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The Case for Local Constitutional Enforcement

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ABSTRACT

This Article calls for the overruling of the central rule in Hunter v. City of Pittsburgh *(1907) on* Erie *grounds.* Hunter *announced as a matter of federal law that local governments are powerless instrumentalities of state governments. Legal scholars have criticized* Hunter *for exacerbating the doctrinal and practical problems that plague local government law. This Article goes further by challenging* Hunter *directly. It argues first that* Erie v. Tompkins *(1938), properly read, effectively overruled the central rule in* Hunter. *Second, it argues that we should not mourn the loss of that rule because its analytic support structures are historically, doctrinally, and logically defective. The Article then narrows its focus to a doctrine derived from* Hunter, *the federal rule barring localities from invoking the Constitution against their own states (the "*Hunter *doctrine"). It argues that after* Erie, *the* Hunter *doctrine is best understood as a doctrine addressing capacity to sue; that federal courts should defer to state law in deciding whether a particular locality has the capacity to bring a constitutional challenge against its own state rather than superimposing a national rule; and that courts and scholars should welcome localities into constitutional debates because their full participation is pro-local and pro-democratic, and would raise the overall competence of constitutional debate and local public advocacy. Finally, looking to the future, the Article calls for scholars to address which of the Constitution's provisions should apply to localities qua localities; to consider the circumstances under which the Court should permit localities to pursue representative constitutional claims on behalf of their constituents; and to develop an alternative, post-*Hunter *theoretical framework for local government law.*

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INTRODUCTION

Common legal wisdom has it that the Constitution does not "see" local public entities, that they are constitutionally invisible. Or, to the extent the Constitution "sees" localities,[1] it views them as mere instrumentalities of

[1] I use the terms "local public entities" and "localities" to include public entities whose leadership is elected or appointed by locally elected officials, as distinct from entities whose leadership is appointed by state officials. My working definition includes cities, counties, towns, and special districts such as school districts, transit districts, water districts, and the like. If not categorically prohibited from doing so, every type of local government could in theory state the essential elements of any number of constitutional claims on its own behalf or on behalf of its constituents.

their state governments rather than legally separate entities.[2] As the United States Supreme Court put it in *Hunter v. City of Pittsburgh*, in 1907: "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."[3]

Hunter's general rule that localities are powerless instrumentalities of state governments quickly gave rise to a subsidiary rule referred to in this Article as the "*Hunter* doctrine": Because localities are mere instrumentalities of state governments, the argument goes, they cannot invoke the Constitution against their own states.[4]

Over the decades since *Hunter* was decided, the Court has seemed deeply ambivalent about that case and the *Hunter* doctrine. The Court has repeatedly departed sub silentio from *Hunter*'s rule of local powerlessness by recognizing and treating localities as legally—and sometimes even constitutionally—independent of their states.[5] Even more astonishingly, the Court

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[2] *See* David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2232 (2006); *see also* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 347–48 (1993). This is the dominant federal doctrine. There also exists a so-called "shadow doctrine" in which, without explanation or mention of *Hunter*, the Court treats localities as constitutionally-cognizable entities. *See infra* note 5.

[3] Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

[4] *See* City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923). I say "invoke the Constitution" rather than "pursue constitutional claims" because cases in the *Hunter* line also bar localities from invoking the Constitution defensively. *See* Michigan *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905) (a precursor to *Hunter*). Note that some jurisdictions read *Hunter* to bar localities from invoking the Constitution not only against their states but against any public defendant. *See, e.g.*, Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1362 (9th Cir. 1998); Hous. Auth. of the Kaw Tribe of Indians of Okla. v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir. 1991). Others, however, appear to read *Hunter* as allowing localities to bring constitutional claims against public entities other than their own states. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 620 (1978) (permitting the City of Philadelphia to sue the State of New Jersey). One U.S. Court of Appeals has suggested that *Hunter* bars localities from pursuing not only federal constitutional claims but also federal statutory claims against their states. *See* Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1242 (9th Cir. 1996).

[5] Scholars refer to these cases as the "shadow doctrine" of local government law. *See, e.g.*, Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002) (explaining that under the shadow doctrine, local entities "are more than convenient jurisdictional units, but actually represent independent and robust political communities, worthy of constitutional recognition. Local political units are not mere instrumentalities of the state, they are autonomous actors with broad powers to set local policy"). The 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. *See* Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 258 (1985) (holding that states cannot commandeer federal funds granted to localities); Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53 (1982) (holding that local ordinances are not "state action" for purposes of the Sherman Act); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 n.54 (1978) (holding that the Eleventh Amendment does not bar municipal liability in Eleventh Amendment cases as "to local government units which are not considered part of the State for Eleventh Amendment purposes"); Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that for federal constitutional purposes the relevant boundary lines for

has not applied the *Hunter* doctrine to bar a local constitutional challenge since 1933. Instead, the Court has reached the merits of several such cases with barely a mention of the *Hunter* doctrine.[6]

Notwithstanding the Court's apparently waning interest in both *Hunter* and the *Hunter* doctrine, both are worth examining for two reasons. First, the Court continues to invoke *Hunter*'s general rule of local powerlessness when it comes in handy, often in cases of great consequence.[7] Second, the *Hunter* doctrine is alive and well in the lower federal and state courts, where it continues to bar and chill local constitutional enforcement.[8]

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desegregation are local school districts and not states as a whole); Avery v. Midland Cnty., Tex., 390 U.S. 474, 480 (1968) (holding that local governments must adhere to the "one person, one vote" principle); Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883) (ruling that a judgment against a locality cannot be collected from the state).

[6] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 131 (2004) (considering on the merits various municipalities' Supremacy Clause challenges to a state statute); Romer v. Evans, 517 U.S. 620, 626 (1996) (considering on the merits various municipalities' federal Equal Protection Clause challenges to state constitutional provision); Papasan v. Allain, 478 U.S. 265, 275 (1986) (remanding school officials' Equal Protection Clause challenges to state for consideration on the merits); *Lawrence Cnty.*, 469 U.S. at 258 (considering on the merits a Supremacy Clause challenge to state action, with *Hunter* cited in dissent); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982) (considering on the merits a school district's federal Equal Protection Clause challenge to a state statute); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 5 n.2 (1973) (accepting school district's intervention in plaintiff's Equal Protection Clause challenge to state's school finance scheme); Bd. of Educ. v. Allen, 392 U.S. 236, 240 (1968) (considering a school board's challenge to state mandates on expenditures under the First Amendment's Establishment Clause).

