of applying current legal principles and what might be best as a matter of public policy. Regarding public policy, commentators have mixed reviews of PA 436, but many have harshly criticized the law's effects.[13] A few have argued that some communities have seen positive results[14] but clearly some communities, such as Flint, Michigan, have suffered greatly since the law was introduced. There, a now-infamous water crisis unfolded while the city was under EM control,[15] which had devastating effects on the community's health.[16]

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12. *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at *8 (E.D. Mich. Nov. 19, 2014).

13. *See, e.g.*, Chastity Pratt Dawsey, *Why Michigan's Emergency Manager Law Stirs Contempt, Lack of Cooperation*, MLIVE (July 10, 2014), https://www.mlive.com/politics/index.ssf/2014/07/emergency_manager_or_emperor_w.html (providing an example of such criticism) [https://perma.cc/F2TV-JRDV].

14. *See* All Things Considered, *Detroit's Outgoing Emergency Manager Is Leaving City in Better Shape*, NPR (Dec. 10, 2014, 5:24 PM), https://www.npr.org/2014/12/10/369902514/detroits-outgoing-emergency-manager-is-leaving-city-in-better-shape [https://perma.cc/L4YU-XXFN].

15. Whether Flint's emergency-management status actually played a role in creating the crisis is a hotly debated subject. *See, e.g.*, *Who Approved Switch to Flint River? State's Answers Draw Fouls*, BRIDGE (Jan. 21, 2016), http://www.bridgemi.com/michigan-truth-squad/who-approved-switch-flint-river-states-answers-draw-fouls [https://perma.cc/M8S3-W3GU] (pointing out that while the Flint City Council voted to switch its water supply to a regional water authority, it never voted to approve the switch to the Flint River, which ultimately created the water crisis). As of this writing, at least two of Flint's EMs face criminal charges for their conduct related to the water crisis. *See* Josh Sanburn, *Flint Emergency Managers Criminally Charged in the City's Water Crisis*, TIME (Dec. 20, 2016), http://time.com/4607810/flint-water-crisis-criminal-charges-emergency-managers/ [https://perma.cc/JW6F-T9H6]. As of yet, neither have been convicted, and their criminal cases are still pending trial. *See* Ron Fonger, *Judge Turns Down Manslaughter ID Requests from Former Flint EM, DPW Director*, MLIVE.COM (Sept. 24, 2018), https://www.mlive.com/news/flint/index.ssf/2018/09/judge_turns_down_involuntary_m.html [https://perma.cc/2L22-J6LN]; *Flint Water Case Delayed Against Former Emergency Manager Gerald Ambrose*, ABC 12 (Sept. 25, 2018, 1:40 PM), https://www.abc12.com/content/news/Flint-water-case-against-former--494278421.html [https://perma.cc/9BHY-QQWC].

16. *See* Christopher Ingraham, *Flint's Lead-Poisoned Water Had a 'Horrifyingly Large' Effect on Fetal Deaths, Study Finds*, WASH. POST (Sept. 21, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/21/flints-lead-poisoned-water-had-a-horrifyingly-large-effect-on-fetal-deaths-study-finds/ [https://perma.cc/3R2S-LFBX]; Samantha Raphelson, *Flint Residents Confront Long-Term Health Issues After Lead Exposure*, NPR (Oct. 31, 2017, 4:00 PM), https://www.npr.org/2017/10/31/561155244/flint-residents-confront-long-term-health-issues-after-lead-exposure [https://perma.cc/4HAU-Q8UH].

Other municipalities, such as Detroit, have languished in their already fragile financial state while under emergency management.[17] Although PA 436 grants enormous powers compared to previous emergency management laws,[18] the mixed results of such laws seem to indicate they are no panacea, even when viewed in a sympathetic light.[19]

While a discussion of the practical prudence of PA 436 is certainly important,[20] this Note focuses on the law's implications for federal constitutional doctrine through the lens of recent litigation in *Phillips v. Snyder*.[21] This Note critiques *Phillips* and explores how the Sixth Circuit's rote application of previous Fourteenth Amendment precedents, while understandable, led to an unacceptable result. Specifically, this Note identifies what it calls the "denominator problem" in existing equal protection doctrine: that a municipality-level analysis of voting rights forecloses any realistic opportunity to demonstrate unfair treatment of municipalities, except in certain extraordinary circumstances.[22]

In *Phillips*, the United States Court of Appeals for the Sixth Circuit considered whether PA 436 violated a number of U.S. constitutional provisions, including the First and Fourteenth Amendments.[23] Plaintiffs, voters and local officials in communities subject to PA 436,[24] raised two primary arguments against PA 436 under the Fourteenth Amendment: (1) that the "right to vote for local legislative offices" is a "fundamental" right under the Due Process

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17. *See* Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html [https://perma.cc/Z6NG-6ZKS].

18. *See infra* Sections I.A–I.C.

19. *See* Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1381 (2014) ("The evidence on the efficacy of takeover boards . . . is both anecdotal and equivocal. Some localities are recidivists, suggesting that even state takeover will not cure fundamental issues that generated the crisis.").

20. *See* Janell Ross, *Flint's Former Emergency Manager Proved That Critics of Michigan's Emergency Manager Law Had a Point*, WASH. POST: THE FIX (Mar. 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/03/15/flints-former-emergency-manager-just-proved-critics-of-michigans-emergency-manager-law-were-right/ [https://perma.cc/WT65-Z5KK].

21. 836 F.3d 707 (6th Cir. 2016).

22. *See infra* Section III.A.

23. U.S. CONST. amends. I, XIV; *Phillips*, 836 F.3d at 710. At the district court, the plaintiffs raised claims under the Fourteenth Amendment's Equal Protection and Due Process Clauses, U.S. CONST. amend. XIV, Article IV's Guarantee Clause, U.S. CONST. art. IV, § 4, cl. 1, Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (2012), as well as the First and Thirteenth Amendments, U.S. CONST. amends. I, XIII. *See generally Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344 (E.D. Mich. Nov. 19, 2014).

24. *Phillips*, 836 F.3d at 710–11.

Clause; and (2) that PA 436 violated the Equal Protection Clause by diluting the voting rights of voters in municipalities with EMs.[25]

The Sixth Circuit ruled for Michigan, rejecting the argument that the right was "fundamental,"[26] holding that a municipality-by-municipality analysis was required under the Equal Protection Clause.[27] Finding that the plaintiffs had an equal right to vote as compared to other citizens in the same "jurisdiction," the court applied only rational basis scrutiny and upheld PA 436.[28] The Sixth Circuit found no reason to apply heightened scrutiny under other constitutional provisions.[29]

This Note examines the Sixth Circuit's treatment of each of these primary arguments. This Note concludes that *Phillips* was almost certainly correct to reject plaintiffs' argument that there is a "fundamental right" to select local government officials in light of current Fourteenth Amendment precedent. On the other hand, this Note argues that *Phillips*'s application of a municipality-by-municipality analysis creates a "denominator problem," which may allow discriminatory or arbitrary deprivations of political participation to be insulated from meaningful judicial review—a result inconsistent with the Fourteenth Amendment's guarantee of "equal protection under the laws" and Supreme Court precedent construing that guarantee. As this Note will show, while the right to participate in local elections may not be *per se* guaranteed under any federal constitutional provision,[30] the right to do so on an equal basis with other qualified voters has been.[31] This Note argues that formulaic application of rational basis scrutiny was inappropriate for PA 436 and suggests that a more flexible state-wide analysis applying a "balancing" standard would have been proper in *Phillips*. As such, this Note concludes that *Phillips* represents that a missed opportunity for a necessary development in Fourteenth Amendment jurisprudence towards greater skepticism and scrutiny of discretion affecting democratic participation.

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25. Brief of Plaintiffs-Appellants Catherine Phillips, et al., at 11–26, *Phillips*, 836 F.3d 707 (No. 15-2394), 2016 WL 1001949. The state argued that heightened scrutiny was inappropriate because residents of municipalities with EMs and residents of those without EMs were not "similarly situated." Brief for Defendants-Appellees at 34, *Phillips*, 836 F.3d 707 (6th Cir. 2016) (No. 15-2394), 2016 WL 1464160.

26. *Phillips*, 836 F.3d at 715.

27. *Id.* at 719.

28. *Id.* at 718–19.

29. *Id.* at 715–718, 721–722.

30. *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 149–50 (2008) (discussing how the Supreme Court has not consistently treated the right to vote as "fundamental" and deserving of strict scrutiny).

31. *See Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 55–56 (1970) ("each qualified voter must be given an equal opportunity to participate in that election . . .").

Part I of this Note provides a closer look at PA 436 and its predecessors. Part II introduces and surveys the precedents that guided the Sixth Circuit's analysis in *Phillips* and analyzes the decision's application of equal protection doctrine, concluding that the Sixth Circuit applied a plausible, but ultimately misguided, interpretation of existing Supreme Court precedent to PA 436. Part III introduces the "denominator problem" inherent in the application of "conventional" equal protection doctrine in *Phillips*, discussing how a municipal-level analysis is ripe for abuse, foreclosing the opportunities for litigants to show they've been treated unfairly as compared to other municipalities. Part III further argues that this "denominator problem" is exacerbated by the presence of official discretion in PA 436 and argues that the First Amendment provides a basis for greater skepticism towards discretion affecting expressive interests like participation in local government. Finally, Part IV proposes that the more sensitive "balancing" approach used in other Fourteenth Amendment contexts would be a more suitable standard for reviewing laws like PA 436.

I. WHAT'S IN A NAME?—MICHIGAN'S EMERGENCY (FINANCIAL) MANAGER LAWS AND *PHILLIPS*

In some respects, PA 436 is not a novel legal regime in Michigan. Since the late 1980s, Michigan has had some form of state oversight of financially distressed municipalities.[32] However, PA 436 and its immediate predecessor, PA 4, marked a significant expansion in the scope and reach of these financial crisis laws. This expansion of powers led to increased criticism and a public backlash, in stark contrast to the popular bipartisan support behind earlier fiscal crisis laws. This Part tracks the relatively uncontroversial beginnings of emergency management in Michigan, explains the genesis of PA 436, and discusses the Sixth Circuit's analysis in *Phillips*.

A. Simpler Times: Emergency Financial Management

Responding to problems stemming from a financial downturn earlier in the decade, Public Act 101 of 1988 (PA 101) was the first of Michigan's "emergency manager" laws.[33] PA 101 allowed for the appointment of "emergency financial managers" (EFMs) for financially troubled cities, with powers similar to that of court-appointed

32. John C. Philo, *Governance: Local Government Fiscal Emergencies and the Disenfranchisement of Victims of the Global Recession*, 13 J.L. SOC'Y 71, 83 (2011).

33. *Id.*

receivers.[34] PA 101 was later replaced by Public Act 72 of 1990 (PA 72), which expanded the law to include school districts.[35] Both PA 101 and PA 72 were passed without considerable disagreement or alarm.[36] Indeed, PA 72 passed "with unanimous bipartisan support."[37]

By and large, these early emergency manager laws lay dormant and were rarely used for some time after their enactment. From 1988 to 2000, "no emergency financial managers were appointed pursuant to either PA 101 or PA 72 . . . ."[38] However, beginning in the late 1990s, a number of municipalities began experiencing financial instability.[39] In 2000, the first emergency financial manager was appointed in Hamtramck, Michigan, followed by several other Michigan cities in the early and late 2000s.[40] PA 72 continued in effect until early 2011.[41]

B. Power Failure: The Expansion of Emergency Management in PA 4

By 2010, the first challenges to Michigan's emergency manager scheme began. That year, the Detroit Public School Board sued its emergency financial manager in state court, "alleging that the manager had overstepped his powers [under PA 72] . . . by seeking to establish academic policies and school curriculum."[42] A state trial court agreed and held that, under PA 72, "authority in these areas remained vested in the elected school board."[43]

Within four months of the state trial court decision regarding Detroit Public Schools, the Michigan legislature replaced PA 72 with

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34. *Id.*; *see also* James M. Hohman, *Public Act 101 and Public Act 72*, MACKINAC CTR. FOR PUB. POL'Y (Oct. 29, 2012), https://www.mackinac.org/17862 [https://perma.cc/8SFT-BAJM]. EFMs possessed broad powers over financial decisions, but not over matters that were not directly related to a city's finances. *See* Philo, *supra* note 32.

