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### A Municipal Speech Claim Against Body Camera Video Restrictions

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COMMENT

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A MUNICIPAL SPEECH CLAIM AGAINST BODY  
CAMERA VIDEO RESTRICTIONS

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MATTHEW A. DE STASIO†

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† Senior Editor, Volume 166, *University of Pennsylvania Law Review*. J.D. Candidate, 2018, University of Pennsylvania Law School. This Comment would not have been possible without the advice and guidance of Professor Seth F. Kreimer, who expanded my understanding of First Amendment jurisprudence and provided critical conceptual boundaries for this Comment. I would also like to thank the editors of the *University of Pennsylvania Law Review* for their tireless work reviewing and developing this Comment, particularly my Executive Editor, Justin Daniel and Comments Editor, Elyssa Eisenberg. Finally, I am grateful to my family and fiancée for their support and the inspiration to pursue what is worthwhile.

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## INTRODUCTION

This Comment describes one approach to securing public access to the data collected by police-worn body cameras (PWBC). Ever since the rapid expansion of body camera programs following highly publicized police shootings (particularly the shooting of Michael Brown in Ferguson, Missouri, in the summer of 2014), state legislatures across the country have rushed to decide who should have access to the collected video and how to limit its public release.<sup>1</sup> Over half of the major police departments across the country are using body cameras supplied by a single manufacturer alone, and the

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<sup>1</sup> See Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 407-09 (2016) (comparing survey results which showed less than a quarter of police departments used body cameras in the summer of 2013 while ninety-five percent of departments surveyed in 2015 have committed to using body cameras, and attributing the change to the aftermath of Brown’s shooting); see also Ryan J. Foley, *State Bills Would Limit Access to Police Body Cam Videos*, POLICEONE.COM (Mar. 24, 2015), <https://www.policeone.com/police-products/body-cameras/articles/8481000-State-bills-would-limit-access-to-police-body-cam-videos/> [<https://perma.cc/J6JD-N6EN>] (“State legislators around the country are pushing to make it much harder for the public to obtain police officer body camera videos, undermining their promise as a tool people can use to hold law enforcement accountable.”); Elizabeth Joh, *Free Police Body Cameras Come with a Price*, SLATE (Apr. 5, 2017), [http://www.slate.com/blogs/future\\_tense/2017/04/05/taser\\_international\\_now\\_axon\\_offers\\_police\\_free\\_body\\_cameras.html?wpsrc=sh\\_all\\_tab\\_fb\\_ru](http://www.slate.com/blogs/future_tense/2017/04/05/taser_international_now_axon_offers_police_free_body_cameras.html?wpsrc=sh_all_tab_fb_ru) [<https://perma.cc/X98K-VQ53>] (“Regulations about how, when, and whether to use [body cameras] vary widely by jurisdiction.”); Laurel Wamsley, *Taser Changes Its Name to Axon and Offers Free Body Cameras for Police*, NPR (Apr. 7, 2017, 4:21 PM), [http://www.npr.org/sections/thetwo-way/2017/04/07/522878573/we-re-more-than-stun-guns-says-taser-as-it-changes-company-name?utm\\_source=facebook.com&utm\\_medium=social&utm\\_campaign=npr&utm\\_term=nprnews&utm\\_content=20170408](http://www.npr.org/sections/thetwo-way/2017/04/07/522878573/we-re-more-than-stun-guns-says-taser-as-it-changes-company-name?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20170408) [<https://perma.cc/KFV9-4NQ3>] (“Sales of body cameras have boomed since the national uproar over a number of police-involved shootings, including the 2014 shooting of Michael Brown in Ferguson, Mo.”).

storage and release of the video is an urgent issue.<sup>2</sup> The patchwork of laws governing the disclosure of PWBC data has left the public without simple or consistent means of accessing that information.<sup>3</sup>

Every state except New Hampshire exempts police records from public records requests.<sup>4</sup> Many laws which explicitly address the release of PWBC data either grant disclosure discretion to a custodian<sup>5</sup> or a judge,<sup>6</sup> or they prohibit release entirely, absent special circumstances.<sup>7</sup> The myriad restrictions on public access has stymied the avowed purpose of implementing body camera programs: to increase the transparency and public accountability of police practices.<sup>8</sup>

The goal of fostering transparency to improve community relations would be more easily achieved if local governments and police departments, in the exercise of their discretion over local affairs, could publicly release video of

<sup>2</sup> See Wamsley, *supra* note 1 (“[Taser International, now Axon] says its cameras are now used by 36 of the 68 major law enforcement agencies across America, including the Los Angeles Police Department, which bought more than 7,500 of the devices.”); *id.* (“Officers are increasingly getting used to recording their interactions with the public, and now a key question is what police departments should do with all that footage.”).

<sup>3</sup> Because “[t]he decision whether or not to release the recordings is usually left to the legislatures rather than the police departments,” each state governs access in a unique way. Richard Shiller, *Shooting in High Definition: How Having Tough Policies in Place Makes the Use of Body Cameras in Law Enforcement Comport with the Fourth Amendment*, 51 NEW ENG. L. REV. 187, 205 (2016); see also Fan, *supra* note 1, at 401 (noting many states have had “competing bills tangled in fierce disputes over how to best balance transparency with privacy and how to protect the public”).

<sup>4</sup> *Police Body-Worn Camera Legislation Tracker: State by State Breakdown*, URBAN INST. (Jan. 1, 2017), <http://apps-staging.urban.org/features/body-camera-update/> [<https://perma.cc/55K9-9RBW>].

<sup>5</sup> See, e.g., N.C. GEN. STAT. § 132-1.4A(d) (2016) (denying police agencies the ability to publicly release PWBC body camera video and limiting disclosure of a recording to a person in the recording or such a person’s representative at the discretion of the custodial law enforcement agency).

<sup>6</sup> See, e.g., LA. STAT. ANN. § 44:3(A)(8)(b) (2017) (“Body-worn camera video or audio recordings that are determined by the custodian to violate an individual’s reasonable expectation of privacy shall be disclosed upon a determination and order from a court of competent jurisdiction.”).

<sup>7</sup> See, e.g., CAL. PENAL CODE § 832.18(b)(8) (2017) (prohibiting police personnel from uploading video records to public websites); MO. REV. STAT. § 610.100.2(2) (2016) (“[M]obile video recordings and investigative reports of all law enforcement agencies are closed records until the investigation becomes inactive.”). A Pennsylvania bill that was defeated in 2016, and is likely to be reintroduced, would have required body camera footage to be “withheld under the state’s Right-To-Know Law if an agency made the decision that the footage was part of an ongoing investigation.” Matt Stroud, *Will Pennsylvania Make Police Body Camera Footage Impossible to Obtain?*, ACLU (Jan. 27, 2017), <https://medium.com/@ACLUPA/will-pennsylvania-make-police-body-camera-footage-impossible-to-obtain-8a27fe5f99d9> [<https://perma.cc/9AQX-55H9>].

<sup>8</sup> See Chuck Wexler, *Letter from the PERF Executive Director*, in POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM, at v (2014) (“A police department that deploys body-worn cameras is making a statement that it believes the actions of its officers are a matter of public record.”); see also Fan, *supra* note 1, at 399 (arguing body cameras are endorsed by law enforcement officers because “recording encounters can help rebuild public trust, improve public as well as officer behavior, and protect against false complaints”); Matt Stroud, *Yes, Body Cameras ARE Designed to Monitor Police*, ACLU (Mar. 9, 2017), <https://medium.com/@ACLUPA/yes-body-cameras-are-designed-to-monitor-police-9c6c9303e086#.rdmiu9z5l> [<https://perma.cc/5CP4-CXGT>] (“[H]igh-ranking police leaders agreed that body cameras would help to build trust between officers and the communities they serve.”).

contested police encounters without prior restraint.<sup>9</sup> Some police departments seek to do just that, either in situations of suspected unwarranted police violence or matters of national importance.<sup>10</sup> For example, in October of 2017 the Las Vegas Police Department publicly released a compilation of PWBC footage only two days after the worst mass shooting in U.S. history took place.<sup>11</sup> Localities may seek to do so when it would improve community relations, inform public debate of police practices, and educate residents so they can effectively participate in the process of self-government. However, state statutes may prevent localities from securing these benefits for their citizens.

In this Comment, I argue that state laws which restrict disclosure of PWBC data by municipal governments run afoul of the First Amendment's Free Speech Clause and are subject to constitutional challenge by the municipalities themselves. Part I challenges the nearly century-old doctrine that local governments lack the power to bring constitutional claims against their own state, concluding both that the doctrine lacks consistency and that it has not been, nor should be, applied to a free speech claim. Part II examines how the Supreme Court has treated speech by government entities under the First Amendment, concluding the question of protection for such speech, which could serve as the foundation for a constitutional claim by municipalities and police departments against state statutes which restrict the

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<sup>9</sup> See Fan, *supra* note 1, at 414 (“The power of body cameras to prevent and provide accountability for [police shooting] deaths is seriously stunted by the inability of the public to get such video [and] leaving release to the discretion of law enforcement.”).

<sup>10</sup> See, e.g., Victoria Cavaliere, *Seattle Police Begin Posting Body Camera Footage on YouTube Channel*, REUTERS (Feb. 26, 2015), <http://www.reuters.com/article/2015/02/26/us-usa-police-seattle-idUSKBN0LU2C220150226> [<http://perma.cc/8MUV-W6S6>] (reporting that the Seattle Police Department launched a YouTube channel in 2015 to allow the public to view video from body cameras “as part of a pilot program to increase transparency”). It should be noted that video uploaded to this channel has been stripped of audio and is heavily blurred. However, private users who have successfully requested PWBC video have posted unredacted versions. See also Kate Mather, *Study Finds Broad Public, Police Support for Release of LAPD Shooting Video, but Sharp Split Over Timing*, L.A. TIMES, (Sept. 26, 2017), <http://www.latimes.com/local/lanow/la-me-ln-lapd-video-policy-20170926-story.html> [<https://perma.cc/G2TZ-B4HY>] (forecasting that the LAPD Police Commission, a civilian panel that sets the department's policies, may decide to make PWBC video automatically public due to vast public support for the release of video); Cleve R. Wootson Jr., *A Body Cam Captured a Cop's Violent Encounter with a Teen—But a New Law Keeps the Video Secret*, WASH. POST (Apr. 6, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/06/a-body-cam-captured-a-cops-violent-encounter-with-a-teen-but-a-new-law-keeps-the-video-secret/?utm\\_term=.18949cf77dd9](https://www.washingtonpost.com/news/post-nation/wp/2017/04/06/a-body-cam-captured-a-cops-violent-encounter-with-a-teen-but-a-new-law-keeps-the-video-secret/?utm_term=.18949cf77dd9) [<https://perma.cc/W3MM-G87J>] (noting that in North Carolina, the city council released PWBC video of two violent incidents between police officers and community members before a state law restricting such release took effect).

<sup>11</sup> See Emily Shapiro & Karma Allen, *Chaos of Las Vegas Massacre Seen in Newly Released Police Bodycam Footage*, ABC NEWS (Oct. 4, 2017), <http://www.abcnews.go.com/US/las-vegas-massacre/story?id=50246458> [<https://perma.cc/SXH9-GSA3>] (showing the chaos that erupted after a gunman opened fire at a music festival).

release of PWBC data, remains an open question. Part III argues for the protection of government speech under the First Amendment, suggesting that there are strong jurisprudential and policy arguments for extending protection to government speech, particularly when the government speaker is a municipal entity. Part IV assumes that government speech is protected under the First Amendment and examines whether a local government entity could bring a free speech challenge against its creating state. Part V offers a broad-strokes analysis of such a hypothetical First Amendment free speech claim by a municipality, assuming restraints on PWBC data disclosures are content-based prior restraints on speech subject to strict scrutiny. Part VI examines, as an alternative to a claim by a protected government speaker, a public “right to know” claim by a local government plaintiff against state restrictions on releasing PWBC data consistent with the Court’s decisions on local government powerlessness to bring constitutional claims of its own.

#### I. CONSTITUTIONAL CLAIMS BY CITIES AGAINST THEIR STATE

State laws restricting the release of PWBC data bind local officials. For a municipality to challenge such laws under the First Amendment Free Speech Clause, it must be able to state a claim against its creating state. The common legal wisdom is that municipalities, as creations of the state, have no rights which they can assert against their creator.<sup>12</sup> In this Part, I first analyze the cases that form the foundation of this majority rule. Second, I examine cases which have permitted municipalities, despite this majority rule, to raise constitutional claims against their creating states. Third, I argue that the rule is not grounded in doctrines of standing or capacity, but rather is limited to substantive constitutional provisions. Finally, I argue that the First Amendment is not a provision to which the rule has been, or should be, applied.

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<sup>12</sup> See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (“The number, nature, and duration of the powers conferred upon [municipal] corporations . . . rests in the absolute discretion of the state . . . unrestrained by any provision of the Constitution of the United States.”); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 536 (1980) (“[T]he central tenet of local government law: municipalities are creatures of the state. That principle limits a municipality’s powers to those either expressly granted by the state constitution or a state statute or those necessarily implied in any expressly conferred powers.”); Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST, (Jun. 24, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm\\_term=.d9aobeb7655c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm_term=.d9aobeb7655c) [https://perma.cc/X95T-RD6W] (noting that “local governments and state agencies likely have no First Amendment rights against state governments, because the state is entitled to control the conduct of its subdivisions”).

A. *The Common Wisdom of Political Subdivisions*

The oft-quoted rule of local government law is that municipalities are state creations without rights beyond those given to them by the state and that the state may take away those rights at its convenience.<sup>13</sup> This common legal wisdom stems from the Court's dicta in *Hunter v. City of Pittsburgh*,<sup>14</sup> wherein it noted that the state "may do as it will, unrestrained by any provision of the Constitution of the United States" with regard to its political subdivisions.<sup>15</sup> *Hunter* addressed whether citizens of Allegheny County could challenge Pennsylvania's decision to merge the cities of Allegheny and Pittsburgh over their objection.<sup>16</sup> The citizen plaintiffs argued that the state's combination of the two cities deprived them of due process of law by "subjecting [them] to the burden of the additional taxation which would result from the consolidation."<sup>17</sup> Rejecting this argument, the Court held the citizens had no right to the continued existence of their municipal corporation because:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted [sic] to them . . . . [T]he powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . [T]heir charters [do not] . . . constitute[] a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers . . . with or without the consent of the citizens . . . . [T]he State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.<sup>18</sup>

*Hunter* thus spawned a doctrine of local powerlessness which has characterized the municipal corporation as "merely a department of the

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<sup>13</sup> See *Hunter*, 207 U.S. at 178 ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them."); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 870 (1979) ("While differences in degree may exist, local governments are as much creatures of the state as federal administrative agencies are creatures of Congress.").

<sup>14</sup> 207 U.S. 161.

<sup>15</sup> *Id.* at 179.

<sup>16</sup> See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 15 (2012) ("*Hunter* considered whether the residents of one locality could challenge their state's decision to shift local boundaries and thereby merge them with another locality.")

<sup>17</sup> *Hunter*, 207 U.S. at 177.

<sup>18</sup> *Id.* at 178-79.

State”<sup>19</sup> without independent constitutional status. In the following decades, the Court employed this doctrine to bar constitutional arguments by municipalities under the Takings and Contracts Clauses,<sup>20</sup> and the Due Process<sup>21</sup> and Equal Protection<sup>22</sup> Clauses of the Fourteenth Amendment. The language of these cases has been cited by the Court sporadically since the early twentieth century without further analysis or indeed any explanation for the general proposition that a municipal entity cannot invoke constitutional provisions against the actions of its creating state.<sup>23</sup> Many lower courts have latched onto this broad doctrine to completely bar constitutional claims and defenses by municipalities asserted against acts of their states.<sup>24</sup>

### B. Hunter’s Shadow Doctrine

Despite its sweeping rhetoric, *Hunter* itself has not been applied by the Court to bar a municipality’s constitutional challenge to a state law since *Williams v. Baltimore* was decided in 1933.<sup>25</sup> Its broad principle has never been critically examined by the Court,<sup>26</sup> despite being deployed inconsistently since that time to bar municipal claims.<sup>27</sup> Dissenting Justices have at times

<sup>19</sup> *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

<sup>20</sup> *See, e.g., id.* at 188 (denying the city’s Takings Clause claim that it could require the state to grant it the same exception to a license fee that it had granted to a private water company the city had purchased); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (denying the city’s Equal Protection Clause claim under the same facts and rationale as in the companion case *City of Trenton*).

<sup>21</sup> *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) (denying a claim by citizen plaintiffs that extending police jurisdiction over their residence outside of town without also extending the voting district violated the Due Process Clause).

<sup>22</sup> *See, e.g., Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (overturning a circuit court ruling that a state law exempting a railroad corporation from local taxes violated the Equal Protection Clause as to plaintiff municipalities).

<sup>23</sup> *See* Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 391 (2013) (“Aside from *Gomillion [v. Lightfoot]*, 364 U.S. 339 (1960)], there has been almost no meaningful analysis of the *Hunter* doctrine in decades.”).

<sup>24</sup> *See, e.g., Herriman v. Bell*, 590 F.3d 1176, 1183 (10th Cir. 2010) (denying the plaintiff city standing to bring a Fourteenth Amendment Equal Protection claim); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107-08 (9th Cir. 1999) (denying plaintiff health care district standing to sue its creating state under the federal Constitution because it was a political subdivision); *Texas Catastrophe Prop. Ins. Ass’n v. Morales*, 975 F.2d 1178, 1180 (5th Cir. 1992) (deciding that if the plaintiff agency had been considered part of the state, it could not assert a constitutional right to retained counsel); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) (noting that while the *Hunter* doctrine’s validity has been questioned, it “remains controlling authority”).

<sup>25</sup> *See* *Morris*, *supra* note 16, at 16-17 (“Indeed, in the seventy-eight years since *Williams*, the Court has not invoked the *Hunter* doctrine to bar a single local constitutional challenge to state action.”).

<sup>26</sup> *See* Bendor, *supra* note 23.

<sup>27</sup> *Compare* *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (distinguishing a plan for state legislative apportionment from local representative apportionment by briefly referencing *Hunter*’s principle that states have “absolute discretion” over the powers of their political subdivisions in a way dissimilar to their relationship to the federal government), *with* *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968), *questioned in* *Charlestown v. United States*, 696 F. Supp. 800, 809-11 (D.R.I.



noted the oversimplified nature of the doctrine and the doctrinal thicket in the lower courts which is the result of its scattershot application.<sup>28</sup> For their part, legal scholars view the *Hunter* doctrine as “analytically muddled”<sup>29</sup> and in need of an overhaul.<sup>30</sup> Lower courts have recognized its force as “waning with time.”<sup>31</sup>

In recognition of the doctrine’s odd disappearing act, the Court has noted *Hunter* is not the absolute bar its dicta claims it to be in cases like *Gomillion v. Lightfoot*.<sup>32</sup> In *Gomillion*, the Court considered a city’s Fifteenth Amendment challenge to a state gerrymander of its borders.<sup>33</sup> In rejecting the state’s invocation of *Hunter*’s assertion that it can shape its political subdivisions at its absolute discretion, the Court declared “[we have] never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”<sup>34</sup> Some scholars read this language in *Gomillion* to mean, at its narrowest, that municipalities may sue their state when a manifestation of state control over the municipality violates the rights of the

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1988) (considering a school board’s First Amendment Establishment Clause challenge to state mandated expenditures on the merits).

28 See *City of South Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of certiorari) (“Such a *per se* rule [barring a political subdivision’s standing to make constitutional objections to its state’s statutes] is inconsistent with [*Board of Education v. Allen* 392 U.S. 236 (1968)], in which one of the appellants was a local board of education. Furthermore, there is a conflict in the Circuits over the validity of such a rule.”); see also *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 375 (2009) (Stevens, J., dissenting) (“Relationships between state and local governments are more varied, and the consequences of that variation are more significant, than the majority’s analysis admits.”).

29 Morris, *supra* note 16, at 5.

30 See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2223 (2006) (arguing to permit municipal constitutional challenges to state laws when local political self-determination is implicated); Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1 WIS. L. REV. 83, 86 (1986) (stating municipal legal status is a “startlingly pure example of politics as black letter law”); Morris, *supra* note 16, at 26 (calling for overruling *Hunter* on *Erie* grounds); Bendor, *supra* note 23, at 397 (arguing *Hunter* is a substantive law ruling which permits municipalities to claim some limited constitutional rights against their states).

31 *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991).

32 364 U.S. 339, 342 (1960); see also *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (“[T]he broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer v. Union Free School Dist.*”).

33 *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

34 *Id.* at 344-45.

citizenry.<sup>35</sup> It clearly provides that some constitutional provisions limit state control of municipalities, despite *Hunter's* rhetoric.<sup>36</sup>

Despite these periodic rejections in specific substantive constitutional contexts, the Court has not offered a comprehensive rationale explaining what circumstances entail the doctrine's application or absence. This lack of a roadmap has left the status of municipalities the subject of great confusion among scholars, which is best summarized by Kathleen Morris's observation that "[t]hey are components of state governments except when they are not (but we do not know when or why), and they can bring constitutional claims except when they cannot (but we do not know when or why)."<sup>37</sup>

Many municipal plaintiffs have had their claims decided on the merits, much as they did before *Hunter* was handed down.<sup>38</sup> This line of cases rarely, if ever, mentions *Hunter*, instead departing from its doctrine *sub silentio* to treat municipalities as legally and constitutionally cognizable entities.<sup>39</sup> These cases frequently arise under specific constitutional provisions. Federal Equal Protection claims have been brought by municipal plaintiffs to challenge state laws "restricting local efforts to combat private discrimination,"<sup>40</sup> apparently

<sup>35</sup> See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 568 (1999) ("These cases do not, however, support the further proposition that local governments are entitled to a degree of constitutional protection from an exercise of state power that would not interfere with a judicially enforceable individual constitutional right. Rather, the cases show that a state may not justify the infringement of an otherwise judicially enforceable individual constitutional right simply by asserting its power to control its local governments."). The Court confirmed the basis for this interpretation when it revisited *Gomillion* in *Baker v. Carr*, saying "*Gomillion* was lifted 'out of the so-called 'political' arena and into the conventional sphere of constitutional litigation' because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment." 369 U.S. 186, 230 (1962).