[7] *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363–64 (2009) (applying *Williams*, a case in the *Hunter* line, to dispose of First Amendment challenge to "right to work" law as applied to localities); *see infra* text accompanying note 86. Although the Court regularly invokes *Hunter*'s general rule of local powerlessness, it is not consistent in how it interprets that rule. *Compare* Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960) (interpreting the *Hunter* doctrine narrowly as only barring political boundary disputes brought pursuant to the constitutional provisions at issue in that case), *and* Baker v. Carr, 369 U.S. 186, 299 (1962) (taking the same view as the *Gomillion* Court), *with* Reynolds v. Sims, 377 U.S. 533, 575 (1964) (returning to a broader articulation and application of the *Hunter* doctrine), Sailors v. Bd. of Educ., 387 U.S. 105, 107–08 (1967) (picking up on *Reynolds*' broad articulation of the *Hunter* doctrine and applying it to a non-boundary election dispute), *and* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) (reading *Hunter* as a broad grant of authority to states vis-à-vis localities). In recent decades, the Court articulated a broad interpretation of *Hunter*. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991) (interpreting *Hunter* as a broadly applicable federal doctrine of local powerlessness). Yet the Court has also entirely ignored *Hunter* and looked to state law in order to determine the nature of localities and their relationships to the States. *See* McMillan v. Monroe Cnty., Ala., 520 U.S. 781, 795 (1997) (looking to state law to determine the nature and powers of a county sheriff); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278–81 (1977) (looking to state law to determine the nature and powers of a local board of education). I plan to explore the Court's confusion over the natures and roles of localities in a future article entitled *The Supreme Court and Local Governments: A Legal Ontology.*

[8] As I explain in Part III(A) *infra*, lower federal and state courts have trouble fitting the *Hunter* doctrine into a modern legal category. This is unsurprising, since the *Hunter* doctrine was founded on *Hunter*'s general federal common law rule of local powerlessness. That doctrine simply was not designed to fit into other doctrines of federal constitutional law. Courts most often categorize the *Hunter* doctrine as a doctrine addressing substantive constitutional law or standing to sue. However, since the *Hunter* doctrine's primary analytical focus is on

As legal scholars have long noted, *Hunter* dominates the intersection of constitutional theory and local government law.[9] *Hunter* is unpopular with scholars, who have consistently described the doctrine of local governmental powerlessness as analytically muddled,[10] inconsistently applied, and guilty of posing an unwelcome barrier to efforts at increasing local governmental power and efficacy.[11] But rather than calling for *Hunter* to be overruled, scholars have endeavored to make sense of the case in the larger scheme of constitutional and local government law.[12] They have bemoaned *Hunter*'s doctrinal reach and ill effects, but grudgingly have accepted its theoretical dominance.

This Article attempts to add to the scholarly debate over *Hunter* and the *Hunter* doctrine on both doctrinal and policy fronts. On the doctrinal front, the Article offers two arguments. First, it argues that *Hunter*'s federal rule of local governmental powerlessness vis-à-vis the states was effectively overruled in 1938 by *Erie v. Tomkins*.[13] Second, it argues that we should not mourn the loss of *Hunter* because the rule of local powerlessness has always stood on shaky analytical ground. On the policy front, the Article argues that there are good reasons to support local constitutional enforcement; such enforcement has the potential to promote local power, enhance the democratic legitimacy of constitutional litigation, and shore up local constitutional competency. This Article also argues that abandoning both *Hunter* and the *Hunter* doctrine may help scholars begin to develop a theory of federalism that incorporates local public entities.

The Court decided *Hunter* in 1907. In that case, citizens of Allegheny, Pennsylvania, brought impairment of contracts and due process challenges to the state's plan to merge their city with Pittsburgh.[14] The Court could have

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what localities "are" and can therefore "do," it is more accurately categorized under the rubric of capacity to sue.

[9] *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 n.9 (1980); *see also* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1337–38 (2009).

[10] *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 84 (1986); *see also* Schragger, *supra* note 5, at 395–96, 407–09.

[11] *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 562–78 (1999); Frug, *supra* note 9, at 1121; Schragger, *supra* note 5, at 395–96.

[12] *See, e.g.*, Barron, *supra* note 11, at 562–68 (arguing that *Hunter*'s vision of localities is incomplete because it ignores the social conception of local governments); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85 (1990) (contending that *Hunter*'s top-down view of localities is only the partial story); 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, 102 (2002) (arguing that the principles in *Hunter* should be applied to some but not all constitutional provisions); Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. LAW. 257, 266 (1999) (arguing that *Romer* established an exception to *Hunter*).

[13] 304 U.S. 64 (1938).

[14] Hunter v. City of Pittsburgh, 207 U.S. 161, 174, 176–78 (1907).

dispatched plaintiffs' claims on the merits; instead, it used the occasion to announce a rule that local governments are mere instrumentalities of state governments, and that a state's decision to adjust local political boundaries did not raise constitutional concerns.[15] Critically, the Court went on to issue an open invitation to all federal courts to invoke the federal rule of local powerlessness "wherever applicable."[16] *Hunter* was soon followed by the *Hunter* doctrine, which bars localities from invoking the Constitution against their own states.

In 1938, the Court handed down *Erie v. Tompkins*, putting an end to "federal general common law," that is, federal common law rules that are not tethered to some provision of the Constitution or other body of positive federal law.[17] The Court has never revisited the central rule of *Hunter* in light of *Erie*. However, *Hunter*'s freestanding rule that local public entities are powerless vis-à-vis their state governments is not anchored by any constitutional provision or federal statute. That rule therefore appears to be precisely the sort of "federal general common law" rule that *Erie* abolished.

Assuming that *Erie* did overrule *Hunter*, courts and scholars should not mourn *Hunter*'s loss, because that case is laden with doctrinal and policy problems. The logic of *Hunter* is built on three broad assumptions that upon close examination are largely incorrect. *Hunter*'s first faulty assumption is that, for purposes of the legal relationship between localities and their states, "state government" and the "sovereign state" are conceptually interchangeable.[18] This is incorrect as a matter of state constitutional law. Thirty-eight out of fifty state constitutions explicitly state that the People—not the state government—are the designated "sovereign."[19] Accordingly, local constitutional enforcement is accurately viewed not as an attack on the sovereign state, but as an act in defense of the sovereign state.[20]

Hunter's second faulty assumption is that, as a categorical matter, state governments originally created and are free to abolish local governments, even over the objection of the People. This sweeping presumption is incorrect as a matter of state history and state constitutional law. Localities predated states, and the original state constitutions presupposed their existence just as the U.S. Constitution presupposes the existence of states.[21] State governments are not free to abolish all local governments at will.