35. CITIZEN'S RESEARCH COUNCIL OF MICH., AN ANALYSIS OF THE EFFECTIVENESS OF THE LOCAL GOVERNMENT FISCAL RESPONSIBILITY ACT 1 (1990), http://crcmich.org/PUBLICAT/1990s/1990/pa72analysis.pdf [https://perma.cc/U9GN-SUA3]; *see also* Philo, *supra* note 32.

36. *See* Hohman, *supra* note 34.

37. *Id.*

38. Philo, *supra* note 32 (noting that "only [two municipalities] are known to have entered into consent agreements under the statutes – both in the late 1980s").

39. *See id.* at 83–84 ("[I]n the late 1990s, severe reductions in state revenue sharing caused significant financial stress to Michigan's cities. . . . [E]mergency financial managers were appointed in the cities of Hamtramck (2000), Highland Park (2001), Flint (2002), Ecorse (2009), Pontiac (2009) and Benton Harbor (2010), the village of Three Oaks (2008), and the Detroit Public School System (2009).").

40. *Id.*

41. *Id.* at 84.

42. *Id.*

43. *Id.*

Public Act 4 (PA 4).[44] PA 4 renamed "emergency financial managers" as "emergency managers" to reflect their expanded powers under the new law.[45] Under PA 4, emergency mangers could now "act 'for and in the place of' [a] municipality's elected governing body,"[46] representing a clear shift in the scope of powers granted under the law. PA 4 also expanded the number of events triggering review of municipalities' finances[47] and granted the governor greater power to determine whether a "financial emergency" exists.[48]

While early financial management laws enjoyed broad support, PA 4 passed with considerably less consensus. The law passed both houses of the Michigan legislature almost exactly along party lines, with all but one Republican voting for the bill, and all Democrats voting against.[49] The measure was also widely unpopular, and by February 2012, a statewide petition gathered more than 200,000 signatures, significantly more than required to trigger a statewide referendum on whether to repeal PA 436.[50] Although the Michigan Board of State Canvassers initially refused to certify the petitions on an issue related to font size,[51]

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44. *Id.*

45. *See id.* at 85 ("In language illustrative of their expanded powers, Public Act 72's emergency financial managers became emergency managers under Public Act 4.").

46. *Phillips v. Snyder*, No.2:13-CV-11370, 2014 WL 6474344, at *2 (E.D. Mich. Nov. 19, 2014).

47. CITIZENS RESEARCH COUNCIL OF MICH., THE LOCAL GOVERNMENT AND SCHOOL DISTRICT FISCAL ACCOUNTABILITY ACT: PUBLIC ACT 4 OF 2011, at v (April 2011), http://www.crcmich.org/PUBLICAT/2010s/2011/rpt368.pdf [https://perma.cc/5PJR-LW53] ("PA 4 lowers the threshold for state intervention by expanding the list of initiating events and allowing for a preliminary review at the discretion of the state treasurer.").

48. *See id.* at 3, 18 ("PA 4 eliminates the role of the local government financial review board and places responsibility directly with the governor, state treasurer, and state superintendent of education.").

49. *House Roll Call 34 on 2011 House Bill 4214: Increase Power ot School and Local Emergency Financial Managers*, MICHIGANVOTES.ORG, https://www.michiganvotes.org/RollCall.aspx?ID=555935 [https://perma.cc/GLT8-FKWQ].

50. David Sands, *Michigan Emergency Manager Repeal Delivers 226,637 Signatures*, HUFFINGTON POST (Feb. 29, 2012), https://www.huffingtonpost.com/2012/02/29/michigan-emergency-manager-repeal_n_1311582.html [https://perma.cc/79UM-UEGJ].

51. The Michigan Board of State Canvassers, charged with "[c]anvassing state-level ballot proposal petitions," initially voted to not certify the citizen petition to repeal PA 436. *History and Duties*, MICHIGAN.GOV, http://www.michigan.gov/sos/0,4670,7-127-1633_41221-141451--,00.html [https://perma.cc/RS43-RZXM]; *see* Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy? Michigan's Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181, 191 n.70 (2017) (citing Curt Guyette, *Examining the Body of Evidence in Detroit's Bankruptcy Trial*, DET. METRO TIMES (April 1, 2014),

the Michigan Supreme Court ordered that the referendum be placed on the November 2012 ballot.[52] In the November 2012 elections, 53 percent of Michigan voters voted to repeal PA 4, triggering its repeal.[53]

C. Guess Who's Back?—PA 436

Less than two months after the repeal of PA 4 in November 2012, the state legislature passed PA 436, the "Local Financial Stability and Choice Act"[54] during a "lame-duck"[55] legislative session.[56] PA 436 retains many features of PA 4, particularly its broad expansion of EM powers as compared to EFMs under earlier laws. Like PA 4, PA 436 renames "emergency financial managers" "emergency mangers," and grants them broad powers to "act . . . in the place and stead of the governing body" of the municipality.[57] Also like PA 4, PA 436 somewhat expands the circumstances triggering state review, permitting the state treasurer to begin a review if, in his or her "sole discretion," there are "facts and circumstances . . . indicative of probable financial distress."[58] PA 436 vests the final determination of whether a financial

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https://www.metrotimes.com/detroit/examining-the-body-of-evidence-in-detroits-bankruptcy-trial/Content?oid=2144001 [https://perma.cc/Y3FA-CSLL]). "

Font Size Fight over EM Referendum May Reach Michigan Supreme Court, MICH. RADIO (June 29, 2012), http://michiganradio.org/post/font-size-fight-over-em-referendum-may-reach-michigan-supreme-court [https://perma.cc/V8P5-MX9V].

52. Kristin Longley, *Michigan Supreme Court Orders Emergency Manager Law on Ballot, While Gov. Snyder Seeks to Preserve Public Act 4 Intent,* MLIVE.COM (Aug. 3, 2012), http://www.mlive.com/politics/index.ssf/2012/08/emergency_manager_law.html [https://perma.cc/8MGX-QU4E].

53. Alec MacGillis, *The Referendum That Might Have Headed Off Flint's Water Crisis*, PROPUBLICA (Mar. 4, 2016, 1:00AM EST), https://www.propublica.org/article/the-referendum-that-might-have-headed-off-flints-water-crisis [https://perma.cc/A7C3-HWQ9].

54. MICH. COMP. LAWS § 141.1541–.1575 (2018).

55. Petition for Writ of Certiorari at *2, *Bellant v. Snyder*, 138 S. Ct. 66 (2017) (No. 16-1207), 2017 WL 1315037.

56. *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at *2 (E.D. Mich. Nov. 19, 2014).

57. § 141.1549(2).

58. *Compare* Mich. Pub. Act 72 of 1990 § 12(1)(a)–(n) (repealed 2011), https://www.legislature.mi.gov/documents/Publications/repealed/mcl-Act-72-of-1990-repealed.pdf [https://perma.cc/6RCV-99QA], *with* Mich. Pub. Act 4 of 2011 § 12(1)(r) (repealed 2012), https://www.legislature.mi.gov/documents/2011-2012/publicact/htm/2011-PA-0004.htm [https://perma.cc/94E4-MD2M], *and* MICH. COMP. LAWS § 141.1544(1)(s) (2018).

emergency exists in the governor.[59] Importantly, PA 436, unlike PA 4, *cannot be repealed by popular referendum*.[60]

PA 436 contains nineteen situations which can trigger initial a preliminary financial review.[61] These include a number of specific provisions whereby various parties including the municipality,[62] its creditors,[63] a small number of its citizens,[64] or either house of the state legislature[65] may request a review. PA 436 also gives the state treasurer the ability to begin a review if there are circumstances that "in [their] sole discretion . . . are indicative of probable financial stress."[66] This preliminary review is conducted by the "state financial authority," which, in the case of a local government, is the state treasurer themselves.[67] The "authority" must provide the local government with written notification of the review.[68]

The authority's initial findings are then given to the "emergency financial assistance loan board," (EFALB) which consists of three members of the governor's cabinet.[69] If the board finds that there is "probable financial stress" in a local government, the governor appoints a "review team."[70] This team consists of two of the three cabinet members who were on the EFALB (or their designees), and representatives from the state senate majority leader and the speaker of

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59. *See Phillips v. Snyder*, 836 F.3d 707, 712 (6th Cir. 2016); MICH. COMP. LAWS § 141.1546(1) (2018).

60. Kathleen Garbacz, Note, *Michigan Republicans' Tactics to Evade Democracy Using Referendum Proof Laws and Other Means*, 16 J.L. SOC'Y 197, 199, 205 (2014) (explaining that PA 436's appropriation of salaries for Emergency Managers exempts it from repeal by referendum under MICH. CONST. art. II, § 9).

61. § 141.1544(1)(a)–(s); *cf. Phillips*, 836 F.3d at 711 (stating that there are only "eighteen," but overlooking (s)). For an excellent overview of PA 436's financial review process, see MILLER JOHNSON, WHAT YOU NEED TO KNOW ABOUT MICHIGAN'S EMERGENCY MANAGER LAW (2011), https://millerjohnson.com/files/Publication/0883c988-2059-4124-ad28-fd11904b320a/Presentation/PublicationAttachment/84fe10fa-a919-447d-8de3-0464a726a91d/Summary-%20EmergencyFinanceManagerLaw.pdf [https://perma.cc/AFQ5-WG7T].

62. § 141.1544(1)(a).

63. § 141.1544(1)(b).

64. § 141.1544(1)(c).

65. § 141.1544(1)(g).

66. § 141.1544(1)(s).

67. *Phillips v. Snyder*, 836 F.3d 707, 711–12 (6th Cir. 2016); *see also* § 141.1542(u)(i)–(ii).

68. § 141.1544(3).

69. *Phillips*, 836 F.3d at 712; § 141.932 (stating that the loan board shall consist of "the state treasurer, the director of the department of licensing and regulatory affairs, and the director of the department of technology, management, and budget").

70. § 141.1544(4); *Phillips*, 836 F.3d at 712; *see also* § 141.1544(5) (providing the same, except substituting the state superintendent for the state treasurer).

the state house of representatives.[71] This review team must submit a report indicating whether any one of thirteen factors "exist or are likely to occur" within the current or subsequent fiscal year.[72] If any factors exist and, in the review team's opinion, "threaten the local government's . . . capability to provide necessary governmental services," the review team may conclude that a financial emergency exists.[73] After receiving the review board's conclusion, the governor must determine whether a financial emergency exists.[74] The governor is free to determine that a financial emergency exists despite a contrary finding by the review board.[75]

If the governor determines that a financial emergency exists, he or she must submit written notification to the local government, at which time the government has seven days to request a hearing before the governor to review the decision.[76] If no hearing is requested or if the governor confirms his or her earlier finding of a financial emergency, the local government may, by a "2/3 vote of its governing body" appeal that determination within ten days to the Michigan Court of Claims.[77] The court may only set the governor's determination aside if it finds the determination is not supported by "substantial evidence on the whole record" or was "[a]rbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion."[78] As of this writing, this author could find no reported cases where a challenge—much less a successful

71. § 141.1544(4). The governor is also empowered to appoint additional members to the review team. *Id*.