<sup>36</sup> See *Baker*, 369 U.S. at 229 (citing *Hunter* when stating *Gomillion* explicitly rejected "what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries"); Michael A. Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 101 (2002) ("*Gomillion* thus sets forth the important principle that there are constitutional limits to the degree of control that may be asserted by a state over municipal corporations, through legislation or otherwise.").

<sup>37</sup> Morris, *supra* note 16, at 44.

<sup>38</sup> See, e.g., *Bd. of Comm'rs of Tippecanoe County v. Lucas*, 93 U.S. 108, 115 (1876) (suggesting a locality could invoke the Constitution against its state in some limited circumstances, such as to protect county property just as individual and private corporations' property was).

<sup>39</sup> See Morris, *supra* note 16, at 3 n.5 ("Scholars refer to these cases as the 'shadow doctrine' of local government law . . . [wherein t]he Court has treated localities as independent from their states for purposes of liability for judgments, the ability to collect on federal grant obligations, Eleventh Amendment immunity, the Sherman Act, school desegregation, and voting rights.").

<sup>40</sup> Barron, *supra* note 30, at 2243-44 n.94; see, e.g., *Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (invalidating under the Equal Protection Clause of the Fourteenth Amendment a state law prohibiting localities from barring discrimination on the basis of sexual orientation); *Papasan v. Allain*, 478 U.S. 265, 275 (1986) (remanding school officials' Equal Protection Clause challenges to state for consideration on the merits); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467-70

overruling *City of Newark*, which held that municipalities could not invoke the Fourteenth Amendment in opposition to their creator.<sup>41</sup> Municipalities have also had claims considered on the merits under the Supremacy Clause,<sup>42</sup> the Contracts Clause,<sup>43</sup> and the First Amendment Establishment Clause.<sup>44</sup> Additionally, the Court has denied cert in several cases wherein lower courts have permitted municipalities to bring suit against the state,<sup>45</sup> indicating approval for the abrogation of *Hunter's* doctrine.<sup>46</sup>

The breadth of constitutional provisions under which municipalities have been permitted to raise claims against their state casts doubt on David Barron's argument that only infringement of individual constitutional rights avoids *Hunter's* bar against political subdivision challenges.<sup>47</sup> For instance, the Supremacy and Contracts Clauses are structural provisions rather than provisions enshrining individual rights. That the Court has reached municipal claims under these provisions on the merits suggests that, in addition to violations of individual rights, violations of the city's own rights can be the basis for a municipal claim against its state.

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(1982) (considering on the merits a school district's Equal Protection Clause challenge to a state statute); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5 n.2 (1973) (allowing a school district to intervene in an Equal Protection Clause challenge to the state's school finance scheme); *City of Chi. v. Sturges*, 222 U.S. 313, 324 (1911) (ruling that a state requiring cities to pay for mob riot damage did not violate the Equal Protection or Due Process Clauses).

<sup>41</sup> See *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State.").

<sup>42</sup> See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 131, 133-34 (2004) (considering on the merits whether a state may prohibit a municipality from providing telecommunications services); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257-58 (1985) (invalidating a state statute on Supremacy Clause grounds which required localities to disburse federal payments in lieu of taxes to school districts).

<sup>43</sup> See, e.g., *City of Bos. v. Jackson*, 260 U.S. 309, 314-16 (1922) (rejecting, seemingly on the merits, a city's Contracts Clause and Due Process Clause arguments against requiring it to levy taxes and turn them over to the state); *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 395, 399 (1919) (rejecting, in part on the merits, municipal plaintiff's Contracts Clause challenge to a state order regulating a gas company servicing the city).

<sup>44</sup> See *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (rejecting on the merits a school district's Establishment Clause challenge to a state law requiring it to purchase textbooks for students attending parochial schools).

<sup>45</sup> See, e.g., *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (interpreting *Gomillion* as limiting *Hunter's* bar on city suits to its substantive provision); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309-12, 1319 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (finding state regulation of the plaintiff local port district was unconstitutional under the Supremacy Clause); *Rogers v. Brockett*, 588 F.2d 1057, 1067-71 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979) (holding that *Gomillion* limited *Hunter* to its substantive provision and cities are only barred from suing their state when it would "interfere with a state's internal political organization").

<sup>46</sup> In *City of Charleston v. Public Service Comm'n*, the Fourth Circuit expressed doubts based on these denials of cert that "the 'broad dicta' that 'a political subdivision may never sue its maker on constitutional grounds' is really 'the rule.'" 57 F.3d 385, 390 (4th Cir. 1995).

<sup>47</sup> See Barron, *supra* note 30, at 2221-22.

### C. Hunter as a Decision of Standing or Capacity

While the *Hunter* Court charged lower courts to apply its doctrine wherever applicable,<sup>48</sup> the doctrine's ambiguous nature and lack of an explicit unifying rule of application has led lower courts to interpret and apply it in disparate ways. Some view it as a rule of standing,<sup>49</sup> others as a decision about a municipality's capacity to bring suit,<sup>50</sup> and still others as a rule of substantive constitutional law confined to the provisions it dealt with.<sup>51</sup>

The doctrinal footing upon which *Hunter*'s "seemingly unconfined dicta"<sup>52</sup> sits is determinative of its scope and effect. Thus, this Section examines each possible foundation and concludes, based on *Gomillion* and the pattern of application under specific constitutional provisions, that *Hunter* is a rule of substantive constitutional law which leaves open the possibility that a municipality may raise a First Amendment free speech challenge against its creating state.

*Hunter* is not a doctrine of standing for five main reasons. First, the term "standing" today does not mean what it did when cases like *Williams* employed it. Second, cities can have standing against their creating state when the state violates the rights of the city's residents. Third, *Hunter* has blocked arguments by defendant municipalities. Fourth, the Supreme Court has affirmed state cases decided on *Hunter* grounds. Finally, *Hunter* has been employed to dismiss claims by private plaintiffs. The Ninth and Tenth Circuits, which interpret *Hunter* to be a decision about standing, appear to do so because the Court described the *Hunter* doctrine in terms of standing in

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<sup>48</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (describing the powerlessness of political subdivisions as "settled doctrines of this court, to be acted upon wherever they are applicable").

<sup>49</sup> The Ninth and Tenth Circuits consider *Hunter* to be a decision about the standing of political subdivisions. *See, e.g.*, *City of Herriman v. Bell*, 590 F.3d 1176, 1183 (10th Cir. 2010) ("Herriman City thus lacks . . . independent standing . . . to bring this Fourteenth Amendment equal protection claim."); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999) (dismissing for lack of standing because "a political subdivision of the state, has no standing to sue the state in federal court"); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363 (9th Cir. 1998) (recognizing that "there is a general rule against standing on the part of a state subdivision to contest state statutes"); *City of Moore v. Atchison, Topeka, & Santa Fe Ry. Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983) ("[P]olitical subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds.").

<sup>50</sup> The Fifth Circuit apparently interprets *Hunter* to address the nature of a political subdivision, whether it be a city or an agency of the state. *See Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) ("A state agency has no constitutional rights to assert against the state of which it is a part.")

<sup>51</sup> The Second Circuit considers *Hunter* to be a decision of substantive constitutional law. *See City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) ("Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."); *Shirk v. City of Lancaster*, 169 A. 557, 560 (Pa. 1933) ("[R]evenues derived in [a municipal corporation's] private capacity, as a return from its water or other utility works, are trust funds, and cannot be controlled or taken directly for state purposes.").

<sup>52</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960).

cases like *Williams* and *Coleman v. Miller*.<sup>53</sup> Because the Constitution has little to say about the standing of municipalities, “judges have stepped into the breach by drawing on general constitutional principles.”<sup>54</sup> Some circuit court judges have tried to fill that breach with *Hunter* in error.

When *Williams* and *Coleman* were decided in 1933<sup>55</sup> and 1939,<sup>56</sup> respectively, the term “standing” meant something very different than it does after *Lujan v. Defenders of Wildlife* defined the doctrine in 1992.<sup>57</sup> In *Rogers v. Brockette*, the Fifth Circuit explained that standing simply meant that the constitutional or statutory provision at issue protected the party’s interests rather than being the “threshold question”<sup>58</sup> it is today. While the Fifth Circuit indicated support for considering *Hunter* to be a rule of prudential standing, Kathleen Morris argues persuasively against that reading.<sup>59</sup>

*Hunter*’s rule has not barred municipal standing when its citizens suffer a constitutional injury. While *Williams* states that a municipality “has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator,”<sup>60</sup> suggesting a municipality should not be able to suffer a constitutional injury sufficient to possess Article III standing, cases such as *Romer v. Evans* and *Washington v. Seattle School District No. 1* defy this inference. Municipal and private plaintiffs in *Romer* successfully challenged a state constitutional amendment prohibiting public action against discrimination of homosexual persons under the Equal Protection Clause of the Fourteenth Amendment.<sup>61</sup> In *Seattle School District No. 1*, the plaintiff local school district was allowed to sue the state to vindicate the district’s right to bus students out of their geographical district for desegregation purposes.<sup>62</sup> The Court did not even discuss

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53 Bendor, *supra* note 23, at 413; *see also* *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (“Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.”); *Williams v. Mayor of Baltimore*, 289 U.S. 36, 47 (1933) (“[T]he respondents [are] without standing to invoke the protection of the Federal Constitution.”).

54 Barron, *supra* note 30, at 2222 n.9.

55 *Williams*, 289 U.S. at 36.

56 *Coleman*, 307 U.S. at 433.

57 504 U.S. 555, 560-61 (1992).

58 588 F.2d 1057, 1070 (1979). Bendor notes that the “use of ‘standing’ in *Williams* and *Coleman* sounds more like the prudential zone-of-interests standing requirement.” Bendor, *supra* note 23 at 414-15. As an example of how cities satisfy this requirement, Barron argues cities have a “quasi-sovereign” interest in protecting the well-being of their residents. Barron, *supra* note 30, at 2242.

59 Kathleen Morris examines four rationales for imposing prudential standing requirements and concludes none are satisfied by *Hunter*’s rule, either because *Hunter*’s purpose or progeny are not consistent with them. Morris, *supra* note 16, at 22-25.

60 *Williams*, 289 U.S. at 40.

61 517 U.S. 620, 623-24 (1996).

62 458 U.S. 457, 478 (1982) (“School boards, of course, are given broad corporate powers . . . . Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation.”).

whether municipalities had standing in these cases to claim an injury to its citizens' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>63</sup>

*Hunter* has been invoked to dismiss arguments made by municipal defendants.<sup>64</sup> However, standing is a doctrine governing who may bring a legal claim, not who may assert a legal defense.<sup>65</sup> And yet, “not all of the local public entities in the *Hunter* line of cases were even claimants . . . [with] some invok[ing] the Constitution only defensively, as a shield against statutory claims.”<sup>66</sup> Because “the *Hunter* line also bars localities from invoking the Constitution defensively,” it cannot be a decision about standing.<sup>67</sup>

State court decisions about standing are outside the Supreme Court's jurisdiction, yet it has reviewed state decisions decided on *Hunter* grounds. Because state standing doctrine is “entirely a matter of state law,” the federal judiciary has no authority to define the jurisprudence.<sup>68</sup> If *Hunter* were a matter of state standing, the Supreme Court could not have affirmed either *City of Trenton* or *Hunter* itself.<sup>69</sup> Additionally, since standing is plaintiff specific, the Court in *Hunter* would have only dismissed the municipal plaintiff, leaving the private plaintiffs' claim intact.<sup>70</sup> Instead, it dismissed the entire case. This suggests strongly that standing was not the animating principle behind *Hunter*'s rule.

A separate minority view among scholars and lower courts is that *Hunter* sounds in capacity,<sup>71</sup> the doctrine concerned with whether a party is qualified to

<sup>63</sup> See Bendor, *supra* note 23, at 391 (“[T]he Court has not explicitly addressed the presence of the municipalities in these cases . . .”).

<sup>64</sup> See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) (dismissing defendant municipality's claim that it was protected from suit brought by the state to recover dues for use of a water supply based on the Contracts, Takings, and Due Process Clauses); *Attorney Gen. ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905) (dismissing defendant school board's challenge to a state law mandating reorganization claiming it violated the Contracts, Due Process, and Republican Form of Government Clauses because the state legislature's creation of the school board prevented constitutional interference); *Williams v. Eggleston*, 170 U.S. 304 (1898) (dismissing defendant town's claims in defense under the Contracts Clause).

<sup>65</sup> See Bendor, *supra* note 23, at 415 (“[S]tanding does not limit the arguments that a party can make in defense if it is sued.”).

<sup>66</sup> *Morris*, *supra* note 16, at 22.

<sup>67</sup> *Id.* at 3 n.4.

<sup>68</sup> *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (“Our standing rules limit only the *federal* courts' jurisdiction over certain claims. [S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.” (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989))).

<sup>69</sup> See Bendor, *supra* note 23, at 416 (suggesting the Supreme Court's affirmation of these cases militates against *Hunter* being viewed as a doctrine of standing and instead a doctrine of substantive constitutional law).

<sup>70</sup> *Id.* (“In *Hunter* itself, the plaintiffs included both residents of Allegheny and the city itself.”).

<sup>71</sup> See *Morris*, *supra* note 16, at 18 (arguing that by defining the nature of municipal corporations, the Court in *Hunter* created federal common law); see also Bendor, *supra* note 23, at 416 (describing the “minority view that *Hunter* is about municipal capacity to sue and be sued”).

take part in litigation.<sup>72</sup> In *Hunter*, the Court noted that it had in the past “decide[d] the nature of municipal corporations.”<sup>73</sup> Because *Hunter* purported to define what localities “are”—that is, political subdivisions of the state—and deny them the protection of constitutional provisions because of that intrinsic nature, *Hunter* has been viewed by some as a decision about the capacity of a locality to bring suit under constitutional provisions.<sup>74</sup> According to Bender, “the capacity to sue and be sued is ‘defined as a party’s personal right to come into court.’”<sup>75</sup> *Hunter* defines the character of localities in a way that denies them independence, and thus the separation from the state necessary to bring suit against it.<sup>76</sup>

There are several persuasive arguments that *Hunter* is not a decision about capacity. First, *Hunter* has been applied to bar private plaintiffs from suing states, an outcome that cannot be related to the nature of municipal plaintiffs.<sup>77</sup> If *Hunter* determines the capacity of municipal plaintiffs, then private plaintiffs should be unaffected just as if it were a doctrine of standing. Second, *Hunter* fails to completely bar constitutional suits by and against municipalities. A lack of capacity is a complete bar to bringing suit or being sued.<sup>78</sup> And yet, localities have been able to bring constitutional claims against their state under the Supremacy, Contracts, and Establishment Clauses.<sup>79</sup> Cities can also sue their state in tort<sup>80</sup> and are conspicuous subjects of civil rights suits under § 1983.<sup>81</sup> Third, the Federal Rules of Civil Procedure explicitly command that state law govern whether a party has capacity to sue.<sup>82</sup> Rule 17 is an explicit congressional mandate that the courts defer to

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<sup>72</sup> Capacity generally addresses such considerations as a party’s mental competence due to age or insanity. See *Morris*, *supra* note 16, at 25 (noting that capacity “concerns, in sum, ‘the personal qualifications of a party to litigate’” (citing 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1559 (3d ed. 1998))).

<sup>73</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177-78 (1907).

<sup>74</sup> See *Morris*, *supra* note 16, at 25 (noting that *Hunter* “bars localities from invoking the federal constitution against their own states because of what they ‘are’”). Indeed, *Hunter* has been interpreted as a decision about municipal capacity to sue in some courts. See, e.g., *City of New York v. State*, 655 N.E.2d 649, 651 (N.Y. 1995) (concluding that “municipal plaintiffs lack the legal capacity to bring this suit against the State”).

<sup>75</sup> Bender, *supra* note 23, at 416-17 (citing WRIGHT & MILLER, *supra* note 72).

<sup>76</sup> See *Morris*, *supra* note 16, at 26 (interpreting *Hunter* to mean municipalities “lack the necessary independence that is a precondition to alleging a constitutional violation against their states”).

<sup>77</sup> See Bender, *supra* note 23, at 416 (“In *Hunter* itself, the plaintiffs included both residents of Allegheny and the city itself.”).

<sup>78</sup> *Id.* at 417 (“[I]f an entity does not have the capacity to sue and be sued, its inability to sue is total.”).

<sup>79</sup> See *supra* notes 42-44 and accompanying text (describing cases in which municipal claims have been considered on the merits under the Supremacy Clause, the Contracts Clause, and the First Amendment Establishment Clause).

<sup>80</sup> See Bender, *supra* note 23, at 417 (“Municipalities can sue in contract and tort.”).

<sup>81</sup> See, e.g., *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658 (1978) (holding that municipal corporations can be sued under § 1983).

<sup>82</sup> FED. R. CIV. P. 17(b)(3) (“Capacity to sue or be sued is determined . . . by the law of the state where the court is located.”).

state law on capacity questions.<sup>83</sup> If *Hunter* were a decision of capacity, it would violate this mandate.

Furthermore, were *Hunter* a decision about capacity to sue, it would violate the ban on federal general common law laid down in *Erie Railroad Co. v. Tompkins*.<sup>84</sup> The *Erie* Court held that there “is no federal general common law” and instead required the law of the states to be applied in all cases, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress.”<sup>85</sup> If *Hunter* were a decision of standing (an Article III matter) or of substantive constitutional law, *Erie* would be no bar since in both cases the doctrine would be tied to the Constitution and be within the Court’s authority.<sup>86</sup> But as a capacity doctrine, “lower federal courts overreach their authority every time they apply [*Hunter*].”<sup>87</sup> *Hunter* has not been revisited by the Court in light of *Erie*,<sup>88</sup> but it seems clear that “the *Hunter* Court essentially conjured a federal common law definition of what localities are, and, based on that, what they can and cannot do.”<sup>89</sup> *Erie* either militates for overruling *Hunter* as a decision of capacity, or it requires reading *Hunter* not as a definition of the nature of municipalities in terms of their capacity to bring suit because it would be “an unconstitutional assumption of powers” by the federal judiciary to so define them.<sup>90</sup>

#### D. *Hunter* as Substantive Constitutional Law

The majority view of *Hunter* is that it is a decision of substantive constitutional law.<sup>91</sup> As such, local powerlessness is viewed as having been

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<sup>83</sup> See *Morris*, *supra* note 16, at 26 (“Congress has directed the federal courts to defer to, rather than trump, state law in deciding capacity questions, and they typically do.”).

<sup>84</sup> 304 U.S. 64, 78 (1938) (“Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general’ . . . . And no clause in the Constitution purports to confer such power upon the federal courts.”).

<sup>85</sup> *Id.*

<sup>86</sup> *Morris*, *supra* note 16, at 26 (“If the *Hunter* doctrine dealt with either standing or substantive constitutional law, it would not be surprising that the Court developed a federal common law rule addressing that subject, since even after *Erie*, the Court is free to develop federal common law that is tethered to the Constitution.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 18 (“No court or scholar has revisited *Hunter* in light of *Erie*.”).

<sup>89</sup> *Id.* at 15.

<sup>90</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 267 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see also *Morris*, *supra* note 16, at 18 (“[N]either the Constitution nor any other body of federal law grants the Court—or, for that matter, any branch of the federal government—the authority to define localities or determine how power is allocated within the several States. Such authority belongs to the People of the several States.”).

<sup>91</sup> See *Lawrence*, *supra* note 36, at 101 (characterizing the Fifth Circuit’s reasoning in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), as holding that *Gomillion* limited the effect of *Hunter* to the substantive constitutional provisions at issue, rather than being a decision of standing).



“appended” to the specific constitutional provisions addressed in cases where *Hunter* was applied.<sup>92</sup> Whether *Hunter* should apply only to a few constitutional provisions or to all substantive constitutional provisions is debatable.<sup>93</sup> The Court’s inconsistency in applying the *Hunter* doctrine has forced lower courts to recognize that it is not the absolute bar it appears to be.<sup>94</sup> Several Courts of Appeals decisions deal with this scattered application by interpreting *Hunter* and its progeny to be decisions of substantive constitutional law,<sup>95</sup> announcing the substantive principle that the “Constitution does not interfere with a state’s internal political organization.”<sup>96</sup> The Second Circuit is the most permissive, barring municipal plaintiff claims against the state only under the Fourteenth Amendment.<sup>97</sup>

Most lower courts and scholars cite *Gomillion v. Lightfoot* for support when interpreting *Hunter* as a limited decision of substantive constitutional law.<sup>98</sup> In that case, the municipal residents successfully challenged the state’s gerrymander of their municipality’s boundaries into a twenty-eight-sided

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<sup>92</sup> See *Morris*, *supra* note 16, at 20 (suggesting that the *Hunter* doctrine “impliedly” attaches to substantive constitutional provisions).

<sup>93</sup> Scholarly arguments exist on both sides of this debate. Compare *id.* at 21 (rejecting the narrow substantive interpretation of *Hunter* that only specific constitutional protections are denied localities because the Court has applied *Hunter* to a “very wide swath of economic, civil rights, and structural constitutional claims” and citing cases barring claims under the Takings, Contracts, Due Process, and Equal Protection Clauses), with *Barron*, *supra* note 35, at 566–67 (concluding that *Gomillion* limits *Hunter* to specific constitutional provisions by prohibiting a state from using its power over municipalities “as an instrument for circumventing a federally protected right”), and *Bendor*, *supra* note 23, at 397 (determining that *Hunter* “must be a doctrine of substantive constitutional law . . . because policy flexibility can only be preserved by a doctrine that protects state statutes from constitutional challenges regardless of procedural posture, party identity, or forum”).