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[15] *Id.* at 177–78.

[16] *Id.* at 178.

[17] Erie v. Tompkins, 304 U.S. 64, 78 (1938).

[18] This Article's claims about sovereignty are grounded entirely in state constitutional law and limited to the context of local government law. The Article does not address whether state governments are or should be treated as sovereign for purposes of federal law.

[19] *See* Kathleen S. Morris, *Table of State Constitutions*, http://www.harvardcrcl.org/morris-table-of-state-constitutions/.

[20] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435–38 (1987).

[21] *See* James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999, 1005 (1976) ("The implication that local entities derive their powers from the legislature did not square well with

Hunter's third faulty assumption, which overlaps with the second, is that localities operate solely as instrumentalities of state governments. By that logic, a local constitutional challenge to state governmental action is an absurdity, akin to a creature attacking itself. However, as scholars have long pointed out, localities serve more than one master. While they act at times as agents of state governments, at other times they act as agents of their constituents.[22] They are necessarily acting in the latter capacity when they challenge state governmental acts.[23]

Assuming that the Court overruled the central rule in *Hunter*, we would still be left with the policy question of whether, when, and why courts and scholars should favor or oppose a partial or total ban on local constitutional enforcement. For purposes of this policy discussion, it is useful to think of local constitutional challenges as falling into one of two categories: Claims brought to remedy harms sustained by the locality itself (termed City Cases);[24] and claims brought to remedy harms sustained by local constituents (termed Constituent Cases).[25] Absent the *Hunter* doctrine, one could in theory imagine a locality invoking any number of constitutional provisions to protect its commercial and governmental interests, including the Supremacy Clause,[26] the Commerce Clause,[27] the prohibition of the impairment of contracts, the Due Process Clause, the Takings Clause, the guarantee of a trial by jury, and the Establishment Clause.[28] Additionally, one might imagine a locality invoking any number of individual rights provisions (equal protec-

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historical facts."); *see also* Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 448 (1900); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 48 (1999) (arguing that McQuillin's statement that cities were created by states "ignores well-established, historical facts, easily ascertainable" (citing EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 679–81 (2d ed. 1928))).

[22] *See* Briffault, *supra* note 12, at 85 (noting that localities act in a dual agency capacity); *see also* Barron, *supra* note 2, at 2243 (analogizing cities' interest in protecting citizens to states' roles in *parens patriae* cases).

[23] I plan to explore these themes further in a future article entitled *Agency Theory and the Local Governments' Constitutions*.

[24] *See* Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, Why the Local Matters: Federalism, Localism, and Public Interest Advocacy, 51, 56–57 (2010), http://www.law.yale.edu/why_the_local_matters_final_122109.pdf (last visited Dec. 1, 2011).

[25] *See id.* This distinction echoes the proprietary actor versus governmental actor distinction that runs through the law. *See, e.g.*, Puget Sound Power & Light Co. v. City of Seattle, 291 U.S. 619, 629–31 (1934). While one can easily imagine harms to a locality reaching its constituents, and vice-versa, the distinction between "City Cases" and "Constituent Cases" is a useful analytical tool because it helps us to grasp quickly the potentially expansive range of cases a locality might pursue absent the *Hunter* doctrine.

[26] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 131 (2004) (permitting a municipality to pursue a claim under the Supremacy Clause).

[27] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 620 (1978) (permitting a city to pursue a constitutional claim against a neighboring state).

[28] *See* Bd. of Educ. v. Allen, 392 U.S. 236, 240 (1968) (considering a school board's challenge to state mandates on expenditures under the Establishment Clause of the First Amendment).

tion, due process, and the like) on behalf of its constituents.[29] The relevant policy question is whether the law should permit localities to pursue such claims.

The weightiest policy argument against local constitutional enforcement is that such cases undermine local autonomy.[30] That is an important observation, and this Article does not dispute it. The Article argues, however, that the benefits of local constitutional enforcement could potentially outweigh concerns about autonomy. Such benefits might include increases in local power,[31] the democratic legitimacy of constitutional litigation,[32] and local constitutional competency.[33] Further benefits might include doctrinal and theoretical clarity regarding the role of localities in our federalist system.[34]

While overruling precedent is never to be done lightly, there are good reasons for doing so in the case of *Hunter*.[35] The doctrine of local powerlessness has little explanatory power yet prevents courts and scholars from developing a coherent, nuanced, and useful theoretical framework for local government law.[36] Additionally, *Hunter*'s derivative ban on local constitutional challenges has eclipsed two additional areas of potential scholarly inquiry, namely, which constitutional provisions, if any, should apply to localities *qua* localities and when localities should be permitted to pursue constitutional claims on behalf of their constituents. These questions are beyond the scope of this Article, but point toward promising areas for future scholarship.

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[29] I plan to explore this distinction and other standing issues related to local government in a future article entitled *Local Government Standing*.

[30] *See* Barron, *supra* note 2, at 2223; Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. & POL. 147, 152–53 (2005).

[31] Gerald Frug has argued more generally that our nation should increase power to local governments because doing so would strengthen their functioning as governments and units of representative democracy. *See* FRUG, *supra* note 21, at 60–61.

[32] We might, for example, wonder whether the law should allow non-profit organizations and private corporations, but not public corporations, access to the Constitution. I plan to explore this question in more depth in a future article entitled *Private Corporations, Public Corporations, and Constitutional Rights*.

[33] *See* FRUG, *supra* note 21, at 6, 19 (referencing the conventional view that local governments are inherently selfish, short-sighted, parochial, and ineffectual).

[34] *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 13 (2010) (calling for scholars to develop a theory of federalism that fully accounts for local public entities).

[35] In modern times, the Supreme Court has taken to deciding some cases as if *Hunter* did not exist. These cases have formed a body of case law that scholars refer to as the "shadow" doctrine of local government. *See* Schragger, *supra* note 5, at 395–96, 407–09; *see also* Romer v. Evans, 517 U.S. 620, 626 (1996); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982).

[36] Scholars have long noted the absence of a workable theoretical framework for local government law. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 356 (1990) ("The different kinds of local governments, with their diverse needs and often conflicting concerns, cast real doubt on the utility of 'local government' as a category for advancing legal analysis."); *see also* Gerken, *supra* note 34, at 25 ("[W]e lack a set of common terms—let alone a full-blown theory—for the sites that fall just below states and cities on the governance flow chart."); Schragger, *supra* note 5, at 398 (describing localities as politically and doctrinally "untethered").