72. § 141.1545(3)(a)–(m). These factors are distinct from the nineteen discussed earlier, *supra* note 61, and include a number of specific provisions, including the existence of a default on municipal securities (a), the existence of a "structural operating deficit" (j), and projection of a general fund deficit of five-percent or greater for the current fiscal year (f). The list also includes a more flexible catch-all provision including "[a]ny other facts . . . indicative of local government financial emergency." § 141.1545(3)(m).

73. § 141.1545(6)(b)(i). The review team may also find a "financial emergency" under three other scenarios, including if the local government has not provided "timely and accurate information" to the review board, the local government has not complied with a "deficit elimination plan," or if the local administrative officer concludes that at least one of the aforementioned factors exists and the state treasurer agrees. *See* § 141.1545(6)(b)(ii)–(iv).

74. § 141.1546(1); *Phillips*, 836 F.3d at 712.

75. *See How a Financial Emergency Works*, MICH. DEP'T OF TREASURY, http://www.michigan.gov/treasury/0,4679,7-121-1751_51556_80603-423711--,00.html [https://perma.cc/6YWK-SPGD].

76. § 141.1546(2).

77. § 141.1546(3).

78. § 141.1546(3)(a)–(b).

one—was made to the governor's determination under this mechanism.[79]

PA 436 gives local governments four ways to respond following a gubernatorial finding of a "financial emergency."[80] These include: entering into a consent agreement with the state government,[81] accepting an emergency manager,[82] entering an arbitration process with creditors,[83] or filing Chapter 9 bankruptcy.[84] While this technically provides a "menu" of options for avoiding emergency management, that freedom of choice is rather illusory.[85] Chapter 9 must be approved by the governor,[86] the results of the neutral arbitration process may be rejected by the state treasurer[87] (or by non-cooperation by creditors),[88] and the treasurer may determine—at their own discretion—whether a municipality is complying with a consent agreement.[89] Therefore, while municipalities formally have a choice in how to respond to a finding of a "financial emergency," their choice is, in practice, ultimately constrained by the governor, the governor's cabinet (through the state treasurer), and creditors. These constraints make it possible, if not likely, that a municipality will be forced into emergency management against its will.

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79. *See* Stateside Staff, *Can Emergency Managers be Held Accountable for Their Bad Decisions?*, MICH. RADIO (Oct. 26, 2015), http://michiganradio.org/post/can-emergency-managers-be-held-accountable-their-bad-decisions [https://perma.cc/F3ND-GQTQ] (quoting Professor Robert Sedler of Wayne State Law School: "'I don't know how many [lawsuits] have been filed, but none have been successful,' Sedler says. 'The law is so broad and gives so many powers that it's very difficult to find a violation.'").

80. § 141.1547(1)(a)–(d); *Phillips v. Snyder*, 836 F.3d 707, 712 (6th Cir. 2016).

81. § 141.1547(1)(a).

82. § 141.1547(1)(b).

83. § 141.1547(1)(c).

84. § 141.1547(1)(d); *Phillips*, 836 F.3d at 712.

85. Nickel, *supra* note 8, at 203 ("Ostensibly, the Michigan approach is to present a menu of takeover options . . . . In implementation, it is a two-sided process with nearly all of the power on one side, the state. This results in a true takeover model: an appropriation of local power . . . ."); *see also* Josh Hakala, *How Did We Get Here? A Look Back at Michigan's Emergency Manager Law*, MICH. RADIO (Feb. 3, 2016) http://michiganradio.org/post/how-did-we-get-here-look-back-michigans-emergency-manager-law [https://perma.cc/L4HA-A2AH].

86. *See* § 141.1566(1).

87. *See* § 141.1565(22)(a).

88. *See* § 141.1565(22)(c), (d).

89. *See* § 141.1548(1) ("Nothing in the consent agreement shall limit the ability of the state treasurer in his or her sole discretion to declare a material breach of the consent agreement.").

D. It's Only Rational (Basis): The Phillips *Litigation*

Following the enactment of PA 436, a group of plaintiffs challenged the law under a variety of constitutional and statutory claims. The plaintiffs were "voters and elected officials from Detroit, Pontiac, Benton Harbor, Flint, and Redford . . . ."[90] Filing suit in the Eastern District of Michigan, the plaintiffs alleged that PA 436 violated the First,[91] Thirteenth,[92] and Fourteenth[93] Amendments to the United States Constitution, along with Article IV's Guarantee Clause[94] and Section 2 of the Voting Rights Act.[95] The district court granted the state's motion to dismiss on all counts except the plaintiffs' race-based equal protection claims.[96] The plaintiffs then voluntarily waived that claim[97] and appealed the dismissal of the other claims to the Sixth Circuit.[98]

On appeal, the plaintiffs advanced roughly the same arguments they did in the district court, arguing that PA 436 should be subject to strict scrutiny under the Fourteenth Amendment because voting for

90. *Phillips v. Snyder*, 836 F.3d 707, 711 (6th Cir. 2016).

91. U.S. CONST. amend. I.

92. *Id.* amend. XIII.

93. *Id.* amend. XIV.

94. *Id.* art. IV, § 4.

95. 52 U.S.C.A. § 10301(b) (2012).

96. *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at *20 (E.D. Mich. Nov. 19, 2014).

97. *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016). At the time this piece goes to print, the plaintiffs have revived their racial equal protection claim in district court by filing a new complaint in December 2017. *See* Complaint for Declaratory Relief at 3, 19–25, *Bellant v. Snyder*, No. 2:17-cv-13887 (E.D. Mich. Dec. 1, 2017). The defendants filed a motion to dismiss and the parties briefed and had oral argument on the motion. *See Bellant v. Snyder (Phillips v. Snyder)*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/bellant-v-snyder-phillips-v-snyder [https://perma.cc/H25W-KJ85] (last updated July 25, 2018); *see also* Defendant's Motion to Dismiss, *Bellant v. Snyder*, No. 2:17-cv-13887 (E.D. Mich. Mar. 12, 2018), https://ccrjustice.org/sites/default/files/attach/2018/04/Defs%20Mot%20to%20Dismiss%202018.03.12.pdf [https://perma.cc/4DLS-JW99]. The district court granted in part and denied in part the motion to dismiss, finding that the plaintiffs' equal protection claims were moot due to the end of emergency management except those regarding Benton Harbor Area Schools and Pontiac County Schools, as those two school districts are still currently under consent agreements pursuant to PA 436. *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss at 1, 9, *Bellant v. Snyder*, No. 2:17-cv-13887 (E.D. Mich. Sept. 5, 2018). The district court also dismissed the plaintiffs' facial constitutional challenge to PA 436 under the Equal Protection Clause as the court found that Michigan had a "legitimate government interest in preventing or rectifying the insolvency of its financial subdivisions" and therefore passed rational basis review. *Id.* at 19.

98. *Phillips*, 836 F.3d at 713.

locally elected officials was a "fundamental right."[99] They alleged that the "trial court erred by . . . misunderstanding established jurisprudence *unequivocally* finding that voting is a fundamental right."[100] The State argued that rational basis review was appropriate because voting was not a "fundamental right," at least not in the context of local elections.[101] The State characterized the "right" to vote as the district court did, arguing that the "right [is] to participate in elections on an equal footing with other citizens in the jurisdiction . . . ."[102]

In the end, the Sixth Circuit found "no basis for applying scrutiny stricter than rational basis review."[103] Mirroring the language offered by the State, the Court pointed out that "close scrutiny has not been applied beyond the right to vote on an equal footing with other citizens in a given jurisdiction . . . ."[104] It also noted that "in cases where the issue is whether an election is required in the first place, the Court has declined to apply close scrutiny."[105] For this proposition, the Court cited to *Rodriguez v. Popular Democratic Party*,[106] where the Supreme Court upheld a law providing that interim legislative vacancies be filled by the political party which captured the seat in the general election.[107] Like the court in *Rodriguez*, the Sixth Circuit applied rational basis review and found that PA 436 easily passed.[108] The plaintiffs' subsequent request for Supreme Court review of the Sixth Circuit's decision was denied.[109]

While undoubtedly a disappointing result for the plaintiffs, *Phillips* has not been exhaustively analyzed by legal scholars.[110] In particular,

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99. *See* Brief for Plaintiffs-Appellants Catherine Phillips, et al., *supra* note 25, at 22–24.

100. *Id.* at 22 (emphasis added).

101. Brief for Defendants-Appellees, *supra* note 25, at 38–41.

102. *Id.* at 26.

103. *Phillips*, 836 F.3d at 718.

104. *Id.* at 719.

105. *Id.*

106. 457 U.S. 1 (1982).

107. *Id.*

108. *Phillips*, 836 F.3d at 718 ("Improving the financial situation of a distressed locality undoubtedly is a legitimate legislative purpose, and PA 436 . . . is [a measure] that is rationally related to that purpose.").

109. *Bellant v. Snyder*, 138 S. Ct. 66 (2017). This petition was denied on October 2, 2017. *Id.*

110. One unexplored area of inquiry which this author believes merits a brief digression is the constitutionality of laws like PA 436 under various state constitutions, particularly those with "home rule" provisions. "Home rule" generally refers to "the right of localities to exercise control over matters of local concern," see N.Y. STATE BAR, REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE 6 (2016), https://www.nysba.org/homerulereport/ [https://perma.cc/88QP-DNA7], and may be conferred upon municipalities by statutes or constitutional provisions, see

Phillips's implications for Fourteenth Amendment equal protection doctrine.[111] However, PA 436 and *Phillips* present novel and important questions in these areas and others. Sitting at the confluence of areas that appear increasingly ripe for re-examination—voting rights[112] and local governmental sovereignty[113]—*Phillips* may well influence a constitutional conversation larger than the narrow field of municipal

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generally Claire Silverman, *Municipal Home Rule in Wisconsin*, MUNICIPALITY, June 2016, at 16, 16–19, http://www.lwm-info.org/DocumentCenter/View/949/Home-Rule-Article-from-June-2016?bidId= [https://perma.cc/YY74-QAK2]. The Michigan state constitution contains such a "home rule" provision in MICH. CONST. art. VII, §§ 22, 34. *See* MICH. MUNICIPAL LEAGUE, HOME RULE IN MICHIGAN—THEN AND NOW 1 (2006), https://www.mml.org/advocacy/resources/homerule-paper.pdf [https://perma.cc/34PN-8LS6]; Nickels, *supra* note 8. Despite this fact, at the time of this writing this Author is not aware of any serious challenges to PA 436 under these state constitutional provisions.

This topic might be particularly interesting in Wisconsin, where the Wisconsin Constitution also has a "home rule" provision, WIS. CONST. art. XI, § 3, but one whose scope and application has arguably been narrowed through judicial construction in recent years. *See* Silverman, *supra*, at 17–18; *see also Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 368–69 (Wis. 2014) (construing art. XI, § 3 as imposing a disjunctive test: state legislation must *either* (1) concern "exclusively," "primarily," or "paramountly" "statewide concern," or (2) must be "uniformly applied statewide"). Under this rather anemic construction of art. XI, § 3, it seems as though a law like PA 436 might be valid under the Wisconsin Constitution. However, under what this author considers a better reading of the text of art. XI, § 3, see *Black v. City of Milwaukee*, 882 N.W.2d 333, 354–55 (Wis. 2016) (Bradley, J., concurring), such laws might face a more substantial challenge. *But cf.* Nickels, *supra* note 8, at 195.

111. Instead, legal scholarship discussing PA 436 and *Phillips* has focused on the efficacy of emergency management, see Lora Krsulich, Note, *Polluted Politics*, 105 CALIF. L. REV. 501 (2017), and the validity of PA 436 under § 2 of the Voting Rights Act, see Hawthorne, *supra* note 51, at 181.