<sup>94</sup> *E.g.*, *Rogers v. Brockette*, 588 F.2d 1057, 1069 (5th Cir. 1979) (“In some respects the Court has retreated from [its] absolute position.”).

<sup>95</sup> *Hunter* is interpreted as a doctrine of substantive constitutional law in five circuits and several state appellate courts. See *Branson v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) (deciding there was jurisdiction for a federal court to hear a political subdivision’s Supremacy Clause claim, and holding that municipalities cannot bring federal constitutional claims when the provision used was written to protect individual rights, as opposed to structural rights); *Carlyn v. City of Akron*, 726 F.2d 287, 288 (6th Cir. 1984) (deciding *Hunter* was a case about annexation); *Rogers*, 588 F.2d at 1068 (denying on the merits a school district’s Supremacy Clause claim and stating, “We think *Hunter* and subsequent cases are substantive interpretations of the constitutional provisions involved”); *City of New York v. Richardson*, 473 F.2d 923, 933 (2nd Cir. 1973) (dismissing claims asserted by city plaintiffs against the state under the Fourteenth Amendment Equal Protection Clause); *City of Tucson v. Pima Cty.*, 19 P.3d 650, 659 (Ariz. 2001) (applying *Hunter* only to intrastate political boundary disputes); *Star-Kist Foods v. Cty. of Los Angeles*, 719 P.2d 987, 992 (Cal. 1986) (permitting a Commerce Clause challenge on the merits).

<sup>96</sup> *Rogers*, 588 F.2d at 1070.

<sup>97</sup> See *Morris*, *supra* note 16, at 19 (“The Second Circuit interprets the *Hunter* doctrine as barring only Fourteenth Amendment claims.” (citing *Richardson*, 473 F.2d at 929)).

<sup>98</sup> See *Lawrence*, *supra* note 36, at 101 (“*Gomillion* thus sets forth the important principle that there are constitutional limits to the degree of control that may be asserted by a state over municipal corporations, through legislation or otherwise.”).

figure under the Fourteenth and Fifteenth Amendments. In rejecting the state's argument that under *Hunter* it could "at its pleasure . . . expand or contract the territorial area" of its cities,<sup>99</sup> the Court declared that it "has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."<sup>100</sup> The Court continued:

[A] correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.<sup>101</sup>

Combined with the Shadow Doctrine,<sup>102</sup> which tends to permit municipal plaintiffs to make claims against their state under specific constitutional provisions like the Equal Protection and Supremacy Clauses, *Gomillion's* explicit limitation of *Hunter* strongly supports the conclusion that some constitutional provisions are available to protect municipal plaintiffs from state control.

*Hunter* and its progeny also reflect their substantive nature by permitting the state power to "grant" privileges to their political subdivisions, including the ability to sue under state law.<sup>103</sup> If *Hunter* was a decision of standing or capacity, states could not grant cities the ability to sue even under state law.<sup>104</sup> Further, if the underlying purpose of *Hunter* was to give states the power to define their relationship with their own subdivisions,<sup>105</sup> then the doctrine cannot withhold the power to authorize municipal suits under state law without betraying its deference to state autonomy. Therefore, *Hunter* makes the most analytic sense as a doctrine of substantive constitutional law, permitting municipalities to at least raise some constitutional claims against their states when their citizens' rights are violated by a state's exercise of

<sup>99</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>100</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960).

<sup>101</sup> *Id.* at 344.

<sup>102</sup> See *supra* note 39 and accompanying text.

<sup>103</sup> See *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) ("[The] state may withhold, grant or withdraw powers and privileges as it sees fit.").

<sup>104</sup> See *supra* note 65 and accompanying text (discussing standing as a bar to suit); see also *supra* note 77 and accompanying text (discussing capacity as a bar to suit).

<sup>105</sup> As Justice Stevens suggested in dissent in *Ysursa v. Pocatello*, the Court's decisions have attached "constitutional significance [to] the relationship a State chooses to establish with its political subdivisions." 555 U.S. 353, 374 (2008) (Stevens, J., dissenting); see also Barron, *supra* note 35, at 562 ("Although the cases are legion that assert that state law defines the scope of local governmental power, none has done so more forcefully, or more famously, than *Hunter v. City of Pittsburgh*.").

control over them, and perhaps even come under the protective umbrella of some of those constitutional provisions themselves.

Assuming *Gomillion* limits *Hunter* to substantive provisions of the Constitution, the narrowest interpretation of its holding permits the inference that municipalities may sue their state, at least when the constitutional rights of their citizens are violated.<sup>106</sup> At its broadest, *Gomillion* can be read to suggest that municipalities may possess some limited constitutional rights of their own which they can enforce against the state. This interpretation is bolstered by cases like *Washington v. Seattle School District No. 1*, which suggests that a locality may make constitutional challenges to state laws not only when it sues to vindicate the rights of its residents, but also when such laws restrain the locality's *own* powers.

The majority in *Seattle School District No. 1* framed the debate as "whether an elected local school board may use the Fourteenth Amendment to *defend its* program of busing for integration from attack by the State."<sup>107</sup> The locality's own program was at issue, not the local school board's assertion of a right it held in trust for the citizens it served. The majority not only considered, but approved, the locality's claim over the dissent's argument that this would allow "local governmental bodies [to] forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State."<sup>108</sup> The dissent viewed this decision as a subordination of the state's power to control decisions of its own subdivision. Yet it seems the majority was subordinating the state to the Fourteenth Amendment, further limiting the substantive reach of *Hunter* by suggesting that localities can access structural constitutional rights.

While the First Amendment's protection of speech is considered to be an individual right, it undeniably serves structural interests in the free flow of information.<sup>109</sup> The next Part examines whether the First Amendment's protection of this structural interest also protects the speech of municipalities and, if so, whether the protection may be asserted against the locality's own state.

## II. THE DOCTRINE OF GOVERNMENT SPEECH

Whether a municipal government, or indeed any government entity, is entitled to the protection of the First Amendment Free Speech Clause is a

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<sup>106</sup> The Tenth Circuit agrees with this interpretation. See *City of Hugo v. Nichols*, 656 F.3d 1251, 1259 (10th Cir. 2011) ("*Gomillion* stands for the commonsense, limited proposition that a state's actions vis-à-vis municipalities may impact the rights of individuals living in the communities and that those impacted individuals are not denied the protections of the Constitution merely because the municipality itself is not contemplated by the constitutional provisions.").

<sup>107</sup> 458 U.S. 457, 459 (1982) (emphasis added).

<sup>108</sup> *Id.* at 495 (Powell, J., dissenting).

<sup>109</sup> See discussion *infra* Section III.B.

matter of judicial and scholarly debate. This Part first examines whether municipal corporations may assert *any* rights under the federal Constitution, and concludes that constitutional protections are certainly available to municipalities when they act in a proprietary capacity or when they are asserting the rights of their citizens. Second, this Part surveys the doctrinal foundations of the government speech doctrine that government speech is both insulated from restriction by and exempted from protection under the First Amendment Free Speech Clause. This Part concludes by recognizing that the Court has ruled definitively in favor of insulation but ambiguously on protection of government speech.

#### A. *The Rights of a Municipal Corporation*

To answer the question of whether municipal corporations are protected under the First Amendment Free Speech Clause, one might be tempted to consider the rights of private corporations by analogy. Private corporations are protected under the Fourteenth Amendment,<sup>110</sup> and through it, the First Amendment Free Speech Clause.<sup>111</sup> The Court's decision in *First National Bank of Boston v. Bellotti* seemed to indicate it was open to including municipal corporations within the Amendment's reach when it said "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."<sup>112</sup> Later cases revealed, however, "the beguiling symmetry apparent in the notion of treating government entities as the constitutional equivalents of private corporations [does not] find much support in constitutional decisions."<sup>113</sup>

Still, municipal corporations possess some constitutional rights and privileges, particularly when they raise those rights in their proprietary capacity or on behalf of their citizens.<sup>114</sup> In *United States v. 50 Acres of Land*,

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<sup>110</sup> See *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888) ("The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of 'person' there is no doubt that a private corporation is included.").

<sup>111</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect. We hold that it does.").

<sup>112</sup> *Id.* at 802.

<sup>113</sup> Yudof, *supra* note 13, at 867; see also, e.g., MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 44 (1983) (noting the Court rejected an argument equating municipal and private corporations under the Constitution, "albeit ambiguously," in *Williams v. Mayor of Baltimore*).

<sup>114</sup> See YUDOF, *supra* note 13, at 44 n.28 (noting that while the Bill of Rights has not been extended to government bodies, municipalities have been allowed to raise constitutional claims in their proprietary capacity or when asserting the rights of their citizens).

the municipal party was permitted to raise a Fifth Amendment Takings Clause claim in its own right against the federal government.<sup>115</sup> This holding may counsel that other constitutional rights could be held by municipalities under certain circumstances.<sup>116</sup> In *City of Philadelphia v. New Jersey*, the Court entertained a municipal plaintiff's claim that state action violated the Commerce Clause, further indicating that the Court is open to considering municipal constitutional claims.<sup>117</sup> Lower federal courts have also permitted municipalities to raise constitutional rights, including Due Process Clause claims under the Fourteenth Amendment.<sup>118</sup> These cases show, at the very least, that municipal corporations can possess constitutional rights by and for themselves under existing Supreme Court precedent, and that in circuits such as the Third Circuit where municipal entities are considered "persons" for purposes of the Fifth Amendment, those rights may include guarantees against state infringement through the Due Process Clause, including a First Amendment right to speak. However, because speech by a government entity poses different issues than speech by private entities, it has earned its own unique doctrine.

### B. Foundations of the Government Speech Doctrine

The common wisdom of government speech is that the First Amendment does not apply to government expression because the Free Speech Clause specifically protects speech *from* government regulation. The Court has said that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."<sup>119</sup> This rule "leaves

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<sup>115</sup> 469 U.S. 24, 31 (1984) (defining "private property" under the Takings Clause to include property held by public entities); see also Morris, *supra* note 16, at 21 n.125 (noting the Court considered a city's Takings Clause claim on the merits in *United States v. 50 Acres of Land*); Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST, (June 24, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm\\_term=.d9a0beb7655c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm_term=.d9a0beb7655c) [https://perma.cc/9RSY-Y3G9] (citing *50 Acres* for the proposition that government entities can possess some constitutional rights.).

<sup>116</sup> See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1650 (2006) ("*50 Acres* could also be read more ambitiously as an indication that, where appropriate, the protections of the Bill of Rights—whether of speech or property—apply as much to state and local governments as they do to natural persons.").

<sup>117</sup> 437 U.S. 617, 618 (1978); see also Morris, *supra* note 16, at 21 n.125 (noting the Court's consideration of the city's Commerce Clause claim on the merits as support for the proposition that cities may assert constitutional claims).

<sup>118</sup> See, e.g., *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 n.3 (3d Cir. 1989) (holding school boards are "persons" within the meaning of the Fifth Amendment and thus entitled to due process because they are more like private corporations than the state).

<sup>119</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); see also Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance & Procedure: Government Speech and Propaganda*, 5 TREATISE ON CONST. L., §20.11(b) (2016) ("[T]he Free Speech Clause restricts government regulation of private speech but not speech by the government."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501 (2001) (arguing that recognizing government

legislatures free to enact laws limiting government speech—and they often do so.”<sup>120</sup> State statutes restricting the release of PWBC data are one of many instances of government speech restricted under this regime.<sup>121</sup> However, while the decision of a legislature to limit the speech of its own branch or body of government is a decision of a single entity not to speak, such state laws are less easily justified when applied to municipalities without the *Hunter* doctrine defining them as powerless subdivisions lacking any and all privileges against the state. If the argument in Part I of this Comment is persuasive, then it matters very much to the constitutionality of these laws whether government entities, particularly municipalities, are protected under the Free Speech Clause.

Government speech is a “relatively new category”<sup>122</sup> that is “recently minted”<sup>123</sup> and “correspondingly imprecise.”<sup>124</sup> It is a doctrine without well-defined limits lacking a well-developed guiding principle or policy analysis.<sup>125</sup> As early as 1976, the Court recognized that municipal corporations may come within the protection of the First Amendment, though it declined to decide the issue at that time.<sup>126</sup> It was not until 2001, when the Court finally used the term “government speech” that the doctrine had its beginning.<sup>127</sup> However, the Court has never expressly defined the extent of a municipality’s

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expression as a subject of First Amendment protection is inconsistent with the Constitution’s purpose); Yudof, *supra* note 13, at 867 (“The historic purpose of the first amendment has been to limit government, not to serve as a source of government rights.”).

<sup>120</sup> Helen Norton, *Government Speech in Transition*, 57 S.D. L. REV. 421, 423 n.16 (2012).

<sup>121</sup> See Helen Norton, *Campaign Speech Law with a Twist: When the Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 229-30, 260-61 (2011) (describing various statutes which constrain government speech at the federal and state levels).

<sup>122</sup> *Sumnum*, 555 U.S. at 487 (Souter, J., concurring).

<sup>123</sup> *Id.* at 481 (Stevens, J., concurring).

<sup>124</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

<sup>125</sup> See Charles W. Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 418 (2014) (“The Court’s approach to date has been piecemeal, resolving the presented issues in each case with undertheorized conclusions.”); Rotunda & Nowak, *supra* note 119 (noting the Court has not clearly defined limits on when a government may issue reports designed to support government positions on foreign policy).

<sup>126</sup> See *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employ’t Relations Comm’n*, 429 U.S. 167, 175 n.7 (1976) (“We need not decide whether a municipal corporation . . . has First Amendment rights to hear the views of its citizens and employees.”)

<sup>127</sup> See David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389, 390 (2012) (arguing *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), was the beginning of the government speech doctrine rather than *Rust v. Sullivan*, 500 U.S. 173 (1991), because in *Legal Services Corp.* Kennedy stated the Court has interpreted *Rust* as a decision of government speech); see also Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HASTINGS CONST. L.Q. 37, 38-39 (2016) (noting that *Rust* is characterized as the first government speech case, but “was not so understood at the time it was issued”).

First Amendment right to speak, nor whether it has this right at all.<sup>128</sup> Instead, the Court has continually reserved the question for another day.

The Court most recently explicitly declined to address the question of whether government entities have First Amendment speech rights in *United States v. American Library Ass'n*.<sup>129</sup> Against the local library's claim that conditioning federal library funding on installing internet filters violated the First Amendment, the federal government defendant argued that public libraries as "[g]overnment entities do not have First Amendment rights."<sup>130</sup> Despite the issue being fully briefed by both parties and regarded by the lower court to favor public libraries having First Amendment speech rights,<sup>131</sup> the Court ducked the question, stating "[w]e need not decide this question because . . . this claim would fail on the merits."<sup>132</sup> Instead, the Court held that the government had broad discretion to make content-based judgments when choosing what private speech to make available to the public, and the conditional nature of the funds merely required the libraries to spend "it for the purposes for which they were authorized."<sup>133</sup> As such, whether government speech, at any level, is entitled to First Amendment protection remains an open question.

The open question of government speech rests upon language in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*<sup>134</sup> (*CBS*), language which is considered by some to be the foundation for the modern government speech doctrine.<sup>135</sup> In *CBS*, a private radio broadcaster refused to sell airtime to the DNC and the Business Executives Movement for Vietnam Peace because it did not want to run paid editorial advertisements on controversial issues.<sup>136</sup> The Court accepted the broadcaster's argument that broadcasters were not required to accept editorial advertisements under the First Amendment.<sup>137</sup>

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<sup>128</sup> See Note, *The Constitutionality of Municipal Advocacy*, *supra* note 12, at 540 n.24 (noting the Court's reservation of the question in *City of Madison Joint School Dist. No. 8*).

<sup>129</sup> 539 U.S. 194, 210-11 (2003).

<sup>130</sup> *Id.* at 210.

<sup>131</sup> *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490-92, 492 n.36 (E.D. Pa. 2002) ("[T]he notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct."), *rev'd on other grounds*, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003).

<sup>132</sup> *American Library Ass'n*, 539 U.S. at 211.

<sup>133</sup> *Id.* at 211-12 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

<sup>134</sup> 412 U.S. 94 (1973) [hereinafter *CBS*]. The Government defendant in *American Library Ass'n* cited *CBS* for the proposition that government entities receive no First Amendment speech protections. See *American Library Ass'n*, 539 U.S. at 210-11.

<sup>135</sup> See Fagundes, *supra* note 116, at 1641-42 ("The principle that government entities cannot claim the protection of the First Amendment found its first judicial expression in Justice Stewart's concurrence in *Columbia Broadcasting System*").

<sup>136</sup> *CBS*, 412 U.S. at 94.

<sup>137</sup> *Id.* at 95 ("The 'public interest' standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements.").

In denying the petitioner's claim that the broadcaster was a government actor bound by the First Amendment, Justice Stewart's concurrence pointed out that the broadcaster's journalistic discretion to refuse paid advertising editorials would be completely eliminated if it were a government actor, an unacceptable result.<sup>138</sup> In oft-quoted (but seldom analyzed) dicta,<sup>139</sup> Justice Stewart explained "[t]he First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."<sup>140</sup> Justice Stewart explained the government was exempt from both restriction and protection under the Free Speech Clause because "[t]he purpose of the first amendment is to protect private expression" and "[g]overnment is not restrained by the First Amendment from controlling its own expression."<sup>141</sup>

### C. Weaknesses of the Government Speech Doctrine

Twin assertions form the core of the government speech doctrine: Government speech is not restricted by the First Amendment and, because it is not offered by a private speaker, it is also not protected under that Amendment. The first assertion is cited with approval in more recent cases,<sup>142</sup> most notably in *Matal v. Tam* and *Pleasant Grove City v. Summum*, the latter of which held the placement of religious monuments in public parks was government speech and thus outside the restrictions of the First Amendment.<sup>143</sup> This principle allows the government to control its own speech in ways that would be unconstitutional if applied to other speakers.<sup>144</sup> The justification for this exemption is that the government needs to be able to communicate its policies and information to

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<sup>138</sup> *Id.* at 140 (Stewart, J., concurring) ("To hold that broadcaster action is governmental action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights").

<sup>139</sup> Because the Court held private broadcasters were not state actors, despite being licensed by the federal government, the *CBS* decision rests on the theory that content-discrimination is permissible when it is the subject of an exercise of journalistic discretion by a "public trustee." *Id.* at 95. Because no government speech was at issue, Justice Stewart's conclusions about government speech were not necessary premises for the holding and are thus pure dicta.

<sup>140</sup> *Id.* at 139 (Stewart, J., concurring).

<sup>141</sup> *Id.* at 139 n.7 (citations omitted).

<sup>142</sup> *See, e.g.,* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 550 (2005) (denying the First Amendment challenge of meat producers who did not want to support a government campaign supporting generic beef production because government control of the campaign made it functionally government speech and thus exempt from First Amendment restrictions).

<sup>143</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1748 (2017); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (citing *CBS* for the proposition that the "Free Speech Clause restricts government regulation of private speech; it does not regulate government speech").

<sup>144</sup> *See* Fagundes, *supra* note 116, at 1642 (arguing a foundation of the *CBS* principle is Justice Stewart's "unambitious claim" that the federal government may restrain its own expression without limit); Strasser, *supra* note 127, at 37 ("The First Amendment . . . does not impose . . . constraints on the government's ability to craft its own message.").



the public in viewpoint-discriminatory ways.<sup>145</sup> Arguments along these lines are numerous and persuasive.<sup>146</sup> However, justifying the exemption of government speech from First Amendment restriction is beyond the scope of this Comment. Further, denying government speech such an exemption is not necessary to argue for granting it First Amendment *protection*. That a “government entity has a right to ‘speak for itself’” is not inconsistent with granting protections to that speech.<sup>147</sup>

The second assertion of Justice Stewart’s dicta, that government speech merits no First Amendment protection, has not been a necessary premise of any Supreme Court rulings and thus remains dicta.<sup>148</sup> The Court has multiple times passed over the opportunity to rule on this issue since *CBS* was decided.<sup>149</sup> Perhaps this is because the assumed exemption from speech protection cannot withstand the multitude of cases that describe First Amendment protections as serving interests far beyond individual autonomy.<sup>150</sup> Recognizing this weakness, some lower courts refuse to abide by the spirit of the *CBS* principle. In *County of Suffolk v. Long Island Lighting Co.*, the court equated municipal and private corporations, stating “[a] municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”<sup>151</sup> In *Creek v. Village of Westhaven*, Judge

<sup>145</sup> See *Matal*, 137 S. Ct. at 1757 (“[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”); Strasser, *supra* note 127, at 37 (“Prohibiting the government as a speaker from favoring one message over another would, as a practical matter, preclude the government from speaking at all—an untenable result.”); Recent Case, First Amendment—Freedom of Speech—Government Speech—*Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 129 HARV. L. REV. 221, 225 (2015) (“[G]overnment must have the ability to communicate in support of its policies or to take a position”).

<sup>146</sup> However, it is amusing (in a frustrating way) to note that coupling the exemption of government speech from First Amendment restriction with *Hunter*’s local powerlessness doctrine has the result of preventing localities from communicating their message to the public on the justification that government needs to be able to communicate its message to the public without First Amendment restriction.

<sup>147</sup> *Sumnum*, 555 U.S. at 467 (citing Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000)).

<sup>148</sup> See Fagundes, *supra* note 116, at 1643 (“For all the times federal courts have echoed Stewart’s concurrence, they have invariably done so in descriptive asides, resulting in multiple incidents of dicta; but it has not been employed as the dispositive element of a holding.”); see also *Matal*, 137 S. Ct. at 1760 (holding a federally registered trademark is not government speech, yet commenting without elaboration that if it were government speech, it would “eliminate[] all First Amendment protection”); *supra* Section II.B (discussing *United States v. American Library Ass’n*).