This Article proceeds in six parts. Part I reviews the legal scholarship addressing the *Hunter* doctrine. Part II provides a comprehensive account of the *Hunter* doctrine's rise and fall in the Supreme Court. Part III discusses *Erie*'s impact on *Hunter*. Part IV exposes the defects in *Hunter*'s analytic support structures. Part V joins the normative debate over local constitutional enforcement. Part VI calls for the development of an alternative, post-*Hunter* theoretical framework for local government law.

I. THE DEBATE OVER LOCAL CONSTITUTIONAL ENFORCEMENT

A. *Scholars on* Hunter v. City of Pittsburgh

Legal scholars explain *Hunter* as the outcome of a pitched philosophical battle between a handful of nineteenth-century constitutional theorists, chief among them John Dillon and Thomas Cooley.[37] Dillon believed that the law should treat localities as state governmental subdivisions with no inherent political or legal authority.[38] Cooley believed the law should recognize localities as having retained some measure of inherent authority when they relinquished their sovereignty to form states.[39] In the end, Dillon won, and *Hunter* and its derivatives reflect his viewpoint.

Hunter's doctrine of local powerlessness is not popular with legal scholars, but none have challenged it directly. Instead, the existing *Hunter* scholarship points out the case's ill effects and argues that the Court should limit its reach. For example, Gerald Frug and David Barron have argued that doctrines of local powerlessness present barriers to public freedom.[40] Barron and others, including Richard Briffault, Michael Lawrence, and Lawrence Rosenthal, have written that *Hunter* is overreaching and inadequately captures the real world activities and powers of local governments.[41] Joan Williams and Richard Schragger have gone further, hinting at the deeper doctrinal problems this Article addresses. Williams has described the legal status of cities as "a startlingly pure example of politics as black-letter

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[37] *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 36 (2008); *see also* HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 2–3 (1983); Barron, *supra* note 11, at 496–509; Williams, *supra* note 10, at 88–89.

[38] Dillon's analysis relied heavily on the earlier writings of Chief Justice John Marshall. *See* Barron, *supra* note 11, at 495–509.

[39] *Id.* at 509–22.

[40] *See id.* at 497–505; Frug, *supra* note 9, at 1065. In *The City as a Legal Concept*, Frug wrote that judicially-imposed limits on local power had come to seem so "natural and uncontroversial" that scholars had ceased "questioning them or trying to think of ways to change them." *Id.*

[41] *See* Richard Briffault, *"What About the 'Ism?'" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1336–49 (1994) (comparing the relationship of states to the federal government with that of localities to states); Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 554–56 (1987) (discussing federalism arguments in the context of localities); Rosenthal, *supra* note 12, at 260–61; Williams, *supra* note 10, at 137–38 (arguing that theories of city status and Burger Court jurisprudence acted as forum-shifting arguments to rein in municipal power).

law,"[42] and Schragger has accused the Court of leaving local government law not only politically but also doctrinally "untethered."[43]

B. Scholars on the Hunter *Doctrine*

In recent years, local constitutional challenges to state action—in particular San Francisco's challenge to California's marriage laws[44]—triggered a scholarly debate over whether and when courts should hear constitutional disputes between localities and their states. The three most prominent voices in that debate have been David Barron, Richard Schragger, and Heather Gerken.[45] Generally speaking, Barron and Schragger favor limits on local constitutional enforcement because it undermines local autonomy. By contrast, Gerken conceives of local constitutional challenges as healthy forms of "decisional dissent" from the state majority's views.[46]

In *Why (and When) Cities Have a Stake in Enforcing the Constitution*, Barron argues that the law should only permit localities to pursue constitutional cases aimed at expanding the scope of local policymaking discretion.[47] He does not believe cities should be permitted to bring other types of constitutional claims because in those cases:

> [Localities] are attempting to take discretion away from other cities by replacing the constraints of state statutes with the constraints of the state constitution or Federal Constitution. Cities have no sufficient interest in pressing these constitutional claims—whether through refusals to enforce state statutes or suits seeking to invalidate them—and thus generally should be barred from doing so.[48]

For Barron, a locality that prevails on a local constitutional claim—however legitimate—ends up forcing state and federal constitutional norms

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[42] Williams, *supra* note 10, at 86.

[43] Schragger, *supra* note 5, at 396.

[44] *See, e.g.*, In re Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Marriage Cases, 183 P.3d 384 (Cal. 2008).

[45] Barron, *supra* note 2, at 2220; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Schragger, *supra* note 5.

[46] Barron, *supra* note 2, at 2222; Gerken, *supra* note 45, at 1749; Schragger, *supra* note 5, at 396.

[47] Barron, *supra* note 2, at 2221.

[48] *Id.* at 2222; *see also* Claire McCusker, Comment, *The Federalism Challenges of Impact Litigation by State and Local Government Actors*, 118 YALE L.J. 1557, 1566 (2009) (arguing that localities should not pursue constitutional litigation in part because in so doing they undermine "the self-governance theory of federalism"); *cf.* Samuel P. Tepperman-Gelfant, Note, *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 HARV. C.R.-C.L. L. REV. 219, 261–62 (2006) (arguing that local governments should have leeway in some cases to sue to protect individual constitutional rights). Michael Lawrence has made the opposite argument, namely, that cities should be able to bring constitutional claims *except* those that challenge their state's internal political organization. *See* Lawrence, *supra* note 12, at 115.

onto neighboring localities. Thus, the overall effect of such cases is to undermine rather than bolster local autonomy.

In *Cities as Constitutional Actors: The Case of Same-Sex Marriage*,[49] Schragger stakes out an even bolder localist position in the context of the marriage cases. Schragger proposes that, rather than allowing localities to enforce constitutional norms, the Court should permit them to make their own local marriage eligibility determinations, thus granting them a measure of "constitutional home rule."[50] He favors a "devolutionary constitutional jurisprudence" in which each locality develops constitutional norms in keeping with its own values.[51] Schragger, like Barron, dislikes that local constitutional challenges seek to supplant local discretion with state and federal constitutional norms.