112. *See, e.g.*, Paul Waldman, *The Supreme Court Is Set to Hear a Big Case That Could Change Our Politics*, WASH. POST: PLUM LINE (Oct. 2, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/10/02/the-supreme-court-is-set-to-hear-a-big-case-that-could-change-our-politics/?utm_term=.25932bbeeffd [https://perma.cc/Z98T-KHBA] (discussing the significance of the then-pending Supreme Court case of *Gill v. Whitford*).

113. *See, e.g.*, Ilya Somin, *Federal Court Rules that Trump's Executive Order Targeting Sanctuary Cities Is Unconstitutional*, WASH. POST: VOLOKH CONSPIRACY (Nov. 21, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/federal-court-rules-that-trumps-executive-order-targeting-sanctuary-cities-is-unconstitutional/?utm_term=.c1173572343c [https://perma.cc/HJM3-L6G7]. This topic in particular appears to be hitting a fever pitch, with a number of excellent articles published within the last year or so drawing attention to and analyzing the fascinating (and potentially concerning) developments in how local governments are being treated by states and the federal government. *See generally* Briffault, *supra* note 2; Scharff, *supra* note 2; Schragger, *supra* note 2; Phillips, *supra* note 2. This Note aims to contribute to this larger trend in scholarship by analyzing PA 436, which this Note suggests could be viewed as an extremely powerful tool for interfering with local autonomy, and *Phillips*, which this Note views as effectively providing cart blanche for state governments to implement similar or even more problematic mechanisms.

emergency management. This Note contributes to the literature a critique of the Sixth Circuit's analysis in *Phillips*, considering whether the Sixth Circuit properly applied Fourteenth Amendment equal protection precedents. This Note will show that the rote application of the rules of facially similar equal protection cases to PA 436 is actually inconsistent the principles of the Fourteenth Amendment and that a more sensitive, flexible approach is needed to address the problematic insulation of executive discretion affecting expressive interests.

II. SCRUTINIZING THE SCRUTINY: *PHILLIPS* AND EQUAL PROTECTION

This Part analyzes whether the Sixth Circuit properly determined that PA 436 did not violate the Fourteenth Amendment. First, it provides the legal background for the Sixth Circuit's decision in *Phillips*. Second, it considers whether the Court correctly found that the "right" to vote, as presented in this case, was not a "fundamental right" for purposes of applying strict scrutiny.[114] Next, it examines whether the Sixth Circuit correctly determined that each municipality was the proper "jurisdiction" for its equal protection analysis. This Part concludes that, as unintuitive and "uncomfortable"[115] as it may seem, the Sixth Circuit's conclusion that "there is no fundamental right to have local officials elected"[116] was almost certainly correct, at least as a matter of federal constitutional law. This Part further concludes that *Phillips*'s use of a municipality-by-municipality equal protection analysis was a plausible, but ultimately problematic, approach in light of existing doctrine and precedent. This Part posits that the text of the Fourteenth Amendment and the Court's approach in its "one person, one vote" equal protection cases suggest that an equally plausible, and ultimately more appropriate, approach would be to view the entire state as the relevant "jurisdiction." Part III will go on to argue that defining the relevant jurisdiction as the municipality in question creates a "denominator problem" which undermines the Fourteenth Amendment's guarantee of "equal protection of the laws" and is particularly inappropriate for PA 436 and other laws granting broad discretion affecting expressive interests like participation in local government. In this way, while there may be no "fundamental right to have local officials elected," the Fourteenth Amendment may be

114. *Phillips v. Snyder*, 836 F.3d 707, 715 (6th Cir. 2016), *cert. denied*, *Bellant v. Snyder*, 138 S. Ct. 66 (2017). The plaintiffs technically raised the "fundamental right" argument under a Due Process Clause theory, but this argument blended into the equal protection argument at the district and appellate levels. *See, e.g.*, *id.* at 716.

115. *See supra* note 1 and accompanying text.

116. *Phillips*, 836 F.3d at 715.

properly understood to constrain unequal and unjustified state action curtailing local democratic systems.

A. "Absolute Discretion": Equal Protection and Intra-State Allocation of Power

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[117] The Supreme Court of the United States has devised a "tiered system for analyzing whether a law infringes upon the Equal Protection Clause."[118] Generally, rational basis scrutiny, the most deferential level of review, is applied if the law "neither burdens a fundamental right nor targets a suspect class."[119] This level of review only requires that the law in question be "rationally related to a legitimate state interest."[120] In cases where a suspect class or fundamental right is at issue, strict scrutiny applies and the law must be narrowly tailored to a compelling government interest.[121]

Although the United States Supreme Court has repeatedly *described* the right to vote as "fundamental,"[122] it has not uniformly *treated* it as fundamental for purposes of what level of scrutiny applies.[123] In certain cases, the Court clearly both describes and treats the right to vote as fundamental. For example, in *Harper v. Virginia Board of Elections*,[124] the Court applied strict scrutiny even though no suspect classes were involved, precisely because the right to vote was at issue.[125] In other cases, such as *Rosario v. Rockefeller*,[126] the Court has

117. U.S. CONST. amend. XIV, § 1.

118. Douglas, *supra* note 30, at 147.

119. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also* ALLEN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW – INDIVIDUAL RIGHTS: EXAMPLES AND EXPLANATIONS 285–87 (6th ed. 2013).

120. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

121. *See Plyer v. Doe*, 457 U.S. 202, 216–17 (1982); *see also* IDES & MAY, *supra* note 119.

122. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S 356, 370 (1886).

123. Douglas, *supra* note 30, at 150 ("In several key areas of election law jurisprudence, the Court has vacillated between analyzing the right to vote as a fundamental right and treating it as something other than fundamental."); *see* Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 679–82 (2017) ("On the voting side, the Court's decisions are not now, and have never been, exemplars of conventional equal protection analysis.").

124. 383 U.S. 663 (1966).

125. *See id.* at 670.

126. 410 U.S. 752 (1973).

applied less than strict scrutiny even though voting rights were implicated.[127]

Crawford v. Marion County Election Board,[128] a somewhat recent landmark case regarding voting rights under the Equal Protection Clause, exemplifies yet another approach the court has taken, further muddying the waters regarding its treatment of voting rights.[129] There, a plurality of the Court used a "balancing" approach in considering both the level of state interest which would be required to justify a measure affecting voting rights and how close a match those measures must be to the proffered state interest.[130] This approach applies greater scrutiny to voting restrictions in relation to how much they burden or restrict the right to vote, rather than applying simple strict or rational basis scrutiny.[131] This "sliding scale" or "balancing" approach is now widely viewed as the "general doctrinal framework" applicable to "regulat[ion] of the voting process."[132] At least one commentator has noted it does not appear that there is a single factor which rationally accounts for the Supreme Court's "differing treatment of election law cases" since the Court first applied strict scrutiny to some voting cases.[133]

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127. *See, e.g.*, *id.* at 761–62. *Rosario* upheld a requirement that voters register with a party at least 30 days before a general election to be able to vote in the *next* primary election. *Id.* at 753–54. Four justices dissented, finding that requiring registration eight to eleven months beforehand was a "substantial and unnecessary" restriction on the right to vote. *Id.* at 763–66 (Powell, J., dissenting) ("Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial."). Nevertheless, the Court found preservation of "the integrity of the electoral process" justified the requirement. *Id.* at 761–62 (majority opinion); *see also* Douglas, *supra* note 30, at 152.

128. 553 U.S. 181 (2008).

129. The lead opinion in *Crawford* was not the first time the Court employed this "balancing" approach to voting restrictions. Instead, this approach arguably began with the case of *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld Hawaii's prohibition on write-in voting. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 93 (5th ed. 2016). *Crawford* is discussed here as it is a more recent example.

130. *See* Yablon, *supra* note 123, at 663.

131. *See Crawford*, 553 U.S. at 190 ("[A] court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'") (quoting *Burdick*, 504 U.S. at 434)); Yablon, *supra* note 123, at 663–64.

132. ISSACHAROFF ET AL., *supra* note 129, at 92–93.

133. Douglas, *supra* note 30, at 163–70 (discussing several possible explanations including: distinctions between individual rights versus ballot access, content-based versus content-neutral laws, and direct versus indirect burdens on the right to vote, ultimately concluding that "[t]he foregoing discussion suggests that there may be no principled reason for the Court's vacillation between strict scrutiny and a lower level of review in election law cases").

Where citizens' voting rights are implicated by a change in the manner that an office is elected, the Court has generally applied only rational basis scrutiny under the Equal Protection Clause. Two examples of this are *Rodriguez v. Popular Democratic Party*[134] and *Fortson v. Morris*.[135] In each of those cases the Court upheld processes where positions which were normally subject to election by popular vote were instead selected by other means.[136] *Fortson* upheld a Georgia state constitutional provision which charged the state legislature with electing the state's governor if "no candidate receive[d] a majority of votes" in the general election.[137] As discussed earlier, *Rodriguez* upheld a law allowing a political party to appoint an interim replacement for vacant legislative seats.[138] There, the Court described its guiding principle regarding voting rights thusly: citizens have a "protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[139]

These decisions reflect the Court's judgment that the right to vote, while obviously important, is not uniformly subject to a "fundamental rights" analysis like that used in cases involving other "fundamental rights," such as the right to interstate travel.[140] This approach seems to be motivated at least in part by a recognition of countervailing state interests which might be unduly limited by an unyielding application of strict scrutiny.[141] The Court has recognized that applying strict scrutiny in every case where voting rights were implicated "would tie the hands of States" from pursuing laudable objectives such as "assur[ing] that elections are operated equitably and efficiently."[142]

This concern for countervailing considerations has been especially strong where voting rights intersect with states' authority to organize their constituent governmental units. Under longstanding United States Supreme Court precedent, states enjoy "absolute discretion" over their constituent municipal corporations, at least in the eyes of the federal Constitution.[143] Where voting rights have been collaterally affected by

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134. 457 U.S. 1 (1982).

135. 385 U.S. 231 (1966).

136. *Rodriguez*, 457 U.S. at 12; *Fortson,* 385 U.S. at 232–33.

137. *Fortson*, 385 U.S. at 232–33. This despite the fact that the Georgia state legislature was under a federal court order to rectify its unconstitutional apportionment system (its legislative districts had significant population inequalities providing greater per capita representation to rural areas). *See id.* at 244–45 (Fortas, J., dissenting).

138. *Rodriguez*, 457 U.S. at 12.

139. *Id.* at 10 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

140. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254, 263 (1974); *see also* Douglas, *supra* note 30, at 147–48.

141. *See* Douglas, *supra* note 30, at 152.

142. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

143. *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

this power, the Supreme Court has generally refused to apply heightened scrutiny,[144] except where other factors requiring heightened scrutiny (such as racial discrimination) are present.[145]

An excellent example of this deferential approach is *Holt Civic Club v. City of Tuscaloosa*.[146] There, the Court considered an Alabama law that extended the police jurisdiction of cities to an area three miles outside of their corporate limits.[147] Although residents of this peripheral area were subject to city regulations, they were unable to vote in city elections.[148] The plaintiffs alleged that this extension of jurisdiction without a concurrent extension of the right to participate in the city's elections violated the Fourteenth Amendment's Equal Protection Clause.[149] The Court conceded that "[g]iven this country's tradition of popular sovereignty," the plaintiffs' arguments had "some logical appeal."[150] However, the Court found that because plaintiffs were not city residents, there was no genuine "right to vote" at issue in the case and applied only rational basis scrutiny.[151]

B. PA 436 and a "Fundamental" "Right" to Vote

While it may surprise and unnerve the average *modern* city resident,[152] the Sixth Circuit was almost certainly correct in concluding, as a matter of current federal constitutional law, "there is no fundamental right to have local officials elected."[153] Therefore, the Sixth Circuit properly rejected plaintiffs' demands for strict scrutiny on that basis. As discussed in Section II.A, the Supreme Court has *clearly* not treated the right to vote as fundamental in all situations.[154] While the Court treated the right as "fundamental" in cases such as *Harper*, it has been markedly more deferential where the right to vote claimed affects a state's ability to make changes to its governmental organization.