<sup>149</sup> See *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976); *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

<sup>150</sup> See Fagundes, *supra* note 116, at 1662 (arguing the “*CBS* principle thus fails because it falsely assumes that an important First Amendment value is the only First Amendment value”).

<sup>151</sup> 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-84 (1978)); see Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free*

Posner, writing for the Seventh Circuit, suggested that states and municipalities should enjoy constitutional speech rights when their speech represents the aggregated expression of their constituent members.<sup>152</sup> Finally, in deciding *American Library Ass'n*, the Eastern District of Pennsylvania stated “the notion that public libraries may assert First Amendment rights . . . is clearly plausible, and may well be correct.”<sup>153</sup> This interpretation was left intact by the Supreme Court’s refusal to decide the issue on appeal.<sup>154</sup>

The lower court cases reflect an opinion held by many scholars that Stewart’s dicta is applied “without critical reflection.”<sup>155</sup> Because the Court expressly declined to rule whether a government speaker could ever be protected under the First Amendment when the government defendant explicitly cited *CBS* for that proposition, it seems clear the Court has yet to approve of that dicta. Further, Justice Stevens’s dissent in *American Library Ass'n* indicates that government entities should receive speech protections.<sup>156</sup> The issue’s explicit openness and Justice Stevens’s suggestion that municipal speech should receive protection under the First Amendment in some situations indicates there is another way to answer the question rather than a blanket refusal of protection.

One way to read the *CBS* dicta is that it merely enshrines the common wisdom that “when the government speaks[,] individuals and groups cannot use the Free Speech Clause to challenge a government message that conflicts with private viewpoints.”<sup>157</sup> Under this reading, *CBS* only truly establishes the first principle identified above, that government speech is not restricted by the First Amendment and therefore cannot be subject to individual claims on that basis.<sup>158</sup> This understanding of *CBS* is bolstered by the Court’s recent

*Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1, 34 (1999) (noting the district court in *Long Island Lighting Co.* “held that a county’s expression of its opposition to a nuclear power plant before state and federal agencies and the state legislature constituted an exercise of free speech and freedom of petition protected under the First Amendment”).

<sup>152</sup> 80 F.3d 186, 192-93 (7th Cir. 1996) (“Nor is it out of the question that a municipality could have First Amendment rights.”).

<sup>153</sup> *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 490 n.36 (2002), *rev’d on other grounds*, 539 U.S. 194 (2003).

<sup>154</sup> *See United States v. Am. Library Ass’n, Inc.*, 539 U.S. at 211.

<sup>155</sup> Fagundes, *supra* note 116, at 1643; *see also Norton, supra* note 121, at 215 (exploring “when, if ever, governmental campaign speech is sufficiently dangerous to justify a departure from the general rule that the government’s own speech is insulated from Free Speech Clause review”).

<sup>156</sup> *See Fagundes, supra* note 116, at 1646 (noting Justice Stevens’s dissenting “conclusion that the federal statute at issue unconstitutionally conditioned funding to municipal libraries on surrendering their First Amendment rights implied that the speech of municipal corporations (and their subdivisions, such as public libraries) enjoyed constitutional protection”).

<sup>157</sup> Nelda H. Cambron-McCabe, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 EDUC. L. REP. 753, 754 (2012).

<sup>158</sup> *Id.* at 756-57 (reviewing the Court’s handling of claims that government speech is exempt from First Amendment challenges); Norton, *supra* note 121, at 212 (“[T]he Court has made clear that

opinion in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, in which it stated “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”<sup>159</sup>

*Walker* featured a First Amendment challenge to the Texas DMV’s decision not to issue the private plaintiffs a specialty license plate featuring the Confederate flag. The Court held that specialty license plates were “meant to convey and have the effect of conveying a government message,” and accordingly “constitute government speech.”<sup>160</sup> On this basis, the Court held that private parties could not force the state to issue specific specialty license plates featuring messages it did not endorse, equating the government’s ability to be free of such compulsion with that of the plaintiffs themselves when it stated “just as Texas cannot require SCV to convey ‘the State’s ideological message’ . . . SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.”<sup>161</sup> Not only does this language from *Walker* confirm that government speech is exempt from First Amendment challenges,<sup>162</sup> it suggests government entities may have speech rights because the right to be free from compelled speech has long been treated as a companion of the right to speak.<sup>163</sup> Because the Court in *Walker* held government speech exempt from First Amendment restriction and suggested that exemption was because the plaintiffs could not compel the government to express its message, government speakers may possess speech rights.<sup>164</sup>

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the government’s own speech is exempt from Free Speech Clause scrutiny.”); Rhodes, *supra* note 125, at 418 (“[A] significant exception is that no private individual or entity can seek protection under the First Amendment when the speech at issue is attributed to the government or polity.”).

<sup>159</sup> 135 S. Ct. 2239, 2245 (2015).

<sup>160</sup> *Id.* at 2250 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

<sup>161</sup> *Id.* at 2253 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

<sup>162</sup> *Walker* clearly allows government speech to be viewpoint discriminatory, reinforcing the principle that government speech is not subject to the First Amendment claims of private citizens. See Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 358 (2016) (“The Court has made clear that such viewpoint selectivity in government speech is acceptable.”); *Freedom of Speech—Government Speech—Walker v. Texas Division, Sons of Confederate Veterans*, 129 HARV. L. REV. 221, 221 (2015) (noting that the “government . . . may regulate its own speech however it wishes, even when that speech involves the expression of private individuals”).

<sup>163</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding the state may not compel the flag salute and pledge in schools because such a mandate “invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control”); see also *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (prohibiting discharge of a public employee because of their political party affiliation because compelling or restraining belief and association “is inimical to the process which undergirds our system of government” and hinders “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

<sup>164</sup> See Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST (June 24, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm\\_term=.d9a0beb7655c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?utm_term=.d9a0beb7655c) [https://perma.cc/P9FC-ZFK8] (“This last sentence [of the *Walker* opinion] is of course not a square holding on this question

The Court has considered government entities to be cognizable First Amendment speakers in its decisions recognizing such entities have First Amendment interests. These decisions commonly concern “certain institutions with unique communicative functions—such as universities or broadcasters” and ultimately hold such institutions “may have First Amendment interests regardless of their public or private character.”<sup>165</sup> In *Regents of University of California v. Bakke*, the Court upheld the public university’s racial plus-factor admissions rubric on the rationale that the school’s First Amendment interest in admitting students who would contribute to the “robust exchange of ideas” was a compelling interest sufficient to satisfy strict scrutiny under the Equal Protection Clause.<sup>166</sup> The Court noted that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”<sup>167</sup> *Bakke* stands for the proposition that a public university has a First Amendment freedom to “determine the composition of its student body.”<sup>168</sup> Whether public libraries are institutions which have similar First Amendment interests in determining the composition of their expressions to the public was not addressed by the Court in *American Library Ass’n*. Further, Justice Stevens’s dissent indicates public libraries should be among such institutions whose First Amendment interests give right to a First Amendment right to speak.<sup>169</sup> Whether municipalities might be considered entities with similar First Amendment interests stemming from their representative capacity and the fact that “[t]he majority, as represented by its elected officials, has a right to speak”<sup>170</sup> is, as of yet, undecided.

Another argument for extending municipalities free speech protections comes by way of analogy. If state governments are able to assert speech protections against restrictions imposed by the federal government, it follows that entities with analogous sovereignty and independence should be able to

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of states’ rights to speak—or the right to be free from speech compulsions, which the Court has generally treated analogously to the right to speak. But it does seem to point in favor of such a First Amendment right possessed by state and local governments, with respect to federal regulations.”).

<sup>165</sup> Norton, *supra* note 120, at 423 n.16; see Kermit Roosevelt III, *States as Speakers*, 14 GOOD SOC’Y 62 n.9 (2005), [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1026&context=schmooze\\_papers](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1026&context=schmooze_papers) [<https://perma.cc/EBZ8-MWWA>] (noting that “several recent Supreme Court decisions . . . assume (though sometimes only arguendo) that an entity’s status as a state actor makes no categorical difference to its First Amendment rights under federal regulation”); see also, *Ark. Educ. Television Program Comm’n v. Forbes*, 523 U.S. 666, 669 (1998) (recognizing a state cable channel had speech interests equivalent to a private broadcaster).

<sup>166</sup> 438 U.S. 265, 313 (1978).

<sup>167</sup> *Id.* at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>168</sup> Fagundes, *supra* note 116, at 1646.

<sup>169</sup> See Norton, *supra* note 120, at 423 n.16 (characterizing Justice Stevens’s dissent as “urging the Court to recognize public libraries as First Amendment rightsholders”).

<sup>170</sup> Yudof, *supra* note 13, at 869.

assert similar protections against state restriction. The question of whether states can assert First Amendment rights against the federal government is “at least reasonably open.”<sup>171</sup> There are structural and originalist arguments to be made that states should receive the protections enumerated in the Bill of Rights, including the Free Speech Clause.<sup>172</sup> And it seems clear that the *CBS* principle’s per se bar against government speech receiving First Amendment protection “fails to account for a scenario in which the federal government wrongly attempts to restrict the speech of another sovereign.”<sup>173</sup> As sovereign entities, it is commonsensical that states would not be restricted in their expression by federal government regulation, and that such protection would come from the First Amendment. If *Hunter* is not substantively incorporated into the First Amendment,<sup>174</sup> then municipal governments are independent from state governments for the purposes of First Amendment challenges, and should be able to possess and assert speech rights against restrictions set by state legislatures just as state governments can assert such protections against restrictions set by the federal legislature.

While a full account of the Court’s government speech doctrine is not a goal of this Comment, the preceding survey demonstrates that the questions purportedly answered by *CBS* are far from settled. While the Court has affirmed that government speech is insulated from First Amendment challenges in cases like *Walker* and *Summum*, government speech can still be *protected* under the Free Speech Clause since that question was reserved in *American Library Ass’n*. Additionally, such protection is possible while also preserving the ability of government to function as an unrestricted communicator. Much of the recent scholarship dealing with the government speech issue is focused on how government speech is unrestricted by the First Amendment.<sup>175</sup> However, comparatively little discussion has been devoted in recent years to whether *CBS*’s dicta that government speech is without protection under the Free Speech Clause should remain undisturbed and jurisprudentially unexamined.<sup>176</sup> The next Part answers that question affirmatively and details how

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<sup>171</sup> Roosevelt, *supra* note 165.

<sup>172</sup> Porterfield, *supra* note 151, at 24 (arguing the states “were actually intended, along with individuals, to be beneficiaries of the amendments”).

<sup>173</sup> Fagundes, *supra* note 116, at 1662.

<sup>174</sup> See discussion of *Hunter*’s substantive doctrine, *supra* Section I.D.

<sup>175</sup> See Rhodes, *supra* note 125, at 418 (arguing against the premise that government speech should be exempt from First Amendment restrictions because it gives the Court “freewheeling authority to declare new categories of speech outside the scope of the First Amendment” (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010))).

<sup>176</sup> See *id.* at 421 (“The current doctrinal significance of government speech is not creating a free speech right that the government can assert against itself, but instead providing the government a defense to a First Amendment claim . . . .” (citation omitted)).

protecting government speech—or at least the speech of local governments—fits logically into First Amendment jurisprudence.

### III. PROTECTING GOVERNMENT SPEECH UNDER THE FIRST AMENDMENT

This Part argues for extending First Amendment protections to speech by local government entities. First, this Part briefly describes how municipal speech fits logically into the First Amendment framework due to the Free Speech Clause's object neutrality. Second, this Part argues that while individual autonomy is "an important First Amendment value," it is not "the only First Amendment value."<sup>177</sup> Precedent and scholars alike suggest that societal interests in the value of uninhibited speech are a primary focus of First Amendment protections. Finally, this Part contends that government speech furthers these societal interests and that municipal speech serves these interests far better than speech by higher levels of government.

#### A. *A Brief Word About the Object-Neutral First Amendment*

Opponents of protecting government speech under the First Amendment argue there is an incoherence in granting government speech the protection of the First Amendment. Their argument asserts that since the text of the First Amendment limits the government's ability to abridge speech, to make government a recipient of that protection would prevent it from restricting its own speech.<sup>178</sup> This incoherence is revealed to be largely semantic and superficial when one considers government restrictions on the speech of other governmental bodies. It is just as obviously false to argue that because the text of the First Amendment only prohibits Congress from abridging speech, other governmental bodies are free to do so. Just as precedent has expanded the reach of the First Amendment to actions by states, courts, and agencies,<sup>179</sup> precedent also makes clear that it is the nature of the speech, and not the

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<sup>177</sup> See Fagundes, *supra* note 116, at 1662.

<sup>178</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) ("[T]he First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely."); Bezanson & Buss, *supra* note 119, at 1501 (arguing against categorizing the government as a First Amendment speaker because granting speech protections to government speech would protect it from its own restrictions).

<sup>179</sup> Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 371 (2011) ("In First Amendment doctrine, narrow parsing of the words of the Amendment has not determined its reach. By its terms, the Amendment binds only Congress. Yet the First Amendment applies to actions of the federal executive and judiciary, and the First Amendment constrains the states not by virtue of its text, but because of incorporation through the due process clause.").

speaker, which determines protection.<sup>180</sup> This recognition is vital to protecting government speech. As one scholar put it, “[o]nly if the First Amendment can be loosed from individual liberty can government speech be seen as speech directly protected with all other speech under the First Amendment.”<sup>181</sup>

The text of the First Amendment offers a basic foundation for the argument that an individual speaker’s freedom to speak is not the sole object of protection. The First Amendment is unique among the Bill of Rights in that it does not state who possesses the right it enshrines.<sup>182</sup> The text reads “Congress shall make no law . . . abridging the freedom of speech.”<sup>183</sup> This brief clause “does not identify any limitations on the identities of the speakers on whom [its] safeguard is bestowed.”<sup>184</sup> Further, because the other amendments in the Bill of Rights *do* specify a recipient of their protections, canons of construction suggest the difference was purposeful and should be read with a different meaning.<sup>185</sup>

However, precedents under the Fourteenth Amendment’s Due Process Clause offer interpretations that bear more directly on the question than does the First Amendment’s text alone. While the First Amendment’s object-neutrality has been a basis for the Court to hold some speech to be protected despite the nature of particular speakers,<sup>186</sup> cases expanding protection to speech based on its effect rather than the speaker’s nature are much more important to understanding how the speech protections are applied than the bare bones of the Amendment’s text.

While the dominant interpretation of the First Amendment is as a protection of the individual’s right to speak,<sup>187</sup> individual autonomy is not the

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180 See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 315 (2010) (“Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”); *Pacific Gas Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (“The identity of the speaker is not decisive in determining whether speech is protected.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (“[T]he proper question . . . is not whether corporations ‘have’ First Amendment rights,” but whether the state ban on corporate expenditures “abridges expression that the First Amendment was meant to protect.”).

181 Bezanson & Buss, *supra* note 119, at 1503-04.

182 See Bendor, *supra* note 23, at 426 (arguing under *Citizens United* that “[s]peech in association is protected like individual speech. Municipalities are sites of association, often more so than corporations” (citation omitted)).

183 U.S. CONST. amend. I.

184 Fagundes, *supra* note 116, at 1648.

185 See Porterfield, *supra* note 151, at 32 (arguing that the First Amendment protects states and localities because while some rights under the Bill of Rights have been explicitly construed as “purely personal,” the Court has resisted restricting speech protections to individuals based on their identity).

186 See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010) (considering the free speech rights of a non-profit corporation); *Pacific Gas Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 4 (1986) (considering the free speech rights of a public utility company); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-84 (1978) (considering the free speech rights of a corporation).

187 See Fagundes, *supra* note 116, at 1660 (“[T]he notion that the clause should be understood largely as a bulwark of personal autonomy against state suppression has become a dominant—if not

only purpose of the First Amendment.<sup>188</sup> The First Amendment protects “significant societal interests’ wholly apart from the speaker’s interest in self-expression.”<sup>189</sup> Most often, this structural value is framed as the public’s interest in a diverse and unrestricted marketplace of ideas.<sup>190</sup> Its value and importance derive from its “instrumental value . . . in a democratic society.”<sup>191</sup> The value of a free market of ideas is that it allows the citizenry to debate issues of public importance in order to thresh the chaff of bad ideas from the process of self-government.<sup>192</sup> On this theory, protecting free and open discussion is fundamental to making republican government responsive to the

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the dominant—interpretive approach . . . .”); *id.* at 1649 (describing one view of object neutrality that “the First Amendment should be understood as a safeguard that applies to an artifact (speech) rather than an actor (speakers)”).

<sup>188</sup> See *Citizens United*, 558 U.S. at 341 (“The First Amendment protects speech and speaker, and the ideas that flow from each.”).

<sup>189</sup> *Pacific Gas*, 475 U.S. at 8 (quoting *Bellotti*, 435 U.S. at 776) (“The constitutional guarantee of free speech ‘serves significant societal interests’ wholly apart from the speaker’s interest in self-expression.”); see also *Bellotti*, 435 U.S. at 776 (“The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests.”); *id.* at 777 n.12 (“The individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge.”); Fagundes, *supra* note 116, at 1662 (“cases [like *Red Lion Broadcast. Co. v. FCC* and *Lamont v. Postmaster Gen. belay*] the assertion that the sole purpose of the First Amendment is to protect individual autonomy.”); Porterfield, *supra* note 151, at 32 (“[T]he central function of the First Amendment is not to preserve individual rights, but to protect our democratic society by permitting the free discussion and debate of issues of public concern.”).

<sup>190</sup> See *Bellotti*, 435 U.S. at 783 (“[O]ur recent commercial speech cases . . . illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw.”); *Red Lion Broad. Co. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 390 (1969) (holding that the First Amendment is meant to promote a marketplace of ideas where truth will prevail).

<sup>191</sup> Note, *The Constitutionality of Municipal Advocacy*, *supra* note 12, at 544 (“The [F]irst [A]mendment recognizes not only the intrinsic value of speech in defining individual and group identity, but also the instrumental value of speech in a democratic society. By recognizing the special value of political speech, the [F]irst [A]mendment seeks both to protect the flow of information in the marketplace of ideas and to preserve private control of political discussion.”).

<sup>192</sup> See *Red Lion Broad. Co.*, 395 U.S. at 389-90 (“[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”); see also *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs” which includes “the manner in which government is operated or should be operated, and all such matters relating to political processes.”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down a state regulation of propaganda sent through the mail because it was “at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *Roth v. United States*, 354 U.S. 476, 484 (1957) (arguing that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).



will of the people since that will can hardly be determined in the absence of informed public comment.<sup>193</sup>

In *Citizens United v. Federal Election Commission*, the Court recognized that “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”<sup>194</sup> To that end, the Court held that it is the right of the public “to determine for itself what speech and speakers are worthy of consideration.”<sup>195</sup> In order to protect that right, the First Amendment has been held to embody “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>196</sup> Unrestricted access to the marketplace of ideas for a rich diversity of speakers is a foundational principle of the structural interest.<sup>197</sup> The importance of this principle persuaded the Court to protect expressive contributions emanating from corporations and associations,<sup>198</sup> presumably because such institutions have speech of value to add to the discussion of government affairs. Protecting diversity of thought through prohibitions on content and viewpoint discrimination has been held to be just as vital as preserving a diversity of speakers.<sup>199</sup> If government speech advances a marketplace of ideas by

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<sup>193</sup> See *Citizens United*, 558 U.S. at 339 (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); Yudof, *supra* note 13, at 872 (noting that society’s interest in a free flow of information is inferable from an uninhibited flow being a necessary premise of “democratic processes, majority rule, the verification of consent, and . . . self-governing speech”).

<sup>194</sup> *Citizens United*, 558 U.S. at 341.

<sup>195</sup> *Id.*

<sup>196</sup> *Sullivan*, 376 U.S. at 270; see also Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505 (1974) (“[P]rotection of the free flow of information [is] a basic objective of the [F]irst [A]mendment.”).

<sup>197</sup> See *Pacific Gas Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (“[T]he critical considerations [in *Bellotti* and *Consolidated Edison Co.*] were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.”).

<sup>198</sup> See Yudof, *supra* note 13, at 872 (“So important are these values [of preserving the free flow of information for the democratic process] that courts have protected the expression of private institutions such as unions and corporations.”).

<sup>199</sup> See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (noting subject-matter restrictions that are viewpoint-neutral on their face can still be unconstitutional); *McCullen v. Coakley*, 134 S. Ct. 2518, 2533 (2014) (citing *Bellotti* for the proposition that a legislative attempt to give one side of a debate an advantage is unconstitutional); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978) (“[W]here . . . the legislature’s suppression of speech suggests an attempt to

contributing to a robust exchange with unique expressive content, then its protection is consistent with the purposes of the First Amendment.<sup>200</sup> Additionally, if government speech advances the marketplace in significant and irreplaceable ways, perhaps protection is not only consistent with the First Amendment, but required by it.

### B. Government Speech Furthers First Amendment Values

Government speech “serve[s] a functional purpose within the system of freedom of expression.”<sup>201</sup> In fact, it serves three such purposes. First, government speech presents the public with information relevant to matters of self-government, which is within the government’s sole possession. Second, government speech provides a balancing force in public debate for minorities and individuals struggling to communicate ideas in fora dominated by collective expression. Finally, government speech increases government transparency, particularly when separate governmental bodies speak to check one another.

Whether they are press releases, reports, or tweets,<sup>202</sup> government expressions frequently present a unique point of view and unique information.<sup>203</sup> As Bezanson observes, “Government adds another voice to the marketplace of ideas, and thus furthers one of the important reasons for protecting speech freedom. The marketplace of ideas is patently worse off when government information . . . is kept away from the citizens of a democracy.”<sup>204</sup> Sometimes, this information is in the sole possession of the government, which concerns the affairs and function of government bodies or officials.<sup>205</sup> Such information may be of irreplaceable value in public debate

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give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.”).