Heather Gerken approaches the question of local challenges to state action from a democratic theory rather than a local government law perspective in *Dissenting by Deciding*.[52] She begins by articulating precisely *why* local constitutional challenges trigger cognitive dissonance, namely, that a local constitutional challenge is a form of dissent. Because the classic form of dissent in our democracy is speaking truth *to* power (*i.e.*, standing outside and shaking one's fist at city hall), "we have trouble envisioning dissent taking the form of [government] action,"[53] that is, "speak[ing] truth *with* power."[54] She goes on to explain that acts of "decisional dissent," such as local constitutional challenges to state governmental action, are a predictable side-effect of a political system that disaggregates decision-making: "Where an institution [such as a state] is disaggregated, the power of the polity—by which I mean the political community whose governing systems include that institution—is parceled out to a number of smaller decisionmaking bodies."[55]

Under these circumstances, Gerken argues, courthouse duels between and among different levels of decision-making bodies should not surprise or alarm us. Indeed, we may come to value decisional dissent for the same reasons we value conventional dissent: "[I]t can contribute to the marketplace of ideas, engages electoral minorities in the project of self-governance, and facilitates self-expression."[56] She posits that if "[i]n the long run . . . disagreement is consistently embraced as a public act rather than shunted off to the private realm, it may help us think of dissent as an everyday act of citizenship rather than as an act of disaffiliation."[57]

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[49] Schragger, *supra* note 30.

[50] *Id.* at 167–77. Schragger also argues that the Court's ruling in *Romer v. Evans*, 517 U.S. 620 (1996), may require this result. *See also* Rosenthal, *supra* note 12.

[51] Schragger, *supra* note 30, at 152.

[52] Gerken, *supra* note 45, at 1748.

[53] *Id.* at 1747.

[54] *Id.* at 1750 (emphasis added).

[55] *Id.* at 1755.

[56] *Id.* at 1749 (citations omitted).

[57] *Id.* at 1779.

II. THE *HUNTER* DOCTRINE IN THE SUPREME COURT

Doctrines of local powerlessness have been with us for so long, and are so deeply embedded in local government theory, that they have come to seem "natural."[58] It is perhaps equally natural to presume that the Supreme Court embraced the *Hunter* doctrine at the first opportunity and has applied it with fervor ever since. In fact, that is not the case. Instead, if one were to graph the *Hunter* doctrine's trajectory in the Court, it would resemble an arch. The Court was slow to embrace the *Hunter* doctrine; it discussed and developed that doctrine for 88 years before committing to it in 1923. It only applied that doctrine with full force for ten years, from 1923 to 1933. Then, after 1933, the Court dropped the *Hunter* doctrine sub silentio. Nevertheless, that doctrine is well worth examining because it is alive and well in the lower federal and state courts.

A. *Local Constitutional Challenges Before* Hunter v. City of Pittsburgh *(1907)*

The Supreme Court first addressed whether a locality could invoke the Constitution against its own state in 1845, in *Maryland v. Baltimore & Ohio Railroad Co.*[59] Baltimore & Ohio argued that Washington County, Maryland could not enforce a state statute requiring railroad companies to pay $1 million to benefit the county because the legislature had repealed the statute. The county responded that the statute was a "contract" that the legislature could not repeal without violating the Constitution's prohibition against the impairment of contracts.[60] The Court rejected that argument on the merits.[61] Yet, notably, it also took the time to articulate (in dicta) a nascent theory of local governmental identity:

> [The county commissioners] are a corporate body, it is true, and the members who compose it are chosen by the people of the county. . . . [But] however chosen, their powers and duties depend upon the will of the legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of the state. . . . The several counties are nothing more than certain portions of territory into which the state is divided for the more con-

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[58] *See generally* Frug, *supra* note 9.

[59] 44 U.S. 534 (1845). The Court laid the groundwork for the *Hunter* line of cases in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), in which it announced what would become a critical legal distinction between private and public corporations and ruled that the former could invoke the Contracts Clause. *See* Barron, *supra* note 11, at 497–505.

[60] U.S. CONST. art. I, § 10, cl. 1; *Balt. & Ohio R.R. Co.*, 44 U.S. at 546–48, 553.

[61] The Court ruled against Washington County on the ground that the 1836 statute was not a "contract" for purposes of federal constitutional law. *See Balt. & Ohio R.R. Co.*, 44 U.S. at 553.

> venient exercise of the powers of government. They form together one political body in which the sovereignty resides.[62]

This passage was the Court's first articulation of what, over time, would become the dominant federal view of the relationship between state and local government: (1) A state's sovereignty "resides" in its "political body," or state government; (2) the "pleasure of the state" is expressed via "the will of the legislature"; and (3) local governments are nothing more than agents of state governments.

Five years later, in 1850, the Court decided *Town of East Hartford v. Hartford Bridge Co.*[63] In that case, East Hartford argued (as had Washington County before it) that the Connecticut legislature could not repeal a state statutory right without violating the Constitution's Contracts Clause. Again, the Court reached, and denied relief on, the merits, and similarly noted, in dicta, that as a subdivision of the state the town was "under the control of [state] legislation."[64]

Twenty-six years after *Town of East Hartford*, the Court handed down *Board of Commissioners of Tippecanoe County v. Lucas.*[65] In that case, the county argued that the Indiana legislature could not redistribute local tax dollars without violating the Constitution's Contracts[66] and Takings Clauses.[67] Although the *Tippecanoe County* Court addressed and rejected the County's claims on the merits,[68] the opinion was noteworthy for two reasons.

First, it revealed the Court's unspoken analytical conflict over how to address local constitutional challenges. The Court opined, on the one hand, that municipalities are by "nature" "mere instrumentalities of the State, for the convenient administration of government" and thus cannot invoke the Constitution against their States.[69] But, on the other hand, it stated that county property other than tax revenue was "protected by all the guards against legislative interference possessed by individuals and private corporations for their property," suggesting that, in some circumstances, localities *can* invoke the Constitution against their states.[70]

Second, the *Tippecanoe County* Court repeated earlier language from *Maryland v. Baltimore & Ohio Railroad Co.*, in which it treated the concepts of "State" and "legislature" as interchangeable: "Municipal corporations

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[62] *Id.* at 550.

[63] 51 U.S. 511 (1850).

[64] *Id.* at 536 (citing *Trs. of Dartmouth Coll.*, 17 U.S. at 660–61).

[65] 93 U.S. 108 (1876).

[66] U.S. CONST. art. I, § 10, cl. 1; *see also Tippecanoe Cnty.*, 93 U.S. at 114.

[67] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[68] The county argued, unsuccessfully, that (1) the County's charter constituted a "contract" that the state legislature could not impair; and (2) the County's general fund constituted "property" that the state could not take. *See Tippecanoe Cnty.*, 93 U.S. at 112.

[69] *Id.* at 114.

[70] *Id.* at 115.

are mere instrumentalities of the *State*, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn, at the pleasure of the *legislature*."[71] The Court thus assumed that if the sovereign state has the power to do a particular thing, the state government/legislature has that power. Though incorrect as a matter of state constitutional law, this assumption persists throughout the *Hunter* line of cases.