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144. *See, e.g.*, *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967). *But cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

145. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

146. 439 U.S. 60 (1978).

147. *See id.* at 61–62.

148. *See id.* at 62–63.

149. *Id.*

150. *Id.* at 70.

151. *See id.*

152. *See* Stahl, *supra* note 1 and accompanying text.

153. *Phillips v. Snyder*, 836 F.3d 707, 715 (6th Cir. 2016).

154. *See, e.g.*, *supra* notes 134–139 and accompanying text (citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973), *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982)).

The Court has been deferential when considering state election and appointment schemes in a number of cases, such as *Sailors v. Board of Education*,[155] *Fortson*, and *Rodriguez*. In each of these cases, the Court indicated that "[a]bsent some clear constitutional limitation, [a state is] free to structure its political system to meet its 'special concerns and political circumstances.'"[156] The Equal Protection Clause applies only insofar as it prohibits racial and gender-based discrimination and requires that all citizens be able to participate in elections "on an equal basis with other citizens in the jurisdiction."[157]

Here, the Sixth Circuit properly determined that the right to vote claimed by the plaintiffs fell within the rule of other cases where the Supreme Court declined to apply a "fundamental rights" heightened scrutiny analysis. PA 436 is essentially a state law governing the manner of election for certain state and local offices, like the laws in *Rodriguez* and *Sailors*. In both *Rodriguez* and *Sailors*, the Court upheld the challenged provisions, applying no heightened scrutiny even though plaintiffs raised claims under the Equal Protection Clause regarding their right to vote.[158] In *Sailors,* the Court held that a Michigan law providing for the appointment of county school boards by delegates of local school boards did not require strict scrutiny.[159] In fact, there the Court found that even the "one person, one vote" principle was not implicated.[160] While the Court expressly withheld judgment on the question of whether such an appointment scheme would violate the Equal Protection Clause if used to select legislative offices in *Sailors*,[161] the Court had no issue with the appointment of legislative officers in cases like *Rodriguez*.[162]

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155. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967).

156. *Rodriguez*, 457 U.S. at 13–14.

157. *Id.* at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

158. *See id.* at 12; *Sailors*, 387 U.S. at 111.

159. *See generally Sailors*, 387 U.S. 105.

160. *Id.* at 111. "One person, one vote" refers to the Supreme Court's holding in several reapportionment cases that the Equal Protection Clause requires roughly proportional representation in "congressional and state legislative elections." Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 220–22 (2003) (discussing the emergence of the "one-person one vote" doctrine). In *Sailors*, the Court actually used the phrase "one man, one vote," but here I use the Court's more appropriate modern terminology: "one person, one vote."

161. *Sailors*, 387 U.S. at 109–10.

162. *Rodriguez*, 457 U.S. at 14. The Supreme Court subsequently abandoned the distinction it left open between legislative and non-legislative appointments in *Sailors*. *See Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 55–56 (1970) (noting that "whenever a state or local government *decides* to select persons by popular election to perform *governmental functions* . . ." the Equal Protection Clause requires "that each qualified voter must be given an equal opportunity to participate in that election . . .") (emphasis added); *see also Phillips v. Snyder*, 836 F.3d 707, 715–16 (6th Cir. 2016).

Like the laws in *Rodriguez* and *Sailors*, PA 436 was a measure passed by a state legislature affecting the manner in which certain state or municipal offices are filled.[163] While PA 436 provides for an appointed official who supersedes elected officials,[164] the Court has expressed no special concern for the state laws that allowed for the appointment of offices which were previously or traditionally elected.[165] Arguably, PA 436 poses less of an equal protection problem than the laws at issue in other cases involving the appointment of certain traditionally elected offices, because PA 436 vests the power of appointment in the governor. While the laws in cases such as *Fortson* and *Sailors* allowed for over and under-representation of certain communities,[166] PA 436 does not pose the same problems because governors are typically elected via a state-wide popular election.

Like the law at issue in *Rodriguez*, PA 436 creates an appointive system for a legislative-type office.[167] EMs have legislative powers insofar as they are enabled to "act 'for and in the place of' [a] municipality's elected governing body . . . ."[168] Also, like the system in *Rodriguez*, the appointment system is only triggered under certain circumstances.[169] In *Rodriguez*, the Court deferred to Puerto Rico's judgment that its law served a legitimate interest in quickly filling legislative vacancies.[170] It seems only sensible that similar deference would be accorded to Michigan's stated interest in avoiding municipal bankruptcy by quickly identifying and rectifying fiscal instability, which harms municipalities' constituents and the state as a whole.[171]

Perhaps there are some limitations on state power to create appointive systems, but the Court has given states wide latitude to "experiment."[172] The Court has permitted state laws allowing for

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163. *See* MICH. COMP. LAWS §§ 141.1541–.1575 (2018).

164. § 141.1549(2).

165. *See, e.g.*, *Fortson v. Morris*, 385 U.S. 231, 233, 236 (1966); *Sailors*, 387 U.S. at 110–11.

166. *Fortson*, 385 U.S. at 244 (Fortas, J., dissenting) (discussing how Georgia legislature selecting governor was already ruled to be unconstitutionally malapportioned by a federal court); *Sailors*, 387 U.S. at 107 (discussing how each local school board, regardless of size, sends one delegate for selection of county school board).

167. *See* § 141.1549 (1)–(2), (4), (6).

168. *Phillips v. Snyder*, No.2:13-CV-11370, 2014 WL 6474344, at *2 (E.D. Mich. Nov. 19, 2014).

169. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 5–6 (1982); *see* §§ 141.1544–.1547.

170. *Rodriguez*, 457 U.S. at 12.

171. *See Phillips v. Snyder*, 836 F.3d 707, 718 (6th Cir. 2016). Note that PA 436 grants powers arguably beyond the scope of Michigan's stated interest in financial stability. *See supra* Sections I.B–I.D. In this way, if PA 436 were subject to greater scrutiny, it may not be "narrowly tailored" to its stated objectives.

172. *See infra* note 177 and accompanying text.

appointive or non-popular elective systems for positions including county school board members,[173] state legislators,[174] and even state governors.[175] PA 436 creates such an appointive position, and does so for an interest arguably greater than the reasons accepted by the Court in other cases.[176] Because PA 436, like the other laws discussed above, simply represents a re-organization of intra-state governmental organization it does not, under current federal constitutional doctrine, implicate a "fundamental right."

In short, the Supreme Court has been clear that it "see[s] nothing in the Constitution to prevent experimentation" on the part of states and local governments.[177] Even in cases where the Court applied strict scrutiny, it did so not because the "right" to select candidates for certain state or local offices is *per se* protected by the Constitution, but because the Constitution requires the "right" be allocated consistent with the Equal Protection Clause and other constitutional provisions.[178] The Court has recognized that state and municipal governments "may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions."[179] In recognition of that need, the Court has found numerous times that state appointive systems do not implicate a 'fundamental' right.[180] Therefore, in light of precedent, the Sixth Circuit properly determined that PA 436 did not burden a "fundamental" right, and properly refused to apply strict scrutiny on that basis.[181]

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173. *See Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967).

174. *See generally Rodriguez*, 457 U.S. at 8–12.

175. *See generally Fortson v. Morris*, 385 U.S. 231, 232–36 (1966).

176. *See, e.g.*, *Rodriguez*, 457 U.S. at 5, 13 (discussing Puerto Rico's interests in maintaining minority representation, "protecting the 'electoral mandate,'" and more).

177. *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 59 (1970) (quoting *Sailors v. Bd. of Educ.*, 387 U.S. 105, 110–11 (1967)).

178. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[T]he right to vote in state elections is nowhere expressly mentioned [in the United States Constitution]. . . . [However,] it is enough to say that *once the franchise is granted to the electorate*, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.") (emphasis added).

179. *Hadley*, 397 U.S. at 59 (quoting *Sailors*, 387 U.S. at 110–11).

180. *See, e.g.*, *Sailors*, 387 U.S. 105; *Rodriguez*, 457 U.S. 1.

181. While one could argue that the right to vote *ought to be* a "fundamental right" under federal law as an original matter, such a discussion is beyond the scope of this Note. *See infra* note 203.

C. Second Thoughts About Joining the Holt Civic Club

Although the Sixth Circuit properly determined that the right to vote at issue in *Phillips* was not "fundamental" for purposes of Fourteenth Amendment scrutiny, that alone does not necessarily decide the question of whether the Equal Protection Clause was violated. As the Sixth Circuit recognized, the Constitution does not protect a "right" to vote in state and local elections *per se*, but rather the right to "participate in elections on an equal basis with other citizens in the jurisdiction" when that "right" is granted.[182] The question then becomes: what is the relevant "jurisdiction?" The plaintiffs in *Phillips* argued that PA 436 violated their right to vote as compared to citizens in other non-emergency manager jurisdictions.[183] In *Phillips*, the Sixth Circuit held that comparisons of plaintiffs to citizens in municipalities who did not have an EM was inappropriate.[184] This conclusion is not without considerable support in Fourteenth Amendment precedent, but this Note posits that it is not incontrovertible.

While the state is "free to structure its political system to meet its 'special concerns and political circumstances,'"[185] it may not violate the Equal Protection Clause's requirement that all citizens be able to "participate in elections on an equal basis with other citizens in the jurisdiction."[186] In determining what the relevant "jurisdiction" is for an equal protection analysis, in several situations involving municipalities, the Court has given substantial deference to the lines states have "drawn."[187] For example, in *Holt Civic Club*, the Supreme Court found that there was no problematic restriction on the right to vote when residents outside the city limits were not permitted to participate in local elections although they were subject to the city's laws.[188] There, the Court distinguished previous precedents invalidating state or municipal election schemes by pointing out that those laws "denied the franchise to individuals who . . . [physically resided] within the geographic boundaries of the governmental entity concerned."[189] Although the plaintiffs may have had an interest in the decisions of the city government, they did not reside within its current boundaries, so

182. *Rodriguez*, 457 U.S. at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

183. *Phillips v. Snyder*, 836 F.3d 707, 718 (6th Cir. 2016), *cert. denied*, *Bellant v. Snyder*, 138 S. Ct. 66 (2017).

184. *Id.* at 719.

185. *Rodriguez*, 457 U.S. at 13–14.

186. *Id.* at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

187. *But see Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960).

188. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978).

189. *Id.* at 68.

the court found no 'right to vote' at issue.[190] In short, the Court found the boundaries of the municipality were dispositive for purposes of whether a comparison between city residents and those in the area outside the city was appropriate.

Given eminently applicable precedents like *Holt Civic Club*, the Sixth Circuit's refusal to compare the rights of those found within the jurisdiction of the "governmental entity concerned"[191] to those outside is entirely understandable. As *Holt Civic Club* stated, "[t]he Fourteenth Amendment does not prohibit legislation merely because it is . . . limited in its application to a particular geographical or political subdivision of the state."[192] PA 436, like the statute at issue in *Holt Civic Club*, is a state law with limited application to certain political subdivisions.[193] Looking at the two laws and fact patterns side-by-side, *Holt Civic Club* seems naturally on-point.

However, the approach taken in *Holt Civic Club* is not the *only* plausible approach. After all, the Fourteenth Amendment states, "*No State shall . . . deny to any person within its jurisdiction* the equal protection of the laws,"[194] suggesting that, at least for *state* laws, the entire state ought to be the relevant jurisdiction. This textual argument is also supported by the Court's "one person, one vote" decisions,[195] where equal voting weight as compared to others in one's district or intra-state jurisdiction did not save malapportioned electoral districts.[196] Because the plaintiffs did not raise an argument like this,[197] "one person, one vote" precedents were likely not top of mind for the Sixth Circuit when considering *Phillips*, and the court instead relied on the admittedly more similar fact pattern and more recent decision of *Holt Civic Club*. Nevertheless, the text of the Fourteenth Amendment and

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190. *Id.* at 70. The Court went on to emphasize the "extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Id.* at 71.