<sup>200</sup> See Yudof, *supra* note 13, at 871 (stating that there is a strong collective interest in having the government participate in communication networks, but concluding that this only militates against the strong First Amendment rights of private speakers to restrain government expression).

<sup>201</sup> YUDOF, *supra* note 113, at 43.

<sup>202</sup> See, e.g., NASA (@NASA), TWITTER (Feb. 22, 2017, 9:20 AM), <https://twitter.com/nasa/status/834452802474823681?lang=en> [<https://perma.cc/Q4LM-NPEA>] (“Pssst! We’ve got exciting news from beyond our solar system! Spoiler: NOT aliens. Watch at 1pm ET: [nasa.gov/live Q? Use #askNASA](https://www.nasa.gov/live/Q?Use#askNASA).”).

<sup>203</sup> See YUDOF, *supra* note 113, at 40 (“Government is also a major source of information, which it is sometimes uniquely fitted to acquire and disseminate.”); *id.* at 46 (noting that governments are sometimes “virtually the only entities with resources willing to present a particular side of a public issue”); Fagundes, *supra* note 116, at 1640 (noting that government speech can publicize an “unrecognized point of view on a matter of public concern”); Norton, *supra* note 121, at 215 (“[Government] expression . . . provides a valuable heuristic for those who do not have the time or expertise to evaluate competing policy arguments for themselves . . .”).

<sup>204</sup> Bezanson & Buss, *supra* note 119, at 1474.

<sup>205</sup> See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the *free discussion of governmental*

because it is necessary for the valid exercise of self-government<sup>206</sup> since it concerns government's "internal workings, operations, and policies."<sup>207</sup> Therefore, government speech may be necessary for the public "to identify their government's priorities (and thus to evaluate its performance)."<sup>208</sup> PWBC data are clearly information within the sole control of the government, collectable only by the government, and particularly vital to debate over how government should be run.<sup>209</sup> Access to the information held by the police themselves is highly credible, and the "more credible the information," "the more credible are the debates."<sup>210</sup> These debates can be determinative in the process of self-government, making PWBC data disclosure a compelling example of government speech that advances the societal interests protected by the First Amendment.<sup>211</sup>

Government speech also amplifies "voices that might not otherwise be audible."<sup>212</sup> Amplifying the message of minority speakers is a recognized

*affairs*" which includes "the manner in which government is operated or should be operated, and all such matters relating to political processes." (emphasis added)).

206 See Rotunda & Nowak, *supra* note 119, at 64 ("Undoubtedly there is a valid public interest, and First Amendment value, in the government conveyance to the public of information regarding government programs. Governmental activities . . . provide the basis for the discussion and debate of self-governance issues which have been a touchstone value in the First Amendment analysis."); see also YUDOF, *supra* note 113, at 40 ("The failure of government to disclose facts, particularly facts about its own operations, is destructive of informed, democratic processes."); James A. Goldston et al., *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 444 n.177 (1986) (arguing that government secrecy in espionage cases can "result in the permanent loss of information critical to public debate"); Yudof, *supra* note 13, at 864 ("Government secrecy may make informed debate impossible"); *id.* at 865 ("Government expression is critical to the operation of a democratic polity"); *id.* at 866 ("[C]ommunications emanating from [local government] do provide information necessary to the exercise of the citizenry's judgment about political issues and candidates.").

207 Note, *The Rights of the Public and the Press to Gather Information*, *supra* note 196, at 1510.

208 Norton, *supra* note 120, at 421; see also *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (noting the "paramount public interest in a free flow of information to the people concerning public officials, their servants").

209 *Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) (characterizing access to information regarding police activity as vital to public discourse and therefore occupying "the highest rung of the hierarchy of First Amendment values").

210 *Id.*

211 See *id.* at 358 ("[O]bservation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing."). However, premising protections for government speech entirely on the public's need to know about government-held information may have consequences going much further than ensuring access to information necessary to self-governance. A government may put its expressive capacity to ends other than informing the electorate. Cf. YUDOF, *supra* note 113, at 47 ("But this is a far cry from bootstrapping from the 'right to know' to what is tantamount to a recognition of a constitutional right on the part of governments to engage in extensive communications activities.").

212 *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (Posner, J., concurring); see also YUDOF, *supra* note 113, at 40 ("In all of its efforts, government may be said to be expanding choice and reinforcing personal autonomy.").

benefit of associations under the First Amendment.<sup>213</sup> This is particularly true for local governments because their speech can amplify the views of a concentrated group of citizens with a unified interest in local concerns.<sup>214</sup> Amplification is especially vital in an age when corporations and other interest groups wield such large megaphones.<sup>215</sup> While technological innovations have lowered the entry barrier for speakers in the marketplace of ideas and have permitted spreading a message widely, organizations and corporations with vast resources and large followings across platforms still have an advantage in public debates.<sup>216</sup> However, extending protections to government speech because it has the ability to amplify voices may be an overinclusive remedy.<sup>217</sup>

A final functional purpose that government speech serves is to increase government accountability. By creating transparency in government affairs, such speech provides a check against legislative self-dealing and thereby makes the legislature more responsive to the electorate.<sup>218</sup> This function is particularly persuasive in the context of intergovernmental situations. Governments of different sizes and constituencies represent groups with different interests, interests which may not be aligned between state and federal governments, or state and local governments. Misaligned interests provide an incentive for local governments to function as a check against the efforts of larger governmental bodies to self-deal. As a consequence, local

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<sup>213</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”).

<sup>214</sup> See *Creek*, 80 F.3d at 193 (Posner, J., concurring) (“To the extent . . . that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of [the] right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.”).

<sup>215</sup> See Yudof, *supra* note 13, at 866 (“Government speech can amplify the voices of individuals attempting to participate in debates dominated by the press, corporations, and other large, organized interest groups.”).

<sup>216</sup> See Greene, *supra* note 162, at 354 (“Some state speech fills gaps in the marketplace of ideas, supplementing private speech that might be skewed toward profit or other not publicly regarding ends.”); Norton, *supra* note 121, at 215 (noting that government speech “adds to the marketplace of available ideas and arguments, especially (but not only) as a counter to less [accountable and nontransparent] expression from powerful, private sources”).

<sup>217</sup> See YUDOF, *supra* note 113, at 45 (“It would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires a constitutionalization of government expression in order to counter the distortions brought about by such private institutions.”). Protected government speech could be put to other, more harmful uses which may outweigh the benefit of amplifying minority speech. See *infra* note 238 and accompanying text.

<sup>218</sup> See Fagundes, *supra* note 116, at 1655 (discussing Hamilton’s argument that state legislatures counteract legislative self-dealing); Norton, *supra* note 121, at 215 (stating that Government “expression enhances political accountability by informing voters of their government’s priorities and preferences”); Fan, *supra* note 1, at 407 (body cameras “are mechanisms of control by the people using transparency to check power holders”).

governments are motivated to speak out against centralized power grabs or unconstitutional action.<sup>219</sup> Government speech provides the publicity necessary to prevent self-dealing by governmental bodies with interests contrary to local electorates.<sup>220</sup> Protecting government speech under the First Amendment from efforts to prevent it serving this function would significantly advance the interests of the First Amendment in preserving public debate capable of informing the process of self-government.

The current failure to analyze government speech under a First Amendment framework has itself harmed free expression. Because government speech is currently exempt from speech restrictions, any speech attributable to the government escapes First Amendment scrutiny. This impedes a diverse and vibrant marketplace of ideas since quite a lot of speech is potentially attributable to the government<sup>221</sup> and thus subject to this loophole in speech protections.<sup>222</sup> In dicta in *Matal v. Tam*, the Court opined upon the importance of the government-speech doctrine's allowance for viewpoint discriminatory speech, while cautioning against its overuse.<sup>223</sup> The Court worried about the potential for government to "silence or muffle the expression of disfavored viewpoints" by labeling private expression as government approved, and counseled "great caution" when extending government-speech precedents.<sup>224</sup>

While the aforementioned benefits do suggest government speech is legitimately beneficial to free expression, Mark Yudof noted as early as 1980 that this does not lead to the inevitable conclusion that government speech

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<sup>219</sup> See, e.g., James Madison, Virginia Resolutions of 1798, reprinted in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 528 (Jonathan Elliot ed., 2nd ed. 1836) (opposing the Sedition Act); Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, reprinted in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540 (Jonathan Elliot ed., 2nd ed. 1836) (same).

<sup>220</sup> See *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 569 (1980) ("Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account.").

<sup>221</sup> See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (stating that the rejection of a license plate design featuring the Confederate flag by government was not a free speech violation); *Pleasant Grove City v. Summum*, 555 U.S. 460, 460 (2009) (holding "placement of a permanent monument in a public park is a form of government speech and therefore not subject to scrutiny under the Free Speech Clause").

<sup>222</sup> See Steven G. Gey, *Why Should the First Amendment Protect Government Speech when the Government has Nothing to Say*, 95 IOWA L. REV. 1259, 1313 (2010) (stating "the government speech doctrine is about using the government's speech as an excuse to circumvent other constitutional rules, such as those protecting private speech, restricting the government's religious activities, or structuring the government's ability to prosecute individuals for criminal activities"). However, it should be noted that this is a criticism of government speech being exempt from First Amendment restriction rather than not receiving protection.

<sup>223</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) ("[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse.").

<sup>224</sup> *Id.*

should be protected under the First Amendment.<sup>225</sup> While clearly a “primary means of protecting and enhancing democratic values,”<sup>226</sup> Yudof noted that it was “inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community.”<sup>227</sup> As previously noted, protecting government speech grants it protection for expressions that can do more than bring the above benefits to a system of free expression. A fully theorized doctrine protecting government speech cannot stand without taking account of the ways in which it might harm “the interests of the larger community.”<sup>228</sup>

*C. Purported Harms Done to First Amendment Values  
by Government Speech*

Critics of protecting government speech under the First Amendment offer several policy reasons explaining why it threatens a system of free expression. First, critics note that governments are so large and well positioned in the communication industry that they are not in need of speech protections. Second, governments are said to distort public debate. Third, government is said to crowd out other speakers by virtue of its unique authority. Finally, government’s unique nature as an entity which serves by the consent of the governed is said to be undermined by allowing those who govern to shape and perhaps falsify the consent of the public. Each of these will be presented and rejected in turn as unpersuasive grounds for excluding government speech from First Amendment protection without exception.

Critics argue that “[g]overnments, particularly the federal government, are not fledgling communicators, needing protection from community’s excesses.”<sup>229</sup> Indeed, speech by the federal government does not go unnoticed. However, while not fledgling communicators in the same way as street corner protesters, municipalities are of limited size and power compared to their state governments. What resources they do have are certainly no greater than those wielded by corporate speakers. And it is well established that being an entity with greater resources and communicative power than the average citizen does not disqualify a speaker from protection, as the corporate speech doctrine recognizes.<sup>230</sup> Municipal corporations stand in an analogous relation

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<sup>225</sup> See YUDOF, *supra* note 113, at 41.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 45.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 314 (2010) (“It is irrelevant for First Amendment purposes that corporate funds may ‘have little or no correlation to the public’s support for the corporation’s political ideas’ . . . . All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.”).

to their state and federal governments, as do private corporations when it comes to the sophistication and strength of their expression, and they should be treated analogously as a result. The mere fact of their size no more disqualifies municipalities from speech protection than it does corporations. The restrictions on disclosure of PWBC data are evidence of the need for protecting municipal speech as well.

Particularly in relation to the federal or state governmental bodies which may currently exert control over their speech, municipalities do in fact need protected expression. This is contrary to Yudof's assertion that "emasculat[i]on by state or federal courts of the government's power to communicate, or self-emasculat[i]on of these powers by other branches of government, is unlikely."<sup>231</sup> Perhaps Yudof was not considering the possibility of intergovernmental free speech claims, and he certainly incorporated *Hunter's* doctrine of local powerlessness into his cursory analysis of this particular issue.<sup>232</sup> If *Hunter* allows for local governments to challenge state restrictions on their speech, restrictions like those on the release of PWBC data are not self-emasculat[i]on by legislatures, but potentially First Amendment-violative prior restraints. Yudof also argued that "all government decisions involve hierarchies of authority" and "[i]t is inconceivable that the commands of those at the top . . . should be countermanded by the courts."<sup>233</sup> He goes on to state that "[w]hile differences in degree may exist, local governments are as much creatures of the state as federal administrative agencies are creatures of Congress."<sup>234</sup>

To equate a city's relationship to its state with the executive branch's relationship to the legislative branch of *the same body of government* is to deny the independence many states give their cities. This overly simplistic analogy incorporates the unexamined fallacy of the *Hunter* doctrine to the detriment of the First Amendment speech interests of cities and citizens alike. If state and local governments are indeed separate First Amendment speakers,<sup>235</sup> then Yudof's appeal to the hierarchical control analogy of government officers does not track because localities are not subservient subdivisions for speech purposes. Indeed, Yudof admits there is a stronger case for protecting government speech if the federal government were forbidding state or local government expression.<sup>236</sup> While he concludes federalism makes it

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<sup>231</sup> YUDOF, *supra* note 113, at 45.

<sup>232</sup> Yudof, *supra* note 13, at 870 ("[L]ocal governments are as much creatures of the state as federal administrative agencies are creatures of Congress.").

<sup>233</sup> *Id.* at 868 n.18.

<sup>234</sup> *Id.* at 870.

<sup>235</sup> See *infra* Section IV.C.

<sup>236</sup> See Yudof, *supra* note 13, at 868 n.18 ("A rights approach may be appealing if one branch of government were to forbid another branch to engage in communication activities, or if the federal government were to forbid state or local governments from engaging in certain sorts of

unnecessary to “distort[] . . . the First Amendment” to deal with that issue,<sup>237</sup> federalism does not prevent a state from forbidding local government expression. Municipal speech rights are necessary to that end, as state laws restricting the release of PWBC data evince.

Government speech is said to harm public debate because it is so powerful that it distorts the citizenry’s judgment on issues.<sup>238</sup> The Court addressed this argument first in *Bellotti* when it rejected a discussion-domination justification for excluding corporate speech from First Amendment protection for lack of an evidentiary showing that there was a present threat of corporations dominating political discussion.<sup>239</sup> The Court rejected the anti-distortion justification for exclusion from the marketplace more squarely in *Citizens United*.<sup>240</sup> The prior case of *Austin v. Michigan Chamber of Commerce* had upheld a restriction of corporate speech on the anti-distortion rationale, stating corporate speech had a unique ability to harm the marketplace of ideas.<sup>241</sup> In *Citizens United*, the Court explicitly overruled that justification, finding “the antidistortion interest recognized in *Austin* . . . unconvincing and insufficient.”<sup>242</sup> Government speech is no more distorting than corporate speech, and municipal speech in particular has not nearly the distorting effect of large national corporations. It is anathema to a system of free expression that a speaker should be excluded from the marketplace of ideas because it poses a risk of distorting the public’s view of an issue. The romantic ideal of the First Amendment is that false or harmful speech is best countered by more speech, that through the process of debate the truth will win out:<sup>243</sup> “[T]he fear that speech might persuade provides no lawful basis for quieting it.”<sup>244</sup> This logic has permitted protected access to the marketplace of ideas for corporate speakers, and should do so for government speakers as well, particularly since powerful private speakers like corporations can balance the weight of government speech.

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expression.”); *see also* Fagundes, *supra* note 116, at 1668 (arguing that allowing the federal government to “dictate content” presented by state agencies “would impoverish public debate”).

<sup>237</sup> Yudof, *supra* note 13, at 868 n.18.

<sup>238</sup> *See id.* at 865 (“The power to teach, inform, and lead is also the power to indoctrinate, *distort judgment*, and perpetuate the current regime.” (emphasis added)).

<sup>239</sup> *See* Note, *The Constitutionality of Municipal Advocacy*, *supra* note 12, at 541 n.39 (noting the *Bellotti* Court denied there was a compelling interest in protecting the political process from the domination of corporations).

<sup>240</sup> *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349 (2010) (holding that the antidistortion rationale “cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure”).

<sup>241</sup> 494 U.S. 652 (1990).

<sup>242</sup> 558 U.S. at 366.

<sup>243</sup> *See* *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2550 (2012) (“The remedy for speech that is false is speech that is true.”).

<sup>244</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 576 (2011).



Government expression is also said to put private control of political discussion at risk by crowding out other speakers.<sup>245</sup> Control of political debate is supposed to remain with the polity in a system of free expression.<sup>246</sup> If the system is strengthened by increasing pluralism, some critics claim the system is harmed by adding speakers who dominate discussion and reduce the participation of the plurality.<sup>247</sup> This is closely related to the concern that government speakers are not representing the interests of their constituents when they speak, but are instead intending to sway constituents to their view.<sup>248</sup> Such a concern is just as quickly dispatched for the same reason as was the concern that government speech distorts public discussion. The marketplace functions to weed out bad or false ideas by the process of more speech. Furthermore, it would be arbitrary to allow corporations of comparable size and “volume” to dominate public debate while prohibiting government speech on the rationale that it would do the same. While the issue of crowding out may have intuitive appeal, the argument does not differentiate between government and corporate speakers.

Yet another related line of argument is the scholarly worry that government speech has the potential to undermine the validity of government’s own authority as it is derived from the will of the sovereign people. The crux of the argument is that government expression may influence the citizenry’s expression of its political preferences, perhaps intentionally.<sup>249</sup> Critics claim that if government is permitted to introduce information selectively into the marketplace of ideas, it could manipulate the public into consenting to whatever policy it wished.<sup>250</sup> This argument is

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245 See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 595 (1980) (describing the danger of government speech drowning out political minorities, but also noting that *Bellotti* allows corporations to pose just as much of a threat); Yudof, *supra* note 13, at 865 (stating “the power of governments to communicate is also the power to destroy the underpinnings of government by consent); Greene, *supra* note 162, at 356 (reasoning “if the state were to monopolize a market for a certain type of speech, the virtues of the state as offering just one point of view in a public debate would diminish or be eliminated”).

246 See *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (“In the free society ordained by our Constitution it is not the government, but the people—individually as citizens . . . and collectively as associations . . .—who must retain control over the quantity and range of debate on public issues in a political campaign.”).

247 See Yudof, *supra* note 13, at 873 (stating “[t]he greatest threat to the system of freedom of expression emanates from the welfare state”).

248 See YUDOF, *supra* note 113, at 49 (worrying that “municipal governments may be expressing the views of public officials who are attempting to *create* a majority, and not *representing* a majority in . . . pending policy debates”).

249 See *id.* at 201 (fearing government will “engineer consent to its policies”).

250 See *id.* at 40 (“The failure of government to disclose facts, particularly facts about its own operations, is destructive of informed, democratic processes.”); Bezanson & Buss, *supra* note 119, at 1474 (“[S]elective introduction of information into the marketplace by government would seem to enable the government to manipulate and undermine the decision-making role that citizens must ultimately be free to perform.”); Goldston et al., *supra* note 206, at 444 n.177 (arguing government secrecy in espionage cases

particularly pointed where it concerns information about the operation of government absolutely necessary for informed debate about self-government to occur, like video of police procedures.<sup>251</sup> This is especially true when the information is under the sole control of the government.<sup>252</sup>

This concern is similar to concerns of crowding out smaller speakers and distorting public debate and should be dismissed for similar reasons. The anti-distortion justification was rejected by the Court in *Citizens United* as a reason for excluding corporate speakers from protection. And while a government's unique interest in ensuring the validity of public policy preferences distinguishes it from corporate speakers,<sup>253</sup> the *effect* of its speech on those preferences is no more damaging to public preference validity simply due to that conflict of interest.

Because the concerns about government speech have either been rejected by the Court, as the anti-distortion concern was in *Citizens United*, or fail to bear out in the absence of *Hunter's* local powerlessness doctrine, the benefits of government speech to a system of free expression counsel for its protection. However, such a conclusion is not necessary for the purposes of this Comment. For municipal free speech claims to be viable against the state's restriction of PWBC data disclosure, the court need only protect *local* government speech, not the speech of every government entity. While some scholars voice concern that any government speech protection begins the inevitable slide down the slippery slope to universal protection for all government speakers,<sup>254</sup> the following Section makes the case that local

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can “result in the permanent loss of information critical to public debate”); Norton, *supra* note 120, at 421 (“[G]overnment speech both informs members of the public on a wide range of topics and enables them to identify their government’s priorities (and thus to evaluate its performance).”); Yudof, *supra* note 13, at 864 (“Government secrecy may make informed debate impossible . . .”).

251 The Court recognized that consent to government activities could not be valid without access to government-held “information and other prerequisites for the exercise of the citizen’s judgment about political issues and candidates.” YUDOF, *supra* note 113, at 43 (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)); *see also id.* at 247 (“Facts about [legislative debates or judicial] proceedings are necessary prerequisites for public debate about government operations.”); *id.* at 249 (“[A] right to government-held information is necessary to the creation of the self-controlled citizen.”).

252 When governments are “uniquely situated to gather and disseminate” information, or when they are “virtually the only entities with resources willing to present a particular side of a public issue,” the information is particularly important to the process of self-government. *Id.* at 46; *see also* Note, *The Rights of the Public and the Press to Gather Information*, *supra* note 196, at 1510 (“Information within the sole control of a government, such as data it has gathered or facts about its internal workings, operations, and policies may be necessary for informed public evaluation of government activity.”).

253 *See* Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923, 930 (1980) (“As part of its obligation to determine that will [of the majority of the electorate], the government must facilitate its accurate expression.”).

254 *See* Yudof, *supra* note 13, at 870 (“[I]f the expression of local governments is protected, federal and state expression, or local speech of a more dangerous nature, may also be protected.”).

government speech is a better candidate for protection than state or federal government speech and is materially distinguishable.