In the period between 1889 and 1900, the Court issued a series of opinions that zigzagged between addressing state/local constitutional conflicts on the merits without discussing the status of local governments and slowly but surely moving towards a comprehensive federal doctrine of local governmental powerlessness.[72] But beginning in 1905, the Court solidified the official federal doctrine of local government powerlessness and constitutional invisibility. In *City of Worcester v. Worcester Consolidated Street Railway Co.*, various Massachusetts localities challenged a state statute that released a private railroad company from contractual obligations to localities.[73] Unlike earlier cases in which the Court reached the merits of the localities' federal constitutional claims, in *Worcester* the Court assumed the existence of an otherwise meritorious constitutional claim yet denied the cities relief.[74] Similarly, in *Michigan* ex rel. *Kies v. Lowrey*,[75] a school board resisted reorganization under state law on the ground that it violated the Contracts, Due Process, and Republican Form of Government Clauses. The Court tersely dismissed the board's arguments, stating that because state legislatures create school boards they may operate them without constitutional interference.[76]

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[71] *Id.* at 114 (emphasis added); *see also* Maryland v. Balt. & Ohio R.R. Co., 44 U.S. 534, 550 (1845).

[72] In *Williamson v. New Jersey*, 130 U.S. 189 (1889), *City of Covington v. Kentucky*, 173 U.S. 231 (1899), and *Mason v. Missouri*, 179 U.S. 328 (1900), the Court rejected a wide range of local constitutional claims on the merits without even questioning the localities' authority to pursue those claims. In *Williamson*, the New Jersey township of North Brunswick argued that the state had violated its rights under the Contracts and Due Process Clauses by repealing a particular statute. 130 U.S. at 197–99. The Court held that the prior statute did not create a contract, nor was North Brunswick's taxing power a property interest for purposes of the Due Process Clause. *Id.* at 199–200. The Court conspicuously did not question the city's inherent authority to pursue constitutional claims against its own state. In *City of Covington*, the Court rejected a city's impairment of contract argument on the merits without questioning or even mentioning the power of localities or their relationship to the states. 173 U.S. at 243. In *Mason*, the Court rejected a city's argument under the Equal Protection Clause on the merits without questioning its underlying authority to bring that claim. *Mason*, 179 U.S. at 335. By contrast, during the same period the Court decided two state-local constitutional conflicts in which it reached the merits of the claim, but noted local powerlessness. *See* City of New Orleans v. New Orleans Water-Works Co., 142 U.S. 79, 89 (1891); Essex Pub. Rd. Bd. v. Skinkle, 140 U.S. 334, 342 (1891).

[73] City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 539–40 (1905).

[74] Embracing the dicta from *Baltimore & Ohio R.R. Co.*, *Tippecanoe County*, and *Williamson*, the *Worcester* Court ruled that, as a matter of federal law, municipal corporations are "creature[s] of the state," created by the legislature, and consequently unable to challenge legislative acts under the Constitution. *Id.* at 548–50.

[75] Michigan *ex rel.* Kies v. Lowrey, 199 U.S. 233 (1905).

[76] *Id.* at 238–39.

B. Hunter v. City of Pittsburgh *(1907)*

In 1907, the Court decided *Hunter v. City of Pittsburgh*,[77] the most famous case to address the constitutional status of localities vis-à-vis their states. *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.[78] The *Hunter* plaintiffs were individuals, not local public entities, and their constitutional claims could have been dispatched on the merits. However, the Court used the occasion not only to announce the Constitution's supposed indifference to intra-state political organization, but also to restate its view of localities as politically derivative and constitutionally impotent:

> 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. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.[79]

As this language illustrates, the *Hunter* Court essentially conjured a federal common law definition of what localities are, and, based on that, what they can and cannot do. And critically, the Court called upon the lower federal courts to invoke the federal rule of local powerlessness "wherever . . . applicable."[80]

C. Local Constitutional Challenges from 1908 to 1933

Somewhat surprisingly, for two decades after the Court decided *Hunter* it did not invoke the case to categorically ban local constitutional challenges. Instead, it continued to decide such claims on the merits, which suggests ambivalence.[81] However, in 1923 the Court applied the *Hunter* doctrine to

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[77] Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

[78] *Id.* at 177.

[79] *Id.* at 179.

[80] *Id.* at 177–78.

[81] In the first case to ban local constitutional challenges on the merits, *City of Chicago v. Sturges*, 222 U.S. 313, 323–24 (1911), the Court ruled that a statute requiring cities and counties to pay for damage caused by mob riots did not violate the federal Equal Protection or Due

bar a pair of companion cases in which the cities of Trenton and Newark brought constitutional challenges against a New Jersey statute governing water rights.[82] Trenton argued that the state statute violated its rights under the Takings, Contracts, and Due Process Clauses,[83] while Newark challenged it under the Equal Protection Clause.[84] In sweeping language, the Court in *City of Trenton* ruled that the *Hunter* doctrine categorically bars constitutional claims by localities against their states.[85] In *City of Newark*, the Court—citing *City of Trenton*—declined to address the merits of that city's equal protection claim.[86]

Finally, in 1933, the Court in *Williams v. Mayor of Baltimore* barred a city's constitutional challenge to a state statute exempting a railroad from taxation.[87] The Court's discussion of the constitutional question consisted, in its entirety, of two sentences:

> There is error in the holding of the Circuit Court of Appeals that the statute of Maryland creating this exemption is a denial to the respondents of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. A municipal corporation, 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.[88]

D. Local Constitutional Challenges from 1934 to the Present

Williams represents the *Hunter* doctrine's high-water mark in the Supreme Court. After that case, the Court abruptly, and without explanation, returned to its pre-*Hunter* practice of considering local constitutional claims on the merits. Indeed, in the seventy-eight years since *Williams*, the Court has not invoked the *Hunter* doctrine to bar a single local constitutional chal-

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Process Clauses. In the second, *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397 (1919), the Court rejected, seemingly in part on the merits, a city's challenge to a statute as having violated the Contracts Clause. In the third, *City of Boston v. Jackson*, 260 U.S. 309, 313 (1922), a city argued that a statute requiring it to levy certain taxes and turn them over to the state violated the Contracts and Due Process Clauses. As in *City of Chicago*, the Court seemed to reject Boston's claims in part on the merits and in part on intrinsic powers grounds. *Id.* at 314–16.