191. *Id.* at 68.

192. *Id.* at 70–71.

193. *See id.* at 74; *Phillips v. Snyder*, 836 F.3d 707, 718 (6th Cir. 2016).

194. U.S. CONST. amend. XIV, § 1 (emphasis added).

195. *See supra* notes 160–161.

196. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("'The idea that every voter is equal to every other voter in his State . . . underlies many of our decisions.' . . . '[T]here is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within a State.'") (quoting *Gray v. Sanders,* 372 U.S. 368, 379–80 (1963)). *But cf. Mahan v. Howell*, 410 U.S. 315 (1973) (permitting state legislative apportionment plans to have greater district-to-district population variances than congressional districts, recognizing a "rational state policy of respecting the boundaries of political subdivisions").

197. The plaintiffs did discuss "one person, one vote" cases, but only in arguing that the district court misunderstood *Hadley* as negating *Sailors*'s suggestion that appointive systems might be limited to "nonlegislative" offices. *See* Brief for Plaintiffs-Appellants Catherine Phillips, et al., *supra* note 25, at 16–17.

the Court's "one person, one vote" cases suggest that a broader jurisdictional analysis might be appropriate.

III. DANGEROUS DISCRETION: THE LIMITS OF "CONVENTIONAL" EQUAL PROTECTION

Although *Holt Civic Club* made the Sixth Circuit's use of a municipality-level framework for its equal protection analysis understandable, this Part argues that the Sixth Circuit would have done better to resist that temptation. This Part first explores the "denominator problem" inherent in *Holt Civic Club*'s approach, examining how deference to state-drawn municipal boundaries shuts down most equal protection challenges. Next, this Part argues that even if one believes that a municipality-level analysis is necessary to give proper deference to states, PA 436 introduces a problematic component of discretion—which the Sixth Circuit should have recognized and accounted for.

A. The "Denominator Problem"

As an initial matter, it is worth noting the effect that a municipality-by-municipality analysis had in *Phillips* and the effect it may have on most equal protection claims involving municipalities. By using municipal lines (created by the state) as the "denominator"[198] for an equal protection "equal footing" analysis, the Sixth Circuit foreclosed any meaningful challenge to PA 436. This approach cuts short any opportunity to demonstrate the relevant injury—a relative deprivation of political participation as compared to others outside that municipality.

If the approached used in *Phillips* were adopted in other jurisdictions it would all but ensure that state action affecting voting interests in municipal governments will never receive anything greater than rational basis scrutiny. After all, even if a state chose to

198. I borrow the phrase "denominator problem" from property law, where it is sometimes used to describe the historically intractable problem of how to select the relevant parcel for determining the effect of government action on private property in a "takings" claim. *See* Miriam Seifter, *Argument Preview: Defining the Denominator in Regulatory Takings Law*, SCOTUSBLOG (Mar. 14, 2017), http://www.scotusblog.com/2017/03/argument-preview-defining-denominator-regulatory-takings-law/ [https://perma.cc/6DB2-EMRE]; *see, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943–44 (2017) (stating that one of the "critical questions" of takings law "is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'"). The term translates somewhat imperfectly but highlights the drastically different results that come from determining the relevant "parcel," or in the context of voting rights, population or jurisdiction, just as is the case in "takings" law. *See* Seifter *supra*.

permanently disenfranchise residents of a particular municipality by choosing some alternative method for selecting officeholders, those residents would still be on an "equal footing" as compared to each other. The only exceptions would be action taken with clear animus, which might receive "rational basis with a bite,"[199] or other clearly constitutionally proscribed motivations, such as those involving a suspect class.[200] These are difficult burdens to reach and only the most egregious or poorly executed actions would be captured under such standards.

This deference may be unobjectionable under some circumstances, such as in *Holt Civic Club*[201] where standards are "rule-like"[202] and clear,[203] or where lesser rights or interests are involved. However, even if one accepts that this deference is sound in some circumstances, this Note argues that, in the case of PA 436, such deference is inappropriate. While a municipality-level analysis may be proper where a law's standards and effects are clear, such a deferential approach presents an unacceptable risk to meaningfully equal political participation when it insulates executive discretion.

B. Dangerous Discretion ("First Amendment Equal Protection")

While there is no "fundamental right" to local government at all, much less a particular form of local government,[204] it seems relatively unremarkable to say that local governments now play a significant role in American life. Today, municipal governments enact policies regarding education, law enforcement, sanitation and many other areas

199. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1500 (6th ed. 2015); *see also, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

200. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

201. Recall that the law in *Holt Civic Club* used clear geographic boundaries to establish the right of participation and the burden of taxation. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 61–62 (1978).

202. *See* CALEB NELSON, STATUTORY INTERPRETATION 68–69 (2011) (discussing Professors Hart and Sacks' distinction between "rules" and "standards," stating that more "rule-like" directives have the advantage of "leav[ing] fewer contestable decisions up to the implementing officials").

203. It is, for the most part, beyond the scope of this Note to test the soundness of this proposition. For the sake of argument, this Note assumes that there are sound legal or policy reasons for this deference, which the Supreme Court has repeatedly adopted. This Note attempts to distinguish these areas where the Court has thought deference appropriate in the past from the situation presented by PA 436 and similar laws.

204. *See* Douglas, *supra* note 30; *supra* Sections II.A–II.B.

which directly affect many people's everyday lives.[205] As the *Phillips* district court noted: "The right to vote at the local level has even more impact than it does at the state or federal level."[206] Citizens, through selecting local officials, express themselves through local government. For example, by voting for school board officials who in turn select curriculum, citizens express themselves by indicating what values and knowledge they want the children of their community to gain. Therefore, the right of individuals to select local representatives "who are answerable to [them]"[207] seems to implicate fundamental ideas of self-determination and self-expression.[208]

While again, there is no absolute federal constitutional right to "self-determination" or expression through a ballot box for any particular local office, the realm of political participation is one which intersects with the First Amendment right of free speech and expression. While voting has never squarely been considered speech by the Court, the concept of political participation has long been associated with speech.[209] More recently, scholars have increasingly called for recognition of the right to vote as subject to some First Amendment protection.[210] Therefore, this Note posits that even if there is not an expressive "right" to vote (particularly in local elections), citizens have a kind of "expressive interest" in participating in local elections, where such elections are authorized. This Note argues that the insulating effect of the "denominator problem" is amplified beyond justification where discretion affects political participation. Skepticism of such discretion

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205. *See* JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 1:6 (2018), Westlaw ("[L]ocal government units . . . play a considerable role in the regulation of the environmental impact of air, water, and noise pollution.").

206. *Phillips v. Snyder*, No.2:13-CV-11370, 2014 WL 6474344, at *8 (E.D. Mich. Nov. 19, 2014).

207. *Id.*

208. Recall that the plaintiffs in *Phillips* also raised several First Amendment claims, including claims that PA 436 was impermissible viewpoint discrimination, violated voters' and officials' freedom of speech, and infringed upon citizens' right to petition government. *See id.* at *16–18.

209. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2413 (2003) (suggesting "a First Amendment-like dimension to questions of political equality that have traditionally been examined under the lens of the Equal Protection Clause").

210. *See, e.g.*, Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 471 (2016) ("It seems like an obvious proposition that a citizen registering to vote or casting a ballot is engaging in free speech, a fundamental right entitled to full protection under the First Amendment [especially] in light of the broad First Amendment protection extended to the dollars spent in political campaigns to influence votes."); *see* Yablon, *supra* note 123, at 656 (suggesting that the First Amendment-centric approach to campaign spending cases and the Fourteenth Amendment-centric approach to voting itself might be harmonized through conceptualizing each as being "political participation").

under the Equal Protection Clause is sensible given an increasing recognition of the First Amendment's role in political participation.

1. A FOX GUARDING THE HEN HOUSE: PA 436'S DISCRETIONARY STRUCTURE

Given the connection and similarity between speech and voting rights discussed above, First Amendment-like sensitivity to imprecise standards and discretion should also have some application in equal protection cases involving the right to vote. In *Phillips*, discretion was not even discussed, much less acknowledged as something deserving of particular attention or concern. This omission may be because discretion was not a factor in any of the precedents the Sixth Circuit apparently considered and was not raised by the plaintiffs as a problematic aspect of PA 436.

PA 436, unlike the laws involved in the equal protection precedents used by *Phillips*, involves a great deal of discretion. PA 436 vests the finding of a "financial emergency" in the discretion of the governor,[211] but also grants discretion to the "state financial authority" on whether to begin the process of financial review.[212] PA 436, unlike the Alabama law at issue in *Holt Civic Club*,[213] conditions voting rights based on the ultimate discretion of one individual—the governor.[214] While PA 436 does provide some judicial review of a governor's finding of a "financial emergency,"[215] the statute makes such review difficult to begin in the first place,[216] and only allows for very deferential review of the governor's determination.[217] This gubernatorial discretion is problematic in at least two ways.

First, PA 436 may provide the governor a vague enough standard where he or she may arbitrarily enforce it.[218] PA 436 allows a governor to find a "financial emergency" if such factors "exist, or are likely to exist" which "threaten the local government's current and future

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211. *See Phillips v. Snyder*, 836 F.3d 707, 712 (6th Cir. 2016); MICH. COMP. LAWS § 141.1546(1) (2018).

212. § 141.1544(1) ("[T]he state financial authority *may* conduct a preliminary review . . . if 1 or more of the following occur . . . .") (emphasis added). Recall from the discussion in *supra* Section I.C that the "state financial authority is usually the state treasurer, one of the governor's appointed cabinet members. *See supra* note 67.

213. See discussion *supra* Section II.A.

214. *See Phillips*, 836 F.3d at 712; § 141.1546(1).

215. *See generally* § 141.1546(3).

216. *Id.* (requiring two-thirds vote of the municipality's governing body within ten days).

217. § 141.1546(3)(a)–(b) (providing that governor's determination may only be reversed if "[n]ot supported by . . . substantial evidence on the whole record" or is "[a]rbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion").

218. See discussion *infra* Section III.B.2.

capability to provide necessary governmental services essential to the public health, safety, and welfare."[219] While perhaps this standard does not offer completely unbound discretion, it still gives the governor enormous latitude in his or her actions. With such a broad standard, it may be easy for many municipalities to technically fall within the statute's ambit,[220] leaving it up to the governor to determine whether intervention is appropriate.

This standard may be broad, but PA 436 likely does not present problematic discretion purely from the *standard* it provides. After all, statutes which might technically reach a great deal of behavior, but which are constrained in their application by executive discretion are common.[221] Rather, a second—and more like problematic—manner in which PA 436 grants discretion is in how it prevents meaningful review of the *application* of its rather vague standard.

PA 436 grants the governor a sort of "prosecutorial discretion"[222] not present in any of the cases the Sixth Circuit considered. For example, the law in *Rodriguez* did not permit the governor to determine when a legislator should be removed, triggering the appointment process.[223] Likewise, the state law at issue in *Holt Civic Club* drew a clear legislative line, rather than granting some official power to deprive Holt residents of the power to vote in city elections, if at his or her "sole discretion," they determined some set of circumstances existed.[224] That sort of discretion, while perhaps desirable in certain contexts,[225] should strike one as odd as applied to something so important and inherently fraught with potentially corrupting forces as

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219. § 141.1545(6)(b)(i).

220. This is supported by the plaintiffs' allegations that PA 436 and previous laws were discriminatorily applied to majority-minority communities as compared to majority-white communities. *See Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at *10–12 (E.D. Mich. Nov. 19, 2014).