#### D. *Distinguishing Municipal Speech from State Speech*

Municipal speech brings unique benefits to a system of free expression that speech by state and federal governments does not. It seems almost a truism that “[l]ocal institutions are a vital part of public debate.”<sup>255</sup> Not only do they contribute information of local public import to the marketplace of ideas, they serve as instruments of collective advocacy for local issues and groups that may not be able to marshal the resources to make their voices heard on a significant scale.<sup>256</sup> Further, permitting local governments to bring constitutional challenges enables smaller polities to voice dissent as a way of engaging in self-expression and self-government.<sup>257</sup> As David Barron noted, cities are not just administrative components of the state. They represent “distinct, democratic communities of interest” that give their residents a voice in statewide policy decisions by expressing disagreement.<sup>258</sup> The Supreme Court has described cities in this way,<sup>259</sup> despite lower courts suggesting this conception of government speech leaves out the views of dissenting citizens.<sup>260</sup> Since the Supreme Court noticed this issue of minority dissent in *Bellotti* as applied to minority shareholders of corporations, but nevertheless granted the corporation speech protections, there are strong grounds to argue it is not a decisive objection.

The concerns animating the *CBS* bar to speech protections are generally inapplicable against localities. *CBS* was a case concerning the federal government, not state or local government entities having free speech rights.<sup>261</sup> Thus, many of the concerns mentioned are unique to the federal

<sup>255</sup> Bendor, *supra* note 23, at 425.

<sup>256</sup> *See id.* at 425-26 (asserting that activists organize national issues through local government and that “[m]unicipalities are sites of association, often more so than corporations”).

<sup>257</sup> *See Morris, supra* note 16, at 11 (“[L]ocal constitutional challenges to state government action . . . are a predictable side-effect of a political system that disaggregates decision-making.”). *See generally* Heather Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (discussing how local constitutional challenges to state action are a form of local self-expression).

<sup>258</sup> Barron, *supra* note 30, at 2238; *see also* Gerken, *supra* note 257, at 1791 (“While local governments lack the formal autonomy that sovereignty guarantees, territorial boundaries lend these institutions a level of functional independence that seems to exceed that accorded to many other disaggregated institutions.”).

<sup>259</sup> *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (“[G]overning authorities [of the Village of Euclid], presumably [represent] a majority of [the Village’s] inhabitants and voic[e] their will . . .”).

<sup>260</sup> *See Anderson v. City of Bos.*, 380 N.E.2d 628, 639 (1978) (stating that preventing dissenting minority taxpayers from being forced to finance a position they oppose is a compelling state interest).

<sup>261</sup> *See Porterfield, supra* note 151, at 33 (noting *CBS* was a dispute “involving the federal government, rather than a state or local government”).

government, like its size and power to drown out other communicators. This distinguishes local governments from the kind of government speaker that was the subject of Justice Stewart's concurring opinion in *CBS*. "Local governments, indisputably, are generally much less menacing communicators than the vast federal agencies in Washington."<sup>262</sup> "Their voices would be few among the many[,] . . . unlikely to drown out other centers of communication."<sup>263</sup> Because of their smaller size and reach, local governments pose even less of a risk than state and federal governments do of crowding out private speakers in public debate or distorting the discussion.

At the same time, local governments have a heightened interest in speaking without restrictions as they have "strong independent stakes in legislative decisions and voter approval or disapproval."<sup>264</sup> Because local governments raise a large percentage of their revenue from local taxes and are frequently granted control over their operations under home-rule statutes, they have a stake in making their policy positions known, separate from any interest the state government could assert.<sup>265</sup> And because they are subject to the policy decisions of the state government, they have an interest in speaking truth to power analogous to that held by individuals. Local governments also "have a strong, independent stake in legislative decisions and in voter approval or disapproval of state constitutional amendments . . . and referendums."<sup>266</sup>

These separate interests are not well addressed by the bludgeon of *Hunter*'s local powerlessness doctrine. The rule is too simple to account for the separate and heightened interests local governments have in speaking without prior restraint.<sup>267</sup> If *Hunter*'s purpose is to preserve the policy flexibility of states, permitting municipalities to assert speech rights does not significantly harm that interest. States could still shape the power of cities, just without the ability to target their speech-related functions.<sup>268</sup>

Alternatively, should the *Hunter* doctrine apply, a city's speech on issues of public importance could be characterized as proprietary and thus be distinguished from actions taken in its capacity as an arm of the state government. Across many areas of law, municipalities possess a dual capacity,

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<sup>262</sup> YUDOF, *supra* note 113, at 48.

<sup>263</sup> Yudof, *supra* note 13, at 869.

<sup>264</sup> YUDOF, *supra* note 113, at 48.

<sup>265</sup> See Yudof, *supra* note 13, at 869 (noting that depending on local taxes for revenue leads local governments to inform the public to attempt to influence policy outcomes for voter approval).

<sup>266</sup> *Id.*

<sup>267</sup> See Note, *The Constitutionality of Municipal Advocacy*, *supra* note 12, at 539 ("[S]uch an approach does not even pretend to address the federal constitutional questions that municipal speech may raise. Its only axiom—that cities may speak only when states say they can—recognizes no limit on the type or amount of municipal expression which states may expressly authorize.").

<sup>268</sup> See Bendor, *supra* note 23, at 426 (discussing treatment of municipalities as separate existences from the state for purposes of free speech).

functioning alternately as a public and private entity.<sup>269</sup> Although whether an action is taken in a public or proprietary capacity varies across legal contexts, a government's proprietary action is generally one that is taken for the "peculiar and special advantage of its inhabitants, rather than for the good of the state at large."<sup>270</sup> Courts seem to use the distinction between public and proprietary action to give governmental bodies "greater latitude when they act as participants in markets than when they regulate private businesses."<sup>271</sup> Despite being applied to state action, this formulation could presumably apply to city action in the speech context as well. While the marketplace of ideas is not the same market with which the preceding quote is concerned, municipal speech is an act of participation in a public market rather than an act of regulation. When a city speaks to or for its residents, it seems to act for its citizens' special advantage in a way analogous to making economic contracts. As Wells and Hellerstein note, "The distinction used in the commerce clause and constitutional rights contexts is roughly the same."<sup>272</sup> Perhaps when a local government speaks, it acts in a proprietary capacity for its inhabitants in order to serve their unique localized interests. If so, the protection of municipal proprietary action counsels for protecting the speech of local governments in a way that permits constitutional claims against the state similar to the constitutional claims cities may raise in their proprietary capacity in other contexts.<sup>273</sup>

#### IV. A MUNICIPAL SPEECH RIGHT APPLIED AGAINST THE STATE

Very few cases have addressed the intersection of the *Hunter* and government speech doctrines. As noted in Part I, *Hunter* is read by several Circuit Courts of Appeals to be a doctrine of substantive constitutional law.<sup>274</sup> Whether *Hunter*'s local powerlessness bar is considered a part of the First Amendment is the subject of this Part. This Part examines the few cases in

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<sup>269</sup> See 18 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53:6 (3d ed. 2013) (noting that local governments have been described by courts as having a dual nature that is part governmental and part "corporate" or "proprietary"); Stanley Barlow, *Nuisance or Negligence*, 3 TENN. L. REV. 5, 5 (1924) ("It is an elementary principle of law that municipal corporations act in a dual capacity, one known as their private or corporate character, and the other their public or governmental character.").

<sup>270</sup> *Dep't of Treasury v. Evansville*, 60 N.E.2d 952, 955 (Ind. 1945).

<sup>271</sup> Michael L. Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1076 (1980).

<sup>272</sup> *Id.* at 1076. *But see* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 203 (2016) ("Fundamentally, the governmental/proprietary distinction does not translate well between various fields of law.").

<sup>273</sup> See YUDOF, *supra* note 113, at 44 n.28 (explaining that cities act in a proprietary capacity to assert equal protection, due process, and privacy rights).

<sup>274</sup> See *supra* Part I; *supra* note 95 and accompanying text.

which the Court has had an opportunity to examine the status of municipalities in the context of the Free Speech Clause. It concludes that the court has yet to announce a bar on subdivisions asserting speech rights against their state.

#### A. *Marsh v. Alabama As a Limit on Hunter's Reach*

*Marsh v. Alabama* demonstrates that, under the First Amendment, cities perform a constitutional function independent of the state, which requires both that state law does not entirely determine the nature of cities and that *Hunter* does not permit states to “manipulate [municipalities] in every conceivable way.”<sup>275</sup> In *Marsh*, the Court addressed whether a state law could prohibit the door-to-door distribution of literature in a private company town by criminalizing the conduct as trespass. The Court held that private towns were no different than public towns in regard to their citizens being citizens of the state with a right to be informed from sources of their choosing in order to make decisions about the public welfare. Despite the fact that the state did not consider the private entity a public town, the Court found otherwise for purposes of the First Amendment’s Free Speech Clause because the substantive right at issue—the free exchange of ideas—was premised on there being a “local community within which such free exchanges could take place.”<sup>276</sup> This demonstrates that the Court was willing to ignore how the state defined its political subdivisions when speech protected under the First Amendment was at issue.<sup>277</sup>

While *Marsh* does not militate in favor of municipalities themselves having the protection of the First Amendment against their creating states, it demonstrates two principles of significance to this Comment. First, the *Marsh* Court viewed the status of localities under the First Amendment as not within the complete discretion of the state. Second, because *Hunter* was not even mentioned in the opinion, the Court seemed to consider *Hunter* to be irrelevant to the First Amendment context. These two lessons leave the door open for substantive First Amendment law to permit municipal claims against states.

The Court in *Marsh* based its decision in part on cases requiring a public municipality under the First Amendment to provide for the free exchange of ideas.<sup>278</sup> A state law requiring a city to deny such an opportunity would run

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<sup>275</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960).

<sup>276</sup> *Barron*, *supra* note 35, at 565.

<sup>277</sup> While *Marsh* has been overruled to the extent that criminal penalties for trespass on private property have been upheld as an acceptable restriction of private speech, those cases have left untouched the Court’s decision to define for itself what constitutes a public “town” for First Amendment purposes. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 569-70 (1972) (upholding a trespass law as applied to a private shopping mall because it was not functionally a town).

<sup>278</sup> *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (“[I]t is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners

afoul of this mandate, and *Hunter*'s language that a state may "withdraw all . . . powers" from a municipality would not rescue such a law.<sup>279</sup> David Barron points out this is consistent with cases like *Gomillion* and *Avery*, in which the Court rejected state definitions of municipalities when it resulted in violations of the individual constitutional rights of residents.<sup>280</sup> Further, Barron notes that subsequent cases like *Seattle School District*, *Romer*, and *Milliken* show municipalities themselves can raise these claims against their creating states.<sup>281</sup> Taken together with *Marsh*, this suggests that *Hunter* does not prevent municipalities from raising First Amendment claims against their creating state when the rights of its residents are infringed by a state law. While *Marsh* featured a private plaintiff, the lesson of *Gomillion* suggests a municipal plaintiff raising this right against the state would also not be barred by *Hunter*. If this is true, it could also serve as a foundation for municipalities to raise their own First Amendment right to free speech against their creating state.

#### B. The City of Boston v. Anderson *Distinguished from Municipal Speech Claims*

Scholars like Mark Yudof have summarily dismissed the possibility of First Amendment protections for municipal speech against restriction by the state by pointing to *City of Boston v. Anderson*.<sup>282</sup> The Court dismissed an appeal from Massachusetts's highest court in which the city raised a First Amendment challenge against a state law restricting expenditure of municipal funds to support political advocacy in a state referendum. The Massachusetts court stated "we suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision" to challenge the state.<sup>283</sup> However, it also noted the issue was undecided and instead

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together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature." (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938) (holding public cities can't bar distribution of specific ideas by leaflet on public streets)); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (disallowing a complete ban on distribution by a city on public streets).

<sup>279</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>280</sup> Barron, *supra* note 35, at 567-68 (stating the rule in *Gomillion* to be that the state is not insulated from federal judicial review when it appeals to its power to control local governments to circumvent a federally protected right).

<sup>281</sup> *See id.* at 568 (suggesting that the cases encourage judges to "[limit] state attempts to interfere with local affairs in certain constitutional contexts").

<sup>282</sup> YUDOF, *supra* note 113, at 48 (stating "[t]he Supreme Court has held that such a claim raises no substantial federal question" (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 1060 (1979))).

<sup>283</sup> *Anderson v. City of Bos.*, 380 N.E.2d 628, 637 (Mass. 1978). The Massachusetts court further stated "the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination." *Id.*

assumed *arguendo* that the municipality's advocacy expenditure was protected speech.<sup>284</sup> The Massachusetts court went on to assume *arguendo* that the law restricted protected speech by the city, but determined the state had a compelling interest in restricting that speech sufficient to survive strict scrutiny and the restriction was narrowly tailored to that interest.<sup>285</sup> The Supreme Court dismissed the appeal *per curiam*, stating only that the case failed to raise a "substantial federal question."<sup>286</sup> From this, scholars of the time argued that the Court has held it is constitutional for a state to restrict the speech of its subdivisions.<sup>287</sup>

However, a *per curiam* dismissal for want of a substantial federal question "should not be understood as breaking new ground."<sup>288</sup> A holding that the First Amendment is one of the substantive provisions that incorporates the *Hunter* doctrine would surely have been new ground in 1978. Additionally, because such a *per curiam* dismissal does not establish new law, it merely precludes lower courts from "coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."<sup>289</sup> One of the few certainties about dismissals for want of a federal question is they are "a decision on the merits."<sup>290</sup> Thus, lower courts are bound to hold only that states have a compelling interest sufficient to survive strict scrutiny in restricting public expenditures for the purpose of political advocacy in a state election. It was not "necessarily decided" that all restrictions of municipal speech would be served by, or properly tailored to, such an interest. And because the Massachusetts court's suspicions about the powerlessness of localities was not necessarily decided in the judgment, the appeal's dismissal is entirely consistent with the conclusion that the *Hunter* doctrine is a substantive part of the First Amendment in all situations. The Court's dismissal simply affirmed that states have a compelling interest sufficient to overcome the First Amendment challenge by the city in that context. The question of whether the First Amendment protects cities is far from settled

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<sup>284</sup> *Id.* (stating "we need not resolve this point").

<sup>285</sup> The Massachusetts court held the state had a compelling interest in restricting political advocacy by a municipal entity when the "affected citizenry are not in unanimity." *Id.* at 639. Ensuring dissenting taxpayers did not finance "expression on an election issue of views with which they disagreed" justified the restriction of protected speech so long as the law was "closely drawn to avoid unnecessary abridgement" of the First Amendment. *Id.* at 638-39 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978)).

<sup>286</sup> *City of Bos. v. Anderson*, 439 U.S. 1060 (1979).

<sup>287</sup> YUDOF, *supra* note 113, at 48 (concluding the Court has held that it is constitutional for a state law to "[forbid] municipalities from devoting local or state resources to some or all public relations and advertising activities").

<sup>288</sup> *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

<sup>289</sup> *Id.*

<sup>290</sup> Gerald T. Anglin, *Government Referendum Advocacy: An Emerging Free Speech Problem*, 29 CASE WESTERN RES. L. REV. 886, 894 (1979).



by this dismissal.<sup>291</sup> Indeed, that the Court affirmed a decision on the merits of a First Amendment challenge suggests that the plaintiff city is, at least *prima facie*, protected under that provision.

As a *per curiam* dismissal, *Anderson* is limited to its facts. The restriction in *Anderson* was “a legislative direction that no municipal funds be expended for the purpose of influencing the result of a referendum” to amend the state constitution.<sup>292</sup> Laws restricting the release of body camera data are distinguishable from such a law on several relevant grounds.

First, such laws are not directed at protecting a statewide effort to secure consent of the governed. Scholars like Mark Yudof are frequently concerned with the power of government speech to distort the political process and in doing so erode the basis of democratic self-government.<sup>293</sup> Laws that restrict municipal speech beyond the context of statewide referendums are dissimilar to *Anderson*’s facts, and more importantly, do not threaten to overpower private political speech in the context of elections or referenda. Further, because the behavior of local police officers is unlikely to be determinative of a statewide election, body camera data are unlikely to be put to the purpose of binding other localities through influencing the self-governing process.<sup>294</sup> Finally, raw or redacted police body camera data serves a different function than partisan advertising. There is far less opportunity for a government official or controlling party to craft a self-serving policy message when a government body is not shaping a message, but rather sharing gathered data. Such a difference responds to concerns that government speech protections would be used to benefit a particular office holder’s own reelection.<sup>295</sup>

### C. *The Most Recent Rule from Ysursa*

The Court has only recently addressed the status of municipalities under the First Amendment, albeit with the brevity and lack of rationale customary to *Hunter* and its progeny. In *Ysursa v. Pocatello Education Ass’n*, employee unions challenged an Idaho law which prohibited public sector employers

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<sup>291</sup> *See id.* at 895 (“[A]fter *Anderson*, the question of whether the first amendment protects or prohibits governmental referendum advocacy remains.”).

<sup>292</sup> *Anderson v. City of Bos.*, 380 N.E.2d 628, 635 (Mass. 1978).

<sup>293</sup> Note, *The Constitutionality of Municipal Advocacy*, *supra* note 12, at 544 (cautioning that First Amendment protections for government speech must take account of whether government “intrusion into the machinery of democracy is or is not legitimate”).

<sup>294</sup> The local nexus of effect answers Barron’s concern that local constitutional challenges to state restrictions should only be permitted when localities seek self-determination rather than to impose a constitutional framework on other localities. *See Barron*, *supra* note 30, at 2222 (arguing a city’s interpretive independence is “at its lowest ebb” when seeking to force other localities to “follow a single course”).

<sup>295</sup> YUDOF, *supra* note 113, at 49 (worrying that “municipal governments may be expressing the views of public officials who are attempting to *create* a majority, and not *representing* a majority in . . . pending policy debates”).

from offering payroll deductions for union membership fees and the union's political activities as a content-based restriction because it disfavored political speech in violation of the First and Fourteenth Amendments.<sup>296</sup> The district court upheld the law as applied to public employers at the state level because the First Amendment does not require the government to subsidize private speech through the provision of payroll deductions.<sup>297</sup> However, it found the law unconstitutional as applied to local government employers because it did not find that the state provided any subsidy for the administration of payroll deductions at the local level.<sup>298</sup>

The Ninth Circuit agreed, finding the relationship between the state and its political subdivisions to be “analogous to that between the State and a regulated private utility.”<sup>299</sup> It went on to find that while ultimate control of the municipalities rested with the state legislature, it did not actually fund the payroll deduction system at issue.<sup>300</sup>

The Supreme Court disagreed, holding that while the First Amendment restrains the government from abridging speech, it does not provide an affirmative right to government-funded assistance of speech.<sup>301</sup> The Court found the assistance of payroll deductions provided by the local government employers was attributable to the state, regardless of a lack of any direct management or funding by the state itself, because the relationship was that of a political subdivision, a mere department of the state without privileges or immunities against its creator.<sup>302</sup> The assistance to private speech was thus provided by the state through its instrumentality, making the law a decision of the state to not provide a subsidy for the exercise of a fundamental right,

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<sup>296</sup> 555 U.S. 353 (2009); see also Brian Olney, *Paycheck Protection or Paycheck Deception? When Government “Subsidies” Silence Political Speech*, 4 U.C. IRVINE L. REV. 881, 909-10 (2014) (discussing *Ysursa* and its implications).

<sup>297</sup> See *Pocatello Educ. Ass'n. v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at \*2 (D. Idaho Nov. 23, 2005) (“[T]he State is under no First Amendment obligation to subsidize speech by providing . . . payroll deductions for the purpose of paying union dues or association fees for State employees.”).

<sup>298</sup> See *id.* (stating that the “State cannot use the anti-subsidy argument to justify the VCA to the extent that it applies to local governments”).

<sup>299</sup> See *Ysursa*, 555 U.S. at 358.

<sup>300</sup> *Id.*

<sup>301</sup> See *id.* (explaining that government is “not required to assist others in funding the expression of particular ideas, including political ones”); RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACT §1:1 (3d ed. 2017) (“In *Ysursa v. Pocatello Education Association*, for example, the Supreme Court held that while the First Amendment operates as a *negative* restraint to forbid government from ‘abridging the freedom of speech,’ the First Amendment does not confer an *affirmative* right ‘to use government payroll mechanisms for the purpose of obtaining funds for expression.’”).

<sup>302</sup> See *Ysursa*, 555 U.S. at 362-63 (citing *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 185 (1923)).

an act requiring only a rational basis.<sup>303</sup> The Court held the standard was satisfied by the state's legitimate interest in avoiding the appearance of government favoritism or entanglement in partisan politics.<sup>304</sup>

Ultimately, the narrow ruling of *Yursa* is that the provision of assistance to private speech by local government is really provided by the state because local government is a creation of the state for the convenient exercise of its powers. The Court apparently considered the state "the proprietor" of the locality's payroll system,<sup>305</sup> which made the system a state subsidy supporting private speech and within the state's discretion to withhold. However, being an administrative instrumentality for payroll purposes is different from being an instrumentality in all things, as the many cases permitting municipalities to make constitutional claims against their creating states demonstrate.<sup>306</sup>

While *Yursa* decided a claim under the First Amendment, the status of a municipality's own rights under that amendment was not at issue. The plaintiffs were not municipalities, but instead private unions.<sup>307</sup> The parties did not even brief the issue of whether the local government employers had a First Amendment right to provide assistance to the private speech of unions and employees in the form of payroll deductions.<sup>308</sup>

Nor is the denial of such a right a necessary premise of the holding that municipal payroll systems are an extension of the state's administrative system.<sup>309</sup> The Court did not make clear whether it was deciding a local government's payroll system was a forum for speech ultimately belonging to the state by virtue of the creator-instrumentality relationship, or whether the state and its instrumentalities are a single government speaker and the decision not to assist private speech was a speaker's decision not to facilitate private speech. If the former rationale controls the decision, municipalities can be distinct speakers protected by the First Amendment against infringement while the fora they administer are property ultimately owned

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303 See *Yursa*, 555 U.S. at 359 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983)).