[82] *See* City of Trenton v. New Jersey, 262 U.S. 182 (1923); City of Newark v. New Jersey, 262 U.S. 192 (1923).

[83] *City of Trenton*, 262 U.S. at 183.

[84] *City of Newark*, 262 U.S. at 195.

[85] *See City of Trenton*, 262 U.S. at 186–92 ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.").

[86] *See City of Newark*, 262 U.S. at 196 ("The city cannot invoke the protection of the Fourteenth Amendment against the state.").

[87] Williams v. Mayor of Balt., 289 U.S. 36 (1933).

[88] *Id.* at 40.

lenge to state action; instead, it has reached the merits of multiple local constitutional challenges to state action with little or no mention of *Hunter*.[89]

Paradoxically, although the Court seems to have lost interest in the *Hunter* doctrine, it has not lost interest in *Hunter*'s general federal rule of local powerlessness. Instead, without explanation or discussion, the Court has invoked *Hunter* in some cases and ignored it in others. As Richard Schragger puts it, the Court makes local governments "disappear and reappear at will."[90]

To illustrate, in 1977 the Court faced the question of whether an Ohio school district was part of state government for purposes of the Eleventh Amendment.[91] In deciding that question, the Court ignored *Hunter*, reviewed state law to determine what Ohio school districts "are," and found they are not part of state government.[92] Fourteen years later, in 1991, the Court was asked to decide whether a town was part of state government for purposes of interpreting a particular federal statute.[93] Ignoring state law and citing *Hunter*, the Court ruled that towns are "components of," and thus legally indistinguishable from, their states.[94] Six years later, in 1997, the Court turned back to state law to determine whether a county sheriff was a county or state employee for purposes of 42 U.S.C. § 1983.[95] The Court said that was not an "all or nothing" question, answered it under state law, and ignored *Hunter*.[96] Twelve years later, in 2009, the Court embraced *Hunter* and ignored state law while determining whether, for First Amendment purposes, localities are part of state government.[97]

Schragger has written that "[t]he malleability of local government status is convenient; it means that local institutions are readily deployed in the service of political ends, most often by being treated as invisible until called in to serve as a check on some uncongenial exercise of centralized power."[98] Perhaps *Hunter*'s convenience partly explains why the Court has not overruled it.

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[89] *See supra* note 6 and accompanying text.

[90] Schragger, *supra* note 5, at 415–16 (explaining his view that the Supreme Court makes localities appear and disappear in the same case for the sake of political convenience).

[91] Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977).

[92] *Id.* at 279–81.

[93] Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

[94] *Id.* at 607–08.

[95] McMillan v. Monroe Cnty., 520 U.S. 781 (1997).

[96] *Id.* at 784–96.

[97] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363–64 (2009).

[98] Schragger, *supra* note 5, at 416.

III. THE CASE THAT *ERIE* FORGOT

A. Erie, Hunter, *and Categorical Confusion*

The Court decided *Hunter* in 1907, more than three decades before *Erie v. Tompkins*, which famously did away with all "federal general common law."[99] At face value, *Hunter* announced a "federal general common law" rule of the type that *Erie* later extinguished. The *Hunter* Court announced that it intended to define the "nature of municipal corporations," "to be acted upon wherever [it is] applicable."[100] But of course, neither 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; their fifty state constitutions "design democracy" sub-nationally.[101] It is difficult to square *Hunter*'s disregard of state constitutional designs in favor of a federal general common law rule with the principle announced in *Erie*.[102]

No court or scholar has revisited *Hunter* in light of *Erie*. But after *Erie*, the lower courts have had a terrible time categorizing the *Hunter* doctrine. Their confusion makes a certain amount of sense. After all, the *Hunter* doctrine's logic relies entirely on *Hunter*'s general rule of local powerlessness; the *Hunter* doctrine was not designed to, and does not, fit comfortably within other federal doctrines.

Two federal appellate courts interpret the *Hunter* doctrine as a standing doctrine.[103] The Ninth Circuit has gone the furthest by interpreting the *Hunter* doctrine as *jurisdictional* and allowing it to be raised for the first

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[99] Erie v. Tompkins, 304 U.S. 64, 78–79 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law. . . . [N]o clause in the Constitution purports to confer such a power [to declare substantive rules of common law] upon the federal courts.").

[100] Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907). The Court continues to follow *Hunter*'s call to incorporate its view of localities as mere instrumentalities of state governments wherever it may be applicable. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991); *Ysursa*, 555 U.S at 363–64.

[101] ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 17–18 (2009) (quoting CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001)).

[102] *Erie*, 304 U.S. at 79–80 (quoting Justice Holmes as accusing federal courts that create and impose general federal common law of committing "an unconstitutional assumption of powers" reserved to the states).

[103] *See e.g.* Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104 (9th Cir. 1999) (barring Fourteenth Amendment and Supremacy Clause claims); Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998) (barring Supremacy Clause, Commerce Clause, and Due Process Clause claims); Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240 (9th Cir. 1996) (barring Supremacy Clause claim); City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency, 625 F.2d 231 (9th Cir. 1980) (barring Fourteenth Amendment claim); *see also* Herriman v. Bell, 590 F.3d 1176 (10th Cir. 2010) (barring Equal Protection Clause claim); Hous. Auth. of the Kaw Tribe of Indians v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991) (barring Fourteenth Amendment claim).

time on appeal.[104] Moreover, the Ninth and Tenth Circuits have not only fully embraced but also expanded the *Hunter* doctrine: The Ninth Circuit has suggested that the *Hunter* doctrine bars localities from pursuing federal *statutory* as well as constitutional claims against their states;[105] and both circuits bar localities from pursuing constitutional claims against other localities.[106]

By contrast, five federal and state appellate courts interpret the *Hunter* doctrine as a substantive constitutional law doctrine, although they do not agree on its scope.[107] The Second Circuit interprets the *Hunter* doctrine as barring only Fourteenth Amendment claims.[108] The Fifth Circuit and the California Supreme Court read the *Hunter* doctrine as prohibiting all of the substantive constitutional claims the Court has barred.[109] The Sixth Circuit and the Arizona Supreme Court read the *Hunter* doctrine much more narrowly, as barring only intra-state political boundary disputes.[110] In other words, the lower federal and state courts are all over the place when it comes to categorizing the *Hunter* doctrine.