221. *See, e.g.*, Abigail Caplovitz, *Drafting Limits: Statute Text and the Police Discretion to Define Disorder*, 5 J.L. SOC. CHALLENGES 93, 102 (2003) (stating that "textually non-discretionary statutes" such as those prohibiting drinking in public and speeding "give police tremendous discretion").

222. *See* Tokaji, *supra* note 209, at 2416–17. Like Tokaji, by "prosecutorial discretion" I mean discretion to opt for enforcement or non-enforcement in each given case which may meet the legal requirements for "prosecution." *Id.* The governor may choose to try to "prosecute" every claim of financial instability, none of them, or just certain ones. The governor's reasons for "prosecuting" or not could be related or unrelated to the apparent likelihood of financial instability. This is where problematic aspects of discretion come into play.

223. See discussion *supra* Sections I.D, II.A.

224. See discussion *supra* Sections I.D, II.A.

225. *See* Tokaji, *supra* note 209, at 2461 (discussing how jury discretion has been constitutionally required in death penalty cases, in part because "[a]llowing the jury to consider such factors, under this view, promotes more individualized justice, since mitigating circumstances that call for lenity may come into play").

state and local politics. Personal ambition,[226] partisan gamesmanship,[227] local 'tribalism' or interests,[228] racial or ethnic biases,[229] and a number of other factors all risk being factors which play into decisions about who controls of the levers of power of local government.

The problem with this 'prosecutorial discretion' is that there is no check on the governor's *inaction*, which provides a way to apply PA 436 in a discriminatory manner. For example, if there were two municipalities (municipality "A" and municipality "B") that were identical in all relevant financial respects, the governor could still decide to instruct his treasurer (the "state financial authority" under PA 436) to investigate only municipality "A," while letting municipality "B" continue to self-govern without interference. The decision to investigate one city and not the other could be the product of some legitimate reason, but just as easily could be the product of any of the problematic factors listed above given PA 436's broad standard.[230] If both municipalities had conditions which clearly constituted a "financial emergency," municipality "A" would be able to challenge[231] (likely

226. *See* Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC (July/Aug. 2016), https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/ [https://perma.cc/8TY3-BPHV] ("The reason these obvious solutions are not enacted is that politicians are . . . self-interested . . . .").

227. *See* Craig Fehrman, *All Politics Is National*, FIVETHIRTYEIGHT (Nov. 7, 2016), https://fivethirtyeight.com/features/all-politics-is-national/ [https://perma.cc/G6EL-YJ9S] ("State politicians are becoming more partisan and more polarized . . . . It's spreading through every part of state government, with surprising and potentially troubling results."); *see also* Krsulich, *supra* note 111, at 526–30.

228. *See, e.g.*, Scott Herhold, *Border War: San Jose and Cupertino*, MERCURY NEWS (July 27, 2017), https://www.mercurynews.com/2017/07/27/border-war-san-jose-and-cupertino/ [https://perma.cc/4HAL-H72C].

229. *See* Justin Wolfers, *Pinpointing Racial Discrimination by Government Officials,* N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/business/economy/racial-discrimination-government-officials.html [https://perma.cc/RJN8-GSUT] (detailing widespread 'unconscious biases' in responsiveness by local officeholders).

230. *See supra* notes 226–229. The possibilities range from the trivial to the sinister. *See generally* Krsulich, *supra* note 111, at 526–30. For example, municipality "A" might be a high school sports rival of the governor's home town, resulting in bias towards investigation and prosecution. More realistically, municipality "A" might be a jurisdiction which is not politically friendly towards the governor and perhaps not necessary to the governor's future political endeavors, whereas municipality 'B' might be a jurisdiction needed for future electoral success. *See id.* at 528–29 ("Municipal takeovers do not happen in a political bubble. Indeed, when governors look out across their state for the candidates most likely to challenge them in the next election, big city mayors often top the list."). Such a situation would be ripe for impermissible criteria to influence the 'prosecutorial' decision. While these issues could hypothetically pop up in any area where discretion is vested in public officials, it intuitively seems that the realm of political participation is particularly at risk for these forms of influence.

231. *See supra* notes 76–79 and accompanying text.

unsuccessfully)[232] the governor's determination to enforce PA 436 against them, but, practically speaking, would lack any legal recourse to challenge the governor's non-prosecution of municipality "B." Perhaps *hypothetically*, municipality "A" could show that municipality "B" is "similarly situated" and the discrepancy in enforcement lacks any rational justification or was motivated by impermissible discrimination such as race. However, this type of claim would be extraordinarily hard to prove.[233]

This conclusion is supported by the fact that the plaintiffs in *Phillips* brought essentially that very claim with respect to PA 436's uneven application to municipalities with a majority-minority racial make-up.[234] In the district court, plaintiffs brought a racial equal protection challenge, alleging that PA 436 had been discriminatorily enforced against majority-minority communities, with similarly situated majority-white communities not receiving emergency management.[235] While this was the plaintiffs' only claim which survived the motion to dismiss stage,[236] they voluntarily dismissed the claim before reaching the appellate review process.[237]

While the reason for the plaintiffs' decision to dismiss this claim is unclear, one plausible explanation would be that they lacked the requisite evidence to show discriminatory intent in the enforcement of PA 436. This conclusion is supported by the fact that in the district court, the plaintiffs could only produce data that was approximately five years old.[238] A year later at oral argument, they were still unable to produce any more recent or relevant data.[239] Therefore, it appears that there are several practical limitations to bringing even a traditional

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232. *See supra* note 78 and accompanying text.

233. *See* Tokaji, *supra* note 209, at 2414 n.25 ("[T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."); *id.* at 2430 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28, at 1056 (2d. ed. 1988)) ("Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied . . . grant such officials the power to discriminate . . . . The open-ended delegation of such discretion . . . makes judicial review extremely difficult.").

234. *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at *20 (E.D. Mich. Nov. 19, 2014).

235. *Id.*

236. *Id.* at *10.

237. *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016).

238. *See Phillips*, No. 2:13-CV-11370, 2014 WL 6474344, at *11.

239. *Court Audio, 15-2394 Catherine Phillips v. Richard Snyder*, United States Court of Appeals for the Sixth Circuit, (Aug. 4, 2016), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/08-04-2016%20-%20Thursday/15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder.mp3&name=15-2394%20Catherine%20Phillips%20v%20%20Richard%20Snyder [https://perma.cc/D2S2-ZTBZ].

racial equal protection claim for discriminatory enforcement where discretion is involved.

2. "FIRST AMENDMENT EQUAL PROTECTION"

Given the problematic discretionary aspects of PA 436 discussed above, the question then becomes whether these concerns have a cognizable basis in current law. This Section argues that there is a solid legal foundation for these concerns. In light of the First Amendment-like qualities of participation in local government discussed above, one should look to what the scholar Daniel Tokaji has referred to as "First Amendment Equal Protection."[240]

In his article *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, Daniel Tokaji explores a line of cases which he labels "First Amendment Equal Protection."[241] These cases note the Supreme Court's greater scrutiny of laws which threaten "to undermine equality in the realm of expression."[242] Tokaji explores the Court's approach in these cases and speculates why the same "heightened sensitivity" has not been used in what he calls "Conventional Equal Protection" cases, that is, cases in which the Court adheres to its usual three-tiered equal protection analysis.[243] He contrasts these divergent approaches in this way: "Put simply, the Court exhibits a much greater willingness to trust government decisionmakers — to assume they will exercise their discretion in a fair and unbiased manner — where race is concerned, than where speech is concerned."[244] Ultimately, Tokaji suggests that these "First Amendment Equal Protection" cases could help clarify and improve equal protection doctrine, harmonizing cases that were ostensibly decided under the Equal Protection Clause, but departed from the normal "suspect class" and "fundamental rights" inquiries.[245]

Tokaji characterizes "First Amendment Equal Protection" cases as cases where the Supreme Court demonstrated a "distrust of official discretion," striking down laws for granting too much discretion to permit or suppress expression.[246] One such "First Amendment Equal

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240. Tokaji, *supra* note 209, at 2410. This Note draws extensively on Tokaji's insight into the connection between these "First Amendment Equal Protection" and "Conventional Equal Protection" cases and seeks to flesh out the similarly problematic discretionary aspects of PA 436 overlooked by the Sixth Circuit analysis in *Phillips* (which bears a close resemblance to Tokaji's "Conventional Equal Protection").

241. *Id.*

242. *Id.*

243. *Id.* at 2410–11.

244. *Id.* at 2411.

245. *Id.* at 2507.

246. *Id.* at 2430.

Protection" case is *City of Houston v. Hill*.[247] That case involved a city ordinance "that made it unlawful to 'oppose, molest, abuse, or interrupt any policeman in the execution of his duty . . . .'"[248] The Court invalidated the ordinance on its face because it "provid[ed] the police with unfettered discretion to arrest individuals for words or conduct that annoy[ed] or offend[ed] them."[249]

Rather than requiring plaintiffs actually prove discriminatory application, as is typically required under the Fourteenth Amendment, in "First Amendment Equal Protection" cases the Court generally permits facial challenges.[250] In part, this liberal attitude is attributable to the fact that imprecise standards can insulate government action from meaningful judicial review.[251] Imprecise standards make "the use of shifting or illegitimate criteria [] far too easy, making it difficult for courts to determine" whether a government actor is improperly suppressing speech.[252]

All of the criteria identified in "First Amendment Equal Protection" cases are present in *Phillips*. PA 436, while not providing 'unbounded' discretion, provides the governor with authority to act (or direct his cabinet to act) in a myriad of situations by providing a relatively imprecise standard.[253] PA 436 further provides for very weak constraints on this discretion by setting high bars for initiating[254] a challenge to a "financial emergency" finding by the governor and providing only very deferential judicial review.[255] Like the laws reviewed in "First Amendment Equal Protection" cases, PA 436 suppresses a kind of "expression"—expression through local government. When viewed through the lens of Tokaji's framework, it becomes apparent that PA 436 likely includes problematic discretion through its imprecise standard, insulation from rigorous and meaningful judicial review, and its suppressing effect on expressive conduct (participation in local government).

C. A Perfect Storm: Deference, Discretion, and Desire

While the discretionary structure of PA 436 alone might be enough to raise concerns, the real kicker is this discretion coupled with the

247. 482 U.S. 451 (1987); *see* Tokaji, *supra* note 209, at 2443.

248. *See* Tokaji, *supra* note 209, at 2443.

249. *City of Houston*, 482 U.S. at 465; Tokaji, *supra* note 209, at 2443.

250. *See*, Tokaji, *supra* note 209, at 2445–46.

251. *Id.* at 2442.

252. *Id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988)).

253. *See supra* notes 61–79 and accompanying text.

254. *See supra* note 77.

255. *See supra* notes 78–79 and accompanying text.

"denominator problem" discussed in Section III.A. This jurisdictional analysis, coupled with broad discretion in the hands of state officials *and* potential incentives for discrimination or self-dealing[256] creates a perfect storm. With a 'denominator' fixed on an individual municipality and with the only way to trigger heightened scrutiny being demonstrating racial discrimination or general animus, potential abuses are further insulated from meaningful judicial review. This is because official discretion itself makes proving discrimination or animus more difficult.[257]

In *Phillips*, the Sixth Circuit (and the plaintiffs) failed to fully recognize the problems PA 436 posed for the 'traditional' (or "conventional"[258]) equal protection precedents that the court relied on. PA 436's scheme of granting discretionary 'prosecutorial power' to the governor to restrict precious expressive rights was a novel and critical factor which the Sixth Circuit failed to account for in *Phillips*. Such discretion, mixed with the "denominator problem" creates a dangerous cocktail. The Sixth Circuit's application of "conventional" equal protection precedents like *Holt Civic Club* in this context failed to fully ensure voters are given an "equal opportunity to participate."[259] If officials are capable of capitalizing on the built-in advantage[260] of a municipality-by-municipality analysis by selecting "winners" and "losers" among municipalities at their discretion, the right to participate in local government on a truly "equal footing" is seriously compromised. Under *Phillips*, state officials are permitted to do just that.