304 *Id.* at 359.

305 See Brief of Respondent at 32, *Yursa*, 555 U.S. 353 (No. 07-869).

306 See *supra* text accompanying notes 38-46 (discussing cases in which the Court has decided constitutional claims by cities against their creating states on the merits despite *Hunter*).

307 See *Yursa*, 555 U.S. at 356 (describing respondents as "plaintiff labor organizations").

308 The plaintiffs instead argued that because local governments were the proprietors of the fora of payrolls and distinct entities with the ability to hold property themselves, the state government was attempting to exercise control of another government entity's fora rather than overseeing the use of its own property. See Brief of Respondent at 41, *Yursa*, 555 U.S. 353 (No. 07-869).

309 The Court characterized the law as the legislature's decision to withhold from local government employers "the power to provide payroll deductions for political activities," relying on *Trenton*'s language that all powers of subdivisions exist at the pleasure of the state. *Yursa*, 555 U.S. at 362. However, a city's power to provide a forum for speech seems not to be the same as a city's own right to speak.

by the state. According to this rationale, the Court has not ruled under substantive First Amendment law that municipalities are not distinct from their creating states, despite quoting broadly from *Williams* and *Trenton*,<sup>310</sup> preserving the possibility of a municipal free speech claim against a creating state in jurisdictions which limit *Hunter* to its substantive provisions, such as in the Second Circuit.<sup>311</sup> It seems as though a distinction can be made between states and municipalities—i.e., that although they share a single source of funding, they still maintain enough independence to be treated as separate speakers. A reading of *Yursa* which would fuse state and municipal governments as a single speaker runs counter to constitutional case law deferring to a state's own decisions of how to structure its municipalities.<sup>312</sup>

Because *Hunter* is limited to the substantive provisions it addressed and *Gomillion* permits municipalities to raise constitutional claims against their states,<sup>313</sup> First Amendment Speech claims by municipalities against their creating state may be viable if government speech is protected. As *Marsh* indicates, the Court may not follow *Hunter* in a First Amendment free speech context.<sup>314</sup> As a per curiam dismissal for want of a substantial federal question, *Anderson* adds little wisdom to predictions of the Court's view of locality speech against state restriction. *Yursa* did not address whether government speakers were protected under the First Amendment, but its ambiguous language regarding the relationship between municipal and state governments, while not a binding decision on *Hunter*'s applicability in the speech context, indicates some deference to unity. However, as the *Yursa* Court did not squarely address whether the state and local levels of government are a single speaker for First Amendment purposes, it remains an arguable issue.

There is a doctrinal foundation for municipalities to challenge state laws preventing dissemination of PWBC data. At the very least, *Hunter* should not

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310 *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933) (noting that a political subdivision “created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator”); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (holding political subdivisions are “merely . . . department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit”).

311 *See, e.g.*, *New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973).

312 A purpose of the *Hunter* doctrine is to preserve the supremacy of the state in its dealings with its subordinate creations. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“The State . . . at its pleasure, may modify or withdraw all such powers.” (emphasis added)); Barron, *supra* note 35, at 562 (“Although the cases are legion that assert that state law defines the scope of local governmental power, none has done so more forcefully, or more famously, than *Hunter* . . .”). A blanket federal prohibition on cities suing their state under federal constitutional prohibitions preempts any state law attempting to define cities as independent entities with federal constitutional rights. Such a doctrine does not take seriously how a state chooses to structure its relationship with its municipalities and so cannot be justified by reference to the *Hunter* doctrine.

313 *See supra* Part I.

314 *See supra* Section IV.A.

deny municipalities the power to challenge state restrictions of free speech for lack of an independent existence without regard to how the state has chosen to structure the restrictions. In any case, a separate constitutional claim may be available for municipalities that wish to challenge such laws.

#### V. ANALYZING A GOVERNMENT SPEAKER'S FIRST AMENDMENT CLAIM

If the speech of local government entities is entitled to protection under the First Amendment as the previous Part suggests, the question remains how a challenge to speech restraints should be analyzed under existing jurisprudence. This Part will outline a hypothetical challenge using the law of North Carolina as an example, and conclude that when a law requires approval by a judge for police officials to publicly release PWBC data, it imposes a prior restraint on speech that is content-based, subject to strict scrutiny, and likely unconstitutional.

North Carolina state law prohibits the custodian of PWBC data from disclosing video to anyone unless their image or voice is a subject of the recording.<sup>315</sup> In addition, release to such a person must be done pursuant to a court order.<sup>316</sup> This law applies to any recordings made by body cameras, dashboard cameras, or any other recording device operated by police personnel while carrying out law enforcement responsibilities.<sup>317</sup>

If the speech of local governments is protected under the First Amendment, then the public release of PWBC data is an expressive speech act entitled to constitutional protection. It is settled law that the publication of video is an expressive speech act within the ambit of the First Amendment's protection.<sup>318</sup> Film is a significant "medium for the communication of ideas," and its distribution has therefore been recognized as an expressive act of constitutional significance.<sup>319</sup> It is also uncontroversial that requiring approval by a state official to distribute a film to the public is a prior restraint on speech. Such was the precise posture of *Joseph Burstyn, Inc. v. Wilson*, wherein the Court struck down a statute that required film distributors to seek state-issued licenses to distribute motion pictures, and

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<sup>315</sup> N.C. GEN. STAT. § 132-1.4A(c)(1) (2016).

<sup>316</sup> N.C. GEN. STAT. § 132-1.4A(g) (2016) ("Recordings in the custody of a law enforcement agency shall only be released pursuant to court order.").

<sup>317</sup> N.C. GEN. STAT. § 132-1.4A(a) (2016).

<sup>318</sup> See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); see also Kreimer, *supra* note 179, at 373 ("[T]he Court regularly confirmed that images in films can claim First Amendment protection whether displayed publicly or reviewed in private . . .").

<sup>319</sup> *Joseph Burstyn*, 343 U.S. at 501-02.

restricted the issuance of such licenses to films deemed not “sacrilegious.”<sup>320</sup> The prohibition of prior restraints on speech has been a core concern of First Amendment protections for decades.<sup>321</sup> Consequently, prior restraints on speech are particularly disfavored.<sup>322</sup> While the Court has been clear that the right to speak using video may be subject to some degree of prior restraint,<sup>323</sup> the burden of justifying the restriction a censor imposes is heavy and lies with the government imposing the restriction.<sup>324</sup>

The burden of justifying a prior restraint on the release of PWBC data is given shape by the Court’s decisions regarding content-based restrictions. When a restriction upon speech depends on the type of message communicated, the law is not content-neutral and is examined with the highest degree of scrutiny.<sup>325</sup> Restrictions on PWBC data disclosure require “enforcement authorities to examine the content of the message that is conveyed to determine whether” the municipal speaker’s message contains

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<sup>320</sup> *Id.* at 497.

<sup>321</sup> See *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 336 (2010) (noting the functional equivalent of a prior restraint chilled speech in violation of the First Amendment); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity . . .” (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 713 (1931) (“In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication . . .”); see also *Superior Films, Inc. v. Dep’t of Educ. of Ohio*, 346 U.S. 587, 588 (1954) (citing *Near* for the proposition that “[t]he ‘chief purpose’ of the constitutional guaranty of liberty of the press . . . was ‘to prevent previous restraints upon publication’”); *Patterson v. Colorado ex rel. Att’y Gen.*, 205 U.S. 454, 462 (1907) (stating “the main purpose of such constitutional provisions [as the First Amendment] is ‘to prevent all such *previous restraints* upon publications as had been practiced by other governments.” (citation omitted) (emphasis in original)).

<sup>322</sup> See *Joseph Burstyn*, 343 U.S. at 503 (describing prior restraint as “a form of infringement upon freedom of expression to be especially condemned”).

<sup>323</sup> See, e.g., *Times Film Corp. v. City of Chi.*, 365 U.S. 43, 49-50 (1961) (upholding a requirement that film purveyors submit their films to a city official before publication on the grounds that the mere fact of being a prior restraint did not challenge the standard by which restraint was applied).

<sup>324</sup> See *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (noting that “it is as true [for film] as of other forms of expression that ‘(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.’” (citation omitted)); *id.* at 58 (“[T]he burden of proving that the film is unprotected expression must rest on the censor.”).

<sup>325</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1765-66 (2017) (“The First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination . . .” (citing *Reed v. Gilbert*, 135 S. Ct. 2218, 2230 (2015))); *Reed* 135 S. Ct. at 2232 (striking down a law which regulated signs differently based on the type of message they communicated because it singled out speech on the basis of its contents without being narrowly tailored to a compelling government interest); *Turner Broad. Sys. v. Fed. Commc’ns Comm’n*, 512 U.S. 622, 642 (1999) (noting that content-based restrictions on protected speech are the subject of “the most exacting scrutiny”); see also Kreimer, *supra* note 179, at 391 (“[P]ublication of ‘lawfully obtain[ed] truthful information about a matter of public significance’ may not be punished ‘absent a need . . . of the highest order.’” (citing *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001))).

information garnered from a PWBC, making it a content-based law.<sup>326</sup> Because, “as a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,”<sup>327</sup> content-based restrictions are presumptively invalid and must be justified by a compelling government interest that is unrelated to the suppression of the message itself.<sup>328</sup> There are specific exceptions to this rule, but they are limited to laws regulating enumerated, historic categories of speech which are unprotected by the First Amendment and are not applicable to disclosures of PWBC data.<sup>329</sup> Further, the legislature does not have the power to define new categories of unprotected speech.<sup>330</sup> Thus, state legislatures cannot simply declare law enforcement recordings to be exempt from First Amendment protection. Since a law which requires all releases of video to be approved by a judge of the state’s court is a restriction based on the content of the speech, the law must be supported by, and narrowly tailored to, a compelling government interest.<sup>331</sup> The Court has said that a narrowly tailored law must be the “least restrictive means among available, effective alternatives.”<sup>332</sup> A law restricting PWBC data release must therefore be written so as to prohibit only the release of unprotected speech and protected speech that cannot be released without harming the compelling governmental

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<sup>326</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citations omitted).

<sup>327</sup> *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2004) (citations omitted).

<sup>328</sup> *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (“[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality.” (citing *Ashcroft*, 542 U.S. at 660)); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (requiring the government interest in regulating speech to be “unrelated to suppression of free expression”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

<sup>329</sup> Such unprotected categories of speech include obscenity, *Roth v. United States*, 354 U.S. 476 (1957), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), defamation, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), incitements to violence, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and true threats, *Watts v. United States*, 394 U.S. 705 (1969).

<sup>330</sup> *See United States v. Stevens*, 559 U.S. 460, 470-71 (2010) (striking down a restraint on video games by emphatically rejecting the proposition that the legislature could define new categories of unprotected speech, disclaiming the idea as “startling and dangerous”).

<sup>331</sup> *See Reed v. Gilbert*, 135 S. Ct. 2218 (2015) (holding that content-based regulations must survive strict scrutiny); *see also Brown v. Entm’t Merchs. Ass’n.*, 564 U.S. 786, 799 (2011) (striking down a content-based restriction on the grounds that it cannot be justified “by a compelling government interest” and must be “narrowly drawn to serve that interest”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

<sup>332</sup> *Ashcroft*, 542 U.S. at 666; *see also Alvarez*, 132 S. Ct. at 2549 (“There must be a direct causal link between the restriction imposed and the injury to be prevented.”).

interests animating the law. Such a law cannot “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>333</sup>

The North Carolina law lays out several standards by which a judge is to decide whether to release PWBC data the custodian requests permission to disclose to interested parties. These include factors such as whether release (1) is “necessary to advance a compelling public interest”; (2) “would reveal information of a highly sensitive [and] personal nature”; (3) “would harm the reputation or jeopardize the safety of a person”; or (4) would destroy the confidentiality “necessary to protect an active or potential internal or criminal investigation.”<sup>334</sup> In addition to these enumerated factors, the judge is also permitted to consider “any other standards the court deems relevant.”<sup>335</sup> Giving a censor the ability to deny release of video upon any grounds they deem relevant is a sure failure of narrow tailoring. There must be meat on the bone to even analyze whether the limits on discretion are fitted to constitutional proportions.

In *Joseph Burstyn*, the far more specific standard which allowed a censor to refuse to grant a license because they deemed a film “sacrilegious” was an unconstitutional standard because it granted the censor “unlimited restraining control over motion pictures.”<sup>336</sup> Allowing a judge to deny requests to release video upon any grounds they deem relevant provides for absolutely no limit on the judge’s control of what speech is restricted. Such is the very definition of “unlimited restraining control.”<sup>337</sup> It is no answer that judges, being bound by the Constitution, will only restrict speech which may be constitutionally restricted. As the Court has held, a promise by the government that it will not apply a law unconstitutionally is not sufficient to save a law from being declared unconstitutional.<sup>338</sup> The implicit promise that judicial officials will only exercise the constitutional portion of an overbroad censor power would just as readily be deemed insufficient under the strict scrutiny standard.<sup>339</sup>

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<sup>333</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014)).

<sup>334</sup> N.C. GEN. STAT. § 132-1.4A(g) (2016).

<sup>335</sup> *Id.*

<sup>336</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

<sup>337</sup> Seth Kreimer has noted that, when it comes to laws justified by the state’s interest in protecting individual privacy, “[c]atchall statutes . . . invoked on the basis of standardless discretion do not meet [the narrow tailoring] requirement.” Kreimer, *supra* note 179, at 393.

<sup>338</sup> *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

<sup>339</sup> Even under intermediate scrutiny, complete prohibitions on access to forums of public discourse have been struck down as improperly suppressing “lawful speech as the means to suppress unlawful speech.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (citations omitted) (invalidating a state law which prohibited registered sex offenders from accessing social networking web sites because the complete bar inhibited the exercise of First Amendment rights on websites which were “integral to the fabric of our modern society”). While the Court recognized the



*A. Individual Privacy as a Compelling State Interest*

Should a law restricting PWBC data disclosure present more specific standards, they likely would mirror those enumerated in North Carolina's law. These standards embody the compelling interests that would likely be advanced to justify a restriction of protected speech under strict scrutiny. First among these interests would be protecting the individual privacy of those people depicted in the videos, mirroring the concerns the press and public have raised in response to body camera proliferation in recent years. These concerns generally cluster around concerns over the need to prevent harm to the reputation of depicted people, to prevent physical harm from befalling such people, or even to prevent invasions of private places from becoming public.

The tension between individual privacy and protected speech has a long history and is without definite resolution when it comes to truthful speech.<sup>340</sup> The Court has repeatedly refused to state in broad terms whether "truthful publication may ever be punished consistent with the First Amendment."<sup>341</sup> Thus, the following discussion will not attempt a comprehensive analysis of the many privacy concerns PWBC video raises, but it will instead offer a few broad-stroked guideposts by which a court might measure a restriction under strict scrutiny. Since the Court has preferred to issue narrow rulings on whether the privacy interests animating a restriction are significantly important and proportionately protected to justify any given limit on speech,<sup>342</sup> this Section will only look to a few prominent privacy interests that have been raised by critics of body cameras.

Should a government proponent of a law restricting PWBC data release claim a compelling government interest in preserving an individual's privacy interest in protecting their communications with police, the Court would likely view such an interest as insufficient to satisfy strict scrutiny. Critics of body cameras regularly raise the invasion of individual privacy as a concern

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legitimacy of the government's interest in preventing the sexual abuse of children, the complete bar to accessing an important forum of public discourse was not narrowly tailored to that interest nor necessary for its achievement, even though it was a content-neutral law. *Id.* at 1737. Similarly, a *carte blanche* grant of censorship authority to a judge over distribution of PWBC data silences protected speech without necessity.

<sup>340</sup> Libel law addresses the balance between privacy and false speech. *See, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). However, the privacy interest in avoiding false or defamatory publicity is treated differently than avoiding true representations of one's private, but newsworthy, life. *Id.* at 302 ("Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it . . . ." (citations omitted)).

<sup>341</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

<sup>342</sup> *See Florida Star v. B.J.F.*, 491 U.S. 524, 533 ("We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

necessitating limited use.<sup>343</sup> However, a bare interest in preserving the privacy of an individual's behavior was held insufficient to justify a prohibition on speech of public importance, even when that speech was factually inaccurate.<sup>344</sup> It seems unlikely that speech on a matter of public importance that does not contain factual inaccuracies, like a video recording, would be any less privileged. Indeed, the Court has said that individual "privacy concerns give way when balanced against the interest in publishing matters of public importance."<sup>345</sup>

However, in places where an individual has a reasonable expectation of privacy, such as in her own home, it cannot be plausibly argued that she has chosen to bear the loss of privacy "associated with participation in public affairs."<sup>346</sup> Records are made by PWBC inside people's homes, either during consensual entries (like investigating a burglary), or during nonconsensual entries (like investigating a domestic violence situation).<sup>347</sup> Where the Fourth Amendment protects individual privacy from government intrusion without constitutional justification, that expectation of privacy could presumably protect one from publication as well. The Court has recognized that "[t]he State's interest in protecting the well-being, tranquility, and *privacy* of the home is certainly of the highest order in a free and civilized society."<sup>348</sup> This interest in preserving the privacy of the home has been held sufficient in the First Amendment context to prevent speakers from foisting their message on unwilling audiences in places where they have an expectation of privacy from such messages.<sup>349</sup> While this is not strictly analogous to prohibiting the publishing of messages gathered while legally inside the home, it does

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<sup>343</sup> Jay Stanley, *Police-Mounted Body Cameras: With Right Policies in Place, a Win for All*, ACLU (March 2015), <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all> [http://perma.cc/HCY9-WNEH] (noting that there is a legitimate government interest in avoiding "embarrassing and titillating releases of video," an area of particular concern given the motivation to do so when the video concerns celebrities).

<sup>344</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.").

<sup>345</sup> *Bartnicki*, 532 U.S. at 516 ("One of the costs associated with participation in public affairs is an attendant loss of privacy.").

<sup>346</sup> *Id.* at 534.

<sup>347</sup> Stanley, *supra* note 343.

<sup>348</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980) (emphasis added); see also *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a municipal ordinance that banned picketing in front of private residences because it was narrowly tailored to the significant government interest of protecting residential privacy).

<sup>349</sup> See *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating that the government could only suppress speech to protect an unwilling listener "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner"); *Rowan v. Post Office Dept.*, 397 U.S. 728, 736-37 (1970) (permitting the government to ban unwanted mailings to private residences at the request of the recipient because there must be a sufficient measure of privacy in the household).

indicate that the privacy of the home is a compelling interest in the First Amendment context. On this basis, perhaps a law requiring a censor to consider whether PWBC data was gathered inside a private residence would be narrowly tailored to a compelling state interest.<sup>350</sup> However, those same concerns might not be implicated for recordings taken in public since there is no reasonable expectation of privacy, and PWBC do not collect the same broad range of data about an individual that the Court found excessive under the mosaic theory in *United States v. Jones*.<sup>351</sup>

The government may also suggest that it is not the invasion of individual privacy that animates its restriction of PWBC data disclosure, but that it is instead the protection of the people depicted. Critics of body cameras have noted that some people who are the subject of recordings may be put in danger by having their conversation recorded and released—witnesses and informants being among the frequently mentioned groups.<sup>352</sup> It could further be argued that the possibility of publication will chill public willingness to report crimes and speak to the police because they risk speaking on the record.<sup>353</sup> Victims of sensitive crimes like sexual assault or domestic violence would be particularly dissuaded from reporting those crimes if they knew their reports would be subject to later publication.<sup>354</sup> This argument implicates the government's ability to protect public safety, as law enforcement often depends on the cooperation of witnesses and victims. This would likely be a stronger interest than the simple invasion of privacy interest, and the issue of narrowly tailoring a restriction on PWBC data publication would become determinative. A law that allowed judges to sanitize recordings before release using redaction, either through selective blurring or muting, could be a more tailored means of protecting the

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<sup>350</sup> That analysis would be highly fact intensive and beyond the scope of this Comment. See Kreimer, *supra* note 179, at 393 (“[W]here legal rules constraining image capture legitimately seek to protect the privacy of intimate venues, analysis of the actual magnitude of the competing interests is required before liability can be sustained.”).

<sup>351</sup> 565 U.S. 400, 402-04 (2012) (holding that the installation of a GPS device on a suspect's vehicle is a search within the language of the Fourth Amendment); see also Shiller, *supra* note 3, at 198 (noting how there is no expectation of privacy in public because persons voluntarily convey information to any other parties in their surroundings).

<sup>352</sup> Stanley, *supra* note 343.

<sup>353</sup> The chilling effect that fear of disclosure of a conversation has on private speech was recognized as a significant interest in preserving the ability of the public to voice “critical and constructive ideas.” *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

<sup>354</sup> See Fan, *supra* note 1, at 438-39 (noting that public disclosure of PWBC data presents a “risk of deterring victims from seeking help at all”); Jay Stanley, *Why 'Active Investigations' Don't Justify Keeping Police Video Secret*, ACLU (Dec. 4, 2015) <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/why-active-investigations-dont-justify-keeping-police-video-secret> [<https://perma.cc/J6G5-QYNH>] (“One purpose of these [active police investigation] exemptions is to protect people from the stigma of being under investigation before the police have even finished assessing whether there is evidence of their involvement in a crime.”).

government's significant interest in preserving public cooperation in the competitive enterprise of law enforcement.<sup>355</sup> This may qualify as a least restrictive, effective means of achieving the compelling interest sufficient to survive strict scrutiny.<sup>356</sup>

B. *Administration of Justice as a Compelling Government Interest*

The second cluster of interests a government may offer in favor of censoring PWBC data would be connected to the need to protect the integrity of ongoing investigations and potential court proceedings. PWBC data are often withheld by police departments from the public under exceptions to public records laws for ongoing investigations.<sup>357</sup> Release of video could undermine investigations by tipping off potential suspects, thus making identifications and arrests more difficult. While sufficient to exempt video from public records requests, this concern carries less force when the local authorities themselves seek to release the video. In that situation, a police department would not likely seek to release the video if it threatened to complicate an investigation. Additionally, situations where a locality seeks to release video would likely be of public concern, usually involving a police use of force. Those incidents involve known suspects, both police personnel and complaining victims, so the fear of tipping off at-large suspects is lessened.<sup>358</sup>

The government could advance a more significant and applicable interest in preserving the right of a fair trial for people depicted in PWBC video. If the release of PWBC video would “create a serious threat to the fair, impartial, and orderly administration of justice,” then perhaps a prior

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<sup>355</sup> In fact, the ACLU recommends redaction be used for the protection of individual privacy when body camera data are released publicly. See Stanley, *supra* note 343; Stanley, *supra* note 354 (“Redaction should also be sufficient should bystanders or others in a video happen to be informants.”). Although redaction would be a resource intensive method of narrow tailoring, the administrative burden of implementing a less restrictive means is not usually a sufficient defense under strict scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

<sup>356</sup> See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 566 (2004) (holding that the Child Online Protection Act’s use of community standards to determine whether material is harmful to minors is not “facially unconstitutional”).