The standard articulated in *Phillips* would, in theory, allow a kind of paper equality, where some citizens are granted the right to make "fundamental" decisions regarding the education of their children, the care of their environment, and the nature of the community they live in through their local government, while others would not.[261] Instead, for perhaps no better reason than the confluence of 1) the whim of a government official and 2) the existence of something which could be categorized as "financial instability," these citizens would be deprived of the same self-determination afforded to others. As compared to citizens within the same municipality (jurisdiction), these citizens experience no relative deprivation of participatory rights, and therefore

256. *See supra* note 228.
257. *See* TRIBE, *supra* note 233.
258. *See supra* note 209, at 2413, 2464.
259. *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 55–56 (1970).
260. *See supra* Section III.A.
261. *See also* example discussed in *supra* Section III.B.

(under the *Phillips* standard) the Fourteenth Amendment would not be offended.[262]

This cannot be. Inherent in even the Court's "traditional" Fourteenth Amendment decisions is the principle that the right to vote is at least precious enough that the "right" ought to be meaningfully protected insofar as compared to other qualified citizens.[263] The guarantee of "equal protection of the laws"[264] would be hollow if it sanctioned the arbitrary or discriminatory system allowed under *Phillips* and described above. While there may be compelling pragmatic and constitutional reasons[265] for limiting judicial second-guessing of changes in intra-state governing structures, the ingenuity of modern state governments (as shown by PA 436) provides compelling reasons to rethink how the balance of power was struck in *Phillips*. *Phillips* therefore presents a lesson and an opportunity for Fourteenth Amendment doctrine, demonstrating that the deference currently afforded to states ought to have its limits.

IV. APPROACHING POLITICAL PARTICIPATION AND DISCRETION ON A DIFFERENT FOOTING

If *Phillips* represents current Fourteenth Amendment doctrine, a reevaluation of that doctrine is clearly needed—at least in the context of state laws which potentially burden important expressive interests through the use of official discretion (like PA 436). This Note suggests that both a greater level of scrutiny and an abrogation of the municipality-by-municipality jurisdictional analysis are needed when examining state laws involving a considerable degree of discretion affecting intra-state voting interests. This is because the confluence of discretion, the "denominator problem," and incentives for discrimination in such contexts creates serious potential for abuse.[266]

As discussed earlier,[267] this approach is not without support in the law. In addition to a growing body of scholarly work clamoring for greater recognition of First Amendment parallels in equal protection doctrine,[268] some courts have cautiously employed analyses with greater sensitivity to official discretion in areas traditionally viewed under the

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262. *See, e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016).

263. *See, e.g.*, *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982).

264. U.S. CONST. amend XIV, § 1.

265. *See supra* note 203.

266. *Supra* Sections III.B–III.C.

267. *Supra* Section III.B.2.

268. *See, e.g.,* Tokaji, *supra* note 209, at 2413; Yablon, *supra* note 123, at 656–57; Derfner & Herbert, *supra* note 210.

Fourteenth Amendment.[269] Perhaps these courts feel as some commentators do: that the proliferation of First Amendment arguments by plaintiffs[270] ought to lead to transformational change in the constitutional analysis of voting rights—perhaps either by reforming Equal Protection doctrine or redefining the right to vote as subject to some First Amendment protection.[271]

A striking example of a contemporary approach which recognizes the deeply suspect nature of discretion in contexts which implicate expression and association (such as voting) is the recent case of *Scott v. Hand*.[272] In that case, the district court considered plaintiffs' arguments that the discretionary structure of Florida's felon re-enfranchisement system burdened convicted felons' First Amendment rights by fostering viewpoint discrimination.[273] Under Florida law, the Executive Clemency Board had "unfettered discretion" in determining whether to restore a felon's voting rights.[274] Finding anecdotal evidence of biases towards individuals expressing politically conservative views,[275] the

269. *See, e.g.*, *Hand v. Scott*, 285 F. Supp. 3d 1289, 1301 (N.D. Fla. 2018) (finding Florida's method of restoring voting rights to convicted felons constituted viewpoint discrimination). Florida's Executive Clemency board has appealed the *Hand* decision to the United States Court of Appeals for the Eleventh Circuit, which has temporarily enjoined the district court decision pending the resolution of the appeal. *See Hand v. Scott*, 888 F.3d 1206, 1207, 1215 (11th Cir. 2018).

270. *See e.g.*, *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 928–29 (W.D. Wis. 2016) (discussing the "partisan fencing" claims raised under the First Amendment in that case, as well as in two other district court cases: *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d. 708 (S.D. Ohio 2016), *rev'd*, *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d. 577 (E.D. Va. 2016)); *see also* Brief for Appellees at 34–36, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-bs.pdf [https://perma.cc/T5BT-W3JP].

271. *See, e.g.*, Mark Joseph Stern, *Does Partisan Gerrymandering Violate the First Amendment?*, SLATE (June 19, 2017, 5:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/does_partisan_gerrymandering_violate_the_first_amendment.html [https://perma.cc/3BEY-VQRC] (discussing why, prior to the Supreme Court's decision in *Gill v. Whitford*, the author feels that recent Supreme Court decisions indicate that the court is moving "in the right direction" on partisan gerrymandering (that is, towards declaring the practice unconstitutional)).

272. 285 F. Supp. 3d 1289 (N.D. Fla. 2018). The defendants in the *Hand* case have subsequently appealed and moved to stay the lower court's injunction. *See Hand*, 888 F.3d at 1207. As of this writing, the Eleventh Circuit has not yet ruled on the merits of this appeal. However, in late April, 2018, a panel of Eleventh Circuit judges granted State's motion to stay the lower court's injunction pending resolution of the appeal, with one judge dissenting. *Id.* at 1215; *id.* at 1215–1222 (Martin, J., dissenting).

273. *See Hand*, 285 F. Supp. 3d at 1301.

274. *Id.* at 1293.

275. *See id.* at 1302.

court analyzed the state's justification for the system under a strict scrutiny standard.[276] The court found the lack of "time limits in processing and deciding vote-restoration risks viewpoint discrimination and is therefore unconstitutional."[277] The court also found that the "completely arbitrary" nature of the board's standards violated both the First Amendment and the Equal Protection Clause.[278]

While there are significant differences between Florida's felon re-enfranchisement system and Michigan's PA 436, the same concerns regarding discretion and voting rights apply to each. The general sensitivity to discretion used in *Hand*, coupled with an abandonment of the municipality-by-municipality jurisdictional analysis, would have been proper in *Phillips*. This Note does not suggest that strict scrutiny (as was used in *Hand*) is appropriate in the context of laws like PA 436.[279]

Instead, in this author's opinion, Fourteenth Amendment principles demand that a proper standard both consider voters' interests and avoid unduly "t[ying] the hands"[280] of states. Therefore, this Note suggests that a "balancing approach" like that used in *Crawford*[281] would be an appropriate standard to use in reviewing state laws like PA 436. Not only would the implementation of this balancing standard comport with the Court's modern trend in the treatment of election laws,[282] it would also be sensitive to both the state and private interests discussed above.

Crawford's balancing approach,[283] *applied on a state-wide basis* would be able to take into account how severely a state law burdens individual expressive and associational interests in local government *as compared to other individuals in the state*. If, as here, the law imposes significant restrictions, the government can show its countervailing interests are sufficiently weighty to withstand increased scrutiny. This

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276. *Id.* at 1300 ("This Court reviews laws permitting such official discretion, when they burden citizens' First Amendment rights, under an exacting standard of scrutiny.").

277. *Id.* at 1305.

278. *Id.* at 1308.

279. As discussed elsewhere, this Note generally assumes for the sake of argument that the Court's decision to mostly steer clear of second-guessing state management of municipalities is supported by sound legal and policy reasons. *Id.* at 1301.

280. *Id.* at 1304.

281. *See supra* notes 130–131.

282. *See supra* note 129 and accompanying text.

283. To assist the unfamiliar reader, rather than applying simple rational basis or strict scrutiny to a restriction on the right to vote, the lead opinion in *Crawford* counseled that "a court evaluating a constitutional challenge to an election regulation [should] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by the rule.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008).

"sliding-scale approach" would also have the positive effect of creating incentives for more narrowly tailoring state laws to the governmental interests served, rather than encouraging broad restrictions on expressive interests like those in PA 436. After all, the broader and heavier the burden, the greater the scrutiny. The greater the scrutiny, the more likely a court will require some limitations on the burdens imposed by a law.

In *Phillips*, such an approach likely would have led to the Sixth Circuit requiring that EM control be limited to areas which bear directly on a municipality's finances. After all, arguably the power of EMs to create non-fiscal policy in some areas (such as education) is not even *rationally* related to Michigan's stated interest in municipal fiscal stability.[284] Alternatively, if there were equal protection precedent applying the "balancing" standard this Note suggests, Michigan may have not implemented PA 436 at all and instead continued using the more limited EFM system under PA 72. In either event, the outcome would be far preferable to the one the court reached in *Phillips*, giving the state government essentially "absolute discretion" to treat municipalities as it sees fit. A state-wide "balancing" approach would allow courts to check state power and ensure that important expressive interests in local government have at least a modicum of protection.

CONCLUSION

While the Sixth Circuit applied a plausible interpretation of Fourteenth Amendment doctrine in *Phillips*, it failed to recognize the "denominator problem" of the application of "conventional" equal protection doctrine and its particularly detrimental effects when applied to PA 436—a law involving a considerable degree of discretion affecting expressive interests. The Sixth Circuit should have recognized the dangerous confluence of insulating factors present in PA 436: discretion and the temptation to discriminate on the basis of political beliefs or other factors. When such factors threaten important expressive interests, a municipality-level analysis is inappropriate. While *Phillips* remains "good law," it represents a disappointing and troubling development in Fourteenth Amendment doctrine.

Through exploring why the Sixth Circuit's "fundamental rights" analysis was likely correct and tracking why the court applied a municipal-level analysis, this Note presents the context that makes the *Phillips* decision understandable. Exploring that context highlights the poor fit of previous Fourteenth Amendment cases to the facts of PA 436. This Note identifies the reasons why old precedent was extended

284. *See supra* note 171.

too far in *Phillips*. Namely, because except for the underlying element of executive discretion, PA 436 appears facially similar to laws evaluated in cases like *Rodriguez* and *Holt Civic Club*. This Note exposes why the presence of discretion makes all the difference and finally proposes a new, more sensitive standard, which draws from First Amendment precedents to ameliorate the potentially discriminatory effects of state laws like PA 436.

At a minimum, PA 436 and *Phillips* raise the issue of discretion and its role in an equal protection doctrine. Perhaps *Phillips*—and this Note's analysis—will contribute a much-needed re-examination of constitutional doctrines. Through re-examining the doctrinal shortcomings and ill-effects of *Phillips*, this Note hopes that courts may better recognize of how similar concerns in different constitutional contexts can avoid the prospect of jeopardizing or denying constitutional guarantees through rigid formalism.[285] In particular, courts should recognize the practical importance[286] and constitutional significance of political participation in local government and how the logic of *Phillips* fails to appropriately vindicate these critical interests.

285. *See* Tokaji, *supra* note 209, at 2522 ("For too long, we have failed to acknowledge the relationship between the First Amendment and rights of political participation traditionally examined under the lens of the Equal Protection Clause.").

286. *Cf.* Phillips, *supra* note 2, at 2262–63 (stating that if local governments are unable to "even *attempt* to experiment with local regulation, a quintessential aspect of the democratic political process will be lost").