<sup>357</sup> See N.C. GEN. STAT. § 132-1.4A(d)(6) (2016) (authorizing the custodian to deny public requests “[i]f confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential . . . investigation”); Martin Kaste, *Piecing Together America’s Patchwork Quilt of Body Cam Laws*, NPR (Feb. 25, 2016) <http://www.npr.org/sections/alltechconsidered/2016/02/25/467990199/piecing-together-the-countrys-patchwork-quilt-of-body-cam-laws> [<https://perma.cc/8XW9-ZKP7>] (“Police can usually withhold videos, at least temporarily, to protect pending investigations, or for other ‘public safety’ reasons.”); Stanley, *supra* note 354.

<sup>358</sup> Kaste, *supra* note 357.

restraint on its release is justified.<sup>359</sup> This claim is common in cases where PWBC data are withheld, and one possible aspect of the argument is that pre-trial release of PWBC video could taint the jury pool.<sup>360</sup> However, the use of prior restraints to prevent pre-trial publicity from harming a criminal defendant's right to a fair trial has been held unconstitutional by the Court. In *Nebraska Press Ass'n v. Stuart*, the Court rejected the argument that pre-trial publicity irreparably harmed a defendant's right to a fair trial, noting that there were several less restrictive means of protecting that interest than a prior restraint on publication.<sup>361</sup> The Court there found that the possibility of securing a change in venue, postponing the trial until public awareness faded, using voir dire to sift through jurors, and employing clear jury instructions that they use only evidence presented at trial were all options that had not been shown to be less effective than prior restraint in preserving a right to a fair trial.<sup>362</sup> A prior restraint is not a narrowly tailored means of preventing jury bias when parties can strike jurors or move for a change of venue rather than prohibit the pre-trial publicity that a release of PWBC video brings.<sup>363</sup> And when such measures are sufficient to protect fair proceedings when bystander video is released publicly before trial, release by the municipality should not be treated differently.

A proponent of a restraint could also argue more generally that public disclosure of video that may become evidence threatens the administration of justice apart from any individual right to a fair trial. However, the Court "has consistently rejected the argument that such [out-of-court] commentary [on pending cases or grand jury investigations] constitute[s] a clear and present danger to the administration of justice."<sup>364</sup> One notable exception is when disclosure is made by a party to the litigation concerning information received in discovery. In *Seattle Times Co. v. Rhinehart*, the Court upheld a protective order prohibiting a newspaper from publishing information it obtained in

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<sup>359</sup> N.C. GEN. STAT. § 132-1.4A(d)(5) (2016).

<sup>360</sup> Alison Knezevich & Pamela Wood, *Baltimore County Withholds Body Camera Footage Withheld in Three Police Shootings*, BALTIMORE SUN (Apr. 28, 2017) <http://www.baltimoresun.com/news/maryland/crime/bs-md-co-body-cameras-20170426-story.html> [<https://perma.cc/28EP-CD4Q>] (reporting that a police spokeswoman stated "[r]elease [of PWBC data] could compromise the prosecution and the defendants' right to fair trials"); Wootson Jr., *supra* note 10 (stating that in the case of a teenager with schizoaffective disorder charged with resisting arrest, "the district attorney's office has told a judge that releasing the [PWBC] video would affect Jose Charles's case").

<sup>361</sup> 427 U.S. 539, 570 (1976) (holding that while free expression rights are not an absolute bar to imposing prior restraints, prohibiting reporting on judicial proceedings held in public does not overcome that barrier).

<sup>362</sup> *Id.* at 602-03.

<sup>363</sup> Stanley, *supra* note 354.

<sup>364</sup> Landmark Commc'ns., Inc. v. Virginia, 435 U.S. 829, 844-45 (1978) (citing Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941)).

discovery because the confidentiality protections were directly related to preserving the efficacy of the discovery process, and through it, the entire system of litigation.<sup>365</sup> While a municipality may be considered a participant in potential litigation, PWBC data are not obtained through discovery and so do not implicate the substantial government interest in preserving the efficacy of the discovery system. Since truthful reports on court proceedings published by third parties are protected by the First Amendment,<sup>366</sup> a suggestion that *potential* litigants could release truthful reports on incidents that may become the subject of later proceedings so long as they are already in the possession of the reporter is not a farfetched analytical leap. PWBC data in the possession of a municipality fits that bill, and so the mere fact that it may become a piece of evidence in later litigation is not immediately connected to judicial proceedings in a way recognized by the Court to implicate administration of justice concerns.

As restrictions on the public release of PWBC data are content-based prior restraints on publication, a proponent of censorship would need to advance a compelling government interest to which the particular restraint is narrowly tailored if a government speaker is protected under the First Amendment. Common interests advanced by police departments when withholding video from public record requests serve as a guide to possible arguments a proponent of the restraint might advance. However, a government interest in protecting individual privacy is narrow, and current laws like those of North Carolina are not well fitted to serve that interest. Additionally, concerns over tainted jury pools are just as effectively addressed through means other than prior restraint, and the integrity of judicial administration is rarely at issue before proceedings have even begun. While this is hardly a comprehensive analysis of the interests a proponent might advance to support a prior restraint on local government release of PWBC data, the rigors of strict scrutiny suggest such laws would need to be more narrowly tailored than they currently are to survive the gauntlet.

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<sup>365</sup> 467 U.S. 20, 37 (1984).

<sup>366</sup> See *Landmark Commc'ns.*, 435 U.S. at 837-38 (“The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry . . . for divulging or publishing truthful information regarding confidential proceedings . . . . The Commonwealth’s interests . . . are insufficient to justify the actual and potential encroachments on freedom of speech.” (citations omitted)); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.”).

## VI. A MUNICIPAL CLAIM THAT RESIDENTS HAVE A “RIGHT TO KNOW”

If government speech is not protected under the First Amendment, a municipality could still raise an alternative claim that state laws restricting the release of PWBC data violate the First Amendment rights of its residents on the basis of a limited “right to know.” Using a municipality’s residents’ right to know as the constitutional basis for a municipal challenge instead of its own protected right to speak sidesteps the *Hunter* doctrine’s ban of local powerlessness. Because *Hunter* has not been substantively incorporated into the First Amendment,<sup>367</sup> a state’s ability to control its political subdivision is constrained by the First Amendment. Further, if a state legislature’s exercise of control over a locality violates the individual residents’ First Amendment rights,<sup>368</sup> the Court would likely permit a municipality to challenge that control on constitutional grounds. While the public’s right to know government information is an extremely limited doctrine,<sup>369</sup> it is based in First Amendment interests.<sup>370</sup> Because of its First Amendment grounding, a municipal plaintiff could bring such a claim within the shadow doctrine of *Hunter*. Given this possibility, this Part examines whether state laws restricting PWBC data disclosures violate the extremely limited First Amendment right to know.

This Part first explores the limited scope of the right to know, concluding that while the public’s interest in gathering certain kinds of government information has been decisive in determining *some* First Amendment claims, it is extremely narrow. Second, it examines what remains of the right to know government information after *Los Angeles Police Department v. United Reported Publishing Corp.*<sup>371</sup> and concludes there is very little support for the right beyond protecting physical access to vital government facilities. Finally, it distinguishes the posture of *United Reporting* from this Comment’s

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<sup>367</sup> See *supra* Part I (discussing how *Gomillion* limited *Hunter* to the substantive provisions it addressed).

<sup>368</sup> Such a First Amendment claim would be similar to the Equal Protection challenge upheld in *Romer v. Evans* or the Fifteenth Amendment challenge upheld in *Gomillion v. Lightfoot*.

<sup>369</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (“This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.” (citing *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972))); *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 1019, 1029 (2007) (“It remains—and should remain—the case that there is no constitutional right of access to government information.”).

<sup>370</sup> See *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) (“Underlying the First Amendment right of access to criminal trials is the common understanding that a ‘major purpose of that Amendment was to protect the free discussion of governmental affairs’ . . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” (citation omitted)).

<sup>371</sup> 528 U.S. 32 (1999).

hypothetical First Amendment claim by a municipal plaintiff to conclude that a content-based restriction of government information burdens protected speech and must be backed by a justification sufficient to survive heightened judicial scrutiny.

#### A. *The Scope of the Right to Know*

The Court has not explicitly recognized a constitutional right to know based in the First Amendment.<sup>372</sup> Despite this, Justices have framed a vast number of First Amendment decisions in terms that suggest the public's interest in receiving information is a guiding force behind speech protections. In *Board of Education Island Trees Union Free School District No 26 v. Pico*, the Court acknowledged “the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.”<sup>373</sup> And in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court stated it “has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive.’”<sup>374</sup> Passages like these<sup>375</sup> prompted a horde of legal scholars to suggest a right to know is a part of the First Amendment freedom of speech.<sup>376</sup>

The strongest support for a right to know government information comes from cases ensuring the public's right of access to criminal trials. Because the government controls these proceedings and the Court has recognized that open access is necessary to ensure the public's “‘discussion of governmental affairs’ is an informed one,” a right to know this information has been based in the First Amendment.<sup>377</sup> In *Richmond Newspapers Inc. v. Virginia*, the Court stated broadly that “an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press

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<sup>372</sup> See YUDOF, *supra* note 113, at 249 (“The Supreme Court has not expressly recognized a broad individual right to gather information from an unwilling government entity.”).

<sup>373</sup> 457 U.S. 853, 867 (1982).

<sup>374</sup> 425 U.S. 748, 757 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

<sup>375</sup> See also *Red Lion Broad. Co. v. Fed. Comm'ns Comm'n*, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”); YUDOF, *supra* note 113, at 201 (stating the Court struck down a restriction of corporate speech in *Bellotti* “in part because of the impact the law's restraints would have on information flows to and among citizens”).

<sup>376</sup> See Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (asserting that the “right to know” falls within First Amendment protection of freedom of expression); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 140 n.40 (2006) (tracing the arguments of scholars who have written in support “of a constitutional right to know information about the government”).

<sup>377</sup> *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604-05 (1982) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (recognizing a presumptive public right of access to criminal trials).



protected by the First Amendment.”<sup>378</sup> And in *Globe Newspaper Co. v. Superior Court for Norfolk County*, the Court explicitly acknowledged that the First Amendment right of access recognizes “a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . [b]y offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”<sup>379</sup> Criminal trials are therefore open to the public under the First Amendment free speech guarantee.<sup>380</sup>

### B. *The Right to Know After United Reporting*

Despite the sweeping language of *Richmond Newspapers* and its progeny, the Court has not extended the public’s right of access beyond the context of criminal trials.<sup>381</sup> There is no right to know *all* governmental information based on the *Richmond Newspapers* rationale,<sup>382</sup> despite the fact that such a right “fits readily into the first amendment”<sup>383</sup> as a “natural complement to the right to speak.”<sup>384</sup> Attempts to expand the right of access into a general right to know met a firm wall in *Los Angeles Police Department v. United Reporting Publishing Corp.*<sup>385</sup> In *United Reporting*, the Court denied a facial

<sup>378</sup> 448 U.S. 555, 583 (1980) (Stevens, J., concurring).

<sup>379</sup> *Globe Newspaper*, 457 U.S. at 604 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>380</sup> See *Richmond Newspapers*, 448 U.S. at 580 (holding that “the right to attend criminal trials is implicit in the guarantees of the First Amendment, without the freedom to attend such trials . . . important aspects of freedom of speech and of the press could be eviscerated” (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972))); see also *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10 (1986) (“The considerations that led the Court to apply the First Amendment right of access to criminal trials in *Richmond Newspapers* and *Globe* and the selection of jurors in *Press-Enterprise I* lead us to conclude that the right of access applies to preliminary hearings as conducted in California.”).

<sup>381</sup> As Seth Kreimer notes, the Court “has rejected an unadorned First Amendment ‘right to gather information’ that supersedes other legal obligations.” Kreimer, *supra* note 179, at 387; see also Note, *The Rights of the Public and the Press to Gather Information*, *supra* note 196, at 1512 (noting the Court has not “recognized an affirmative constitutional obligation to disclose”); *id.* at 1525 (“[T]he public and press have no constitutional right to force information about even important public matters from an unwilling government or other source.”).

<sup>382</sup> The Court has determined that the Constitution does not guarantee access to government-held information which is accessible through FOIA requests. See *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws . . . ‘The Constitution itself is [not] a Freedom of Information Act.’” (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978))).

<sup>383</sup> Emerson, *supra* note 376, at 2.

<sup>384</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489 (1985); see also Emerson, *supra* note 376, at 14 (“[T]he constitutional right to know embraces the right of the public to obtain information from the government. There is a firm, indeed overwhelming, theoretical base for accepting this position.”).

<sup>385</sup> See 528 U.S. 32, 41 (1999) (denying a facial overbreadth challenge to a state statute restricting access to arrestee addresses collected by the police department to those seeking it for

overbreadth challenge to a statute restricting access to arrestee addresses collected by the police department. The Court held that because the law did not impose a threat of prosecution on speakers, the justification for overbreadth challenges—that protected speech would be chilled and standing never obtained to challenge the law—was not present and the doctrine should not be employed.<sup>386</sup> The Court explained that the statute “is not an abridgment of anyone’s right to engage in speech . . . but simply a law regulating access to information in the hands of the police department.”<sup>387</sup> In denying the overbreadth challenge, the Court stated “California could decide not to give out arrestee information *at all* without violating the First Amendment.”<sup>388</sup>

### C. United Reporting *Distinguished*

In distinguishing *United Reporting* from this Comment’s hypothetical right to know claim, it must first be noted that *United Reporting* was a refusal to apply the overbreadth doctrine. As the Court itself explained in the subsequent case of *Sorrell v. IMS Health*, the *United Reporting* Court “did not rule on the merits of any First Amendment claim.”<sup>389</sup> Instead, the overbreadth doctrine, a doctrine applied sparingly to begin with because it is “strong medicine,”<sup>390</sup> was not employed because the concern that protected speech would be chilled was not present.<sup>391</sup> Since no First Amendment claim was actually decided in *United Reporting*, the statement that all information could be withheld without implicating the First Amendment is dicta, albeit strong and well-supported dicta.<sup>392</sup> This leaves open the possibility to argue that a right to know government-held information may exist. Notably, such a right cannot be argued to be strong enough, after *United Reporting*, to sustain

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academic or political purposes because the law could be applied constitutionally to bar access by petitioner commercial business which sold such information).

<sup>386</sup> *See id.* at 38-41. The Court did note that overbreadth challenges had been decided by the Court in the absence of the threat of actual prosecution, but ultimately held this case did not present such a situation. *Id.* at 39.

<sup>387</sup> *Id.* at 40.

<sup>388</sup> *Id.* (emphasis added).

<sup>389</sup> 564 U.S. 552, 568 (2011).

<sup>390</sup> *United Reporting*, 528 U.S. at 39.

<sup>391</sup> *See id.* at 40 (“To the extent that respondent’s ‘facial challenge’ seeks to rely on the effect of the statute on parties not before the Court . . . its claim does not fit within the case law allowing courts to entertain facial challenges . . . ‘because there is [no] possibility that protected speech will be muted.’” (citations omitted)).

<sup>392</sup> Justice Breyer noted in dissent that while it may be dicta, it is dicta that was not contradicted in all of the Court’s prior case law. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting) (“[T]his Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it.”).

an overbreadth challenge because violating a right to know is not imposing a penalty on a speech activity itself; instead, it is merely barring access to the necessary ingredients for speech. A municipal claim that PWBC data restrictions burden the speech of the public that would seek to use that information for speech activities of their own does not face the hurdle of an overbreadth challenge, and is on that ground distinguished from *United Reporting*.<sup>393</sup> Such a claim would be an as-applied challenge because the municipality would argue speech is actually abridged by denying access to this information, not that protected speech *could* be abridged by the application of these restrictions.

While there may not as of yet be a right to know government information and such a right is unlikely to be recognized given the dicta of *United Reporting*, it is important to note that a majority of the Court recognized that denial of access to government information can violate the First Amendment. In *Sorrell*, the Court recognized that eight Justices in *United Reporting* endorsed the proposition that “restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and thereby transgress the First Amendment.”<sup>394</sup> In the more recent case of *Packingham v. North Carolina*, Justice Kennedy signaled the importance of preserving access to ideas and discourse under the First Amendment.<sup>395</sup> In striking down a law prohibiting sex offenders from accessing any website where they might interact with a child, the Court noted foreclosing access to social media would “prevent the user from engaging in the legitimate exercise of First Amendment rights,” going on to suggest constitutional harm might be imposed on convicted criminals if they are denied the ability to “receive legitimate benefits from these means for access to the world of ideas.”<sup>396</sup> If the right of access noted in *Sorrell*, and hinted at in *Packingham*, is a protected First Amendment interest, the government must justify the burden its restriction of PWBC data places on the speech activities

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<sup>393</sup> Just as the Court noted in *Sorrell* when, in examining *United Reporting*, it stated “the [*United Reporting*] Court assumed that the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others through a facial challenge.” *Id.* at 569. A municipal claim raising violations of residents’ rights under *Gomillion* is not an invocation of the rights of others akin to an overbreadth challenge, so it is not stymied by this bar.

<sup>394</sup> *Id.* The Court in *Sorrell* cited Justice Scalia’s concurrence, which stated “a restriction upon access that *allows* access to the press . . . , but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech.” *Id.* (Scalia, J., dissenting). The Court also cited Justice Ginsburg, who stated in concurrence that “the provision of [government] information is a kind of subsidy to people who wish to speak” on certain topics. *Id.* (Ginsburg, J., dissenting).

<sup>395</sup> 137 S. Ct. 1730, 1737 (2017) (“[T]he statute here enacts a prohibition unprecedented in the scope of the First Amendment speech it burdens.”).

<sup>396</sup> *Id.*

of those municipal residents who wish to receive it. Such a constitutional claim would have to be based on the burden restricted access to government-held information places on protected First Amendment speech activities in order to avoid running afoul of precedent which states there is no “right of access to all sources of information within government control.”<sup>397</sup> This narrow approach of claiming a burden upon First Amendment activity would be extremely limited, but perhaps possible.

Justice Stevens, dissenting in *United Reporting*, proposed just such a burden of proof for government restrictions in that case on the basis that “the State’s discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes.”<sup>398</sup> This suggests the purpose of denying access to government information matters and an insufficient justification may not sustain an access restriction. While this counsels only the application of a balancing of interests test rather than an absolute right to know government information, when the access restriction is content or speaker-based heightened judicial scrutiny will require something more than a rational basis to justify the law.<sup>399</sup> The burden placed on free expression by restricting access to PWBC data requires constitutional review under heightened scrutiny when the restriction discriminates based on topic or speaker. State laws that specifically single out the release of PWBC data for restriction seem to be content-based as they do not restrict the release of other types of video that government actors generate. If so, heightened scrutiny should apply to these laws when challenged by a municipality on behalf of its residents, and the analysis would likely feature arguments similar to those presented in Part V.

## CONCLUSION

Police-worn body camera video is a powerful tool. When disclosed to the public by local authorities, it can create transparency in highly charged situations when it is much needed, it can provide the raw data necessary for the informed exercise of self-government, and it can demonstrate an understanding that partnership between police departments and the community is essential. State laws that prevent local governments from granting these benefits to their residents could be challenged by those local

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<sup>397</sup> *Houchins v. KQED, Inc.* 438 U.S. 1, 9 (1978).

<sup>398</sup> *Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32, 46 (1999); *see also id.* at 43 (Ginsburg, J., concurring) (“[O]nce a State decides to make [information] available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed.”).

<sup>399</sup> *See Sorrell*, 564 U.S. at 569-70 (“Vermont’s law imposes a content- and speaker-based burden on respondents’ own speech. That consideration provides a separate basis for distinguishing *United Reporting* and requires heightened judicial scrutiny.”).

governments if disclosure of PWBC data is recognized as a protected First Amendment speech activity. Should *Hunter* be recognized by the Court as a doctrine of substantive constitutional law, limited to the provisions it addressed, and not extending to the First Amendment as *Ysursa* may or may not indicate, the local governments could bring a First Amendment challenge against state laws preventing the release of PWBC data without a court order. Such a prior restraint based on the content of government speech would likely not satisfy strict scrutiny, though such an analysis would be heavily fact-intensive and depend largely on how the law was tailored to interests of individual privacy and the need to provide for efficient policing. While a “right to know” claim offers slim alternative grounds if government speech is not protected under the First Amendment, the dicta of *United Reporting* presents a stiff obstacle to a municipal claim on behalf of residents in the vein of *Gomillion*. This Comment has offered one possible constitutional foundation for securing the transparency benefits body camera programs were meant to secure. Public disclosure is essential for those programs to live up to their promise of improving police forces and their interactions with society, whether through a protected government speaker or a right to know claim.