B. Categorizing the Hunter *Doctrine After* Erie

The lower courts' confusion leads to the question of which modern legal category best suits the *Hunter* doctrine after *Erie*. To consider that question, we must start with the basics. Any plaintiff that wishes to pursue a constitu-

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[104] *Palomar Pomerado Health Sys.*, 180 F.3d at 1106 (holding that standing is a necessary element of federal court jurisdiction, citing *South Lake Tahoe*, 625 F.2d at 233, and that "[u]nder established Ninth Circuit law, '[p]olitical subdivisions of a state may not challenge the validity of a state statute' in a federal court on federal constitutional grounds" (quoting City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973))).

[105] *Indian Oasis-Baboquivari Unified Sch. Dist.*, 91 F.3d 1240 (barring claims under both the Supremacy Clause and the Federal Impact Aid Law, 20 U.S.C. §§ 236–244 (1994)).

[106] *Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d 1360; *Hous. Auth. of the Kaw Tribe of Indians*, 952 F.2d 1183. Taken together, these two Circuits' approaches mean that local governments and their constituents in fifteen States—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming—are almost entirely shut out of local constitutional enforcement.

[107] *See* Carlyn v. City of Akron, 726 F.2d 287 (6th Cir. 1984) (interpreting *Hunter* as an annexation case); Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979) (allowing Supremacy Clause claim to proceed on the merits); *Richardson*, 473 F.2d 923 (barring Fourteenth Amendment claim); City of Tucson v. Pima Cnty., 19 P.3d 650 (Ariz. 2001) (interpreting the *Hunter* doctrine as applying only to intra-state political boundary disputes); Star-Kist Foods v. Cnty. of Los Angeles, 719 P.2d 987 (Cal. 1986) (allowing Commerce Clause challenge to proceed on the merits).

[108] *Richardson*, 473 F.2d at 929 (holding that political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment).

[109] *See Rogers*, 588 F.2d 1057 (allowing Supremacy Clause claim to proceed on the merits); *Star-Kist Foods*, 719 P.2d 987 (allowing Commerce Clause challenge to proceed on the merits).

[110] *Carlyn*, 726 F.2d 287; *Pima Cnty.*, 19 P.3d 650. The Fourth Circuit, meanwhile, has thrown up its hands. That court said that it finds the *Hunter* doctrine to be unintelligible and went on to address the claims at issue. City of Charleston v. Pub. Serv. Comm'n of W. Va., 57 F.3d 385 (4th Cir. 1995).

tional claim in federal court must meet the following threshold requirements: (1) It must be able to state a claim under the provision(s) it invokes;[111] (2) it must have the inherent legal authority, or "capacity," to pursue that particular claim;[112] and (3) it must have Article III standing to pursue that claim.[113] Each inquiry is both precise and distinct.[114] As we have seen, courts and scholars have variously categorized the *Hunter* doctrine as a substantive constitutional doctrine,[115] a standing doctrine,[116] and a capacity doctrine.[117] These possibilities are considered in turn.

1. A Question of Substantive Constitutional Law?

One way to categorize the *Hunter* doctrine is as a substantive constitutional doctrine, that is, a doctrine impliedly appended to one or more substantive constitutional provisions. Courts and scholars who take this view interpret the *Hunter* doctrine at differing levels of breadth.[118] At its narrowest substantive application, the *Hunter* doctrine could mean that neither localities nor their constituents have a constitutional right to particular intrastate political boundaries.[119] At its broadest application, the *Hunter* doctrine

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[111] *See* FED. R. CIV. P. 12(b)(6).

[112] *Id.*

[113] Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State, 454 U.S. 464, 471–72 (1982) (describing the "irreducible minimum" requirements to establish standing to sue).

[114] For clarity's sake, it is worth pausing to recall the distinction between "City Cases" and "Constituent Cases." *See* discussion *supra* notes 22–25 and accompanying text. A locality seeking to pursue a city case must establish standing to sue on its own behalf, *see, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 240 (1968), while a locality seeking to bring a constituent case must establish associational standing to sue on behalf of its constituents. *See, e.g.*, Gonzalez v. Carhart, 550 U.S. 124 (2007) (city filed suit to protect privacy rights of patients); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 341–45 (1977).

[115] *See, e.g.*, Frug, *supra* note 9, at 1065 (stating that the *Hunter* doctrine bars contract, just compensation, due process, and equal protection claims); Lawrence, *supra* note 12 (arguing that the principles in *Hunter* should apply only to certain equal protection and due process claims).

[116] *See, e.g.*, City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency, 625 F.2d 231, 233–34 (9th Cir. 1980); Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973); Williams v. Mayor of Balt., 289 U.S. 36, 47 (1933) (holding that local officials lacked "standing to invoke the protection of the Federal Constitution"); Coleman v. Miller, 307 U.S. 433, 441 (1933) ("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."); Barron, *supra* note 2, at 2232; Brian P. Keenan, Note, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?*, 103 MICH. L. REV. 1899 (2005); Case Comment, *Township of River Vale v. Town of Orangetown*, 83 HARV. L. REV. 679, 682 (1970). *But see* Rogers v. Brockette, 588 F.2d 1057, 1068–70 (5th Cir. 1979) (rejecting "standing" as a category for the *Hunter* doctrine).

[117] *See, e.g.*, Tepperman-Gelfant, *supra* note 48; Harold A. Olsen, Note, *Procedural Barriers to Suits Against the State by Local Government*, 62 BROOK. L. REV. 431 (1996).

[118] *See* discussion, *infra* Part V.B.

[119] *See* Carlyn v. City of Akron, 726 F.2d 287 (6th Cir. 1984); City of Tucson v. Pima Cnty., 19 P.3d 650 (Ariz. 2001).

could read a substantive "no local governments allowed" component into every provision of the Constitution.

The problem is that neither of these interpretations fully accounts for how the Court has actually applied the *Hunter* doctrine. The narrow interpretation does not square with the fact that the Court has applied the *Hunter* doctrine to bar a very wide swath of economic, civil rights, and structural constitutional claims, including those brought to enforce the prohibitions against takings[120] and the impairment of contracts,[121] the guarantees of due process[122] and equal protection,[123] and the guarantee of a republican form of government.[124]

The broadest constitutional interpretation also seems implausible, for two reasons. First, the Constitution says nothing about the nature, status, roles, or powers of local public entities. One could argue that this is why the Court is right to treat localities as constitutionally invisible. But one could just as easily argue that the Founders weren't thinking about localities at all, so they could not have specifically intended to make them strangers to the Constitution. Second, a broad interpretation of the *Hunter* doctrine seems unsatisfactory because it does not square with Court cases allowing localities to bring constitutional claims against public entity defendants other than their own states, such as the federal government and other state governments.[125] For these reasons, the *Hunter* doctrine resists classification as a substantive constitutional law doctrine.

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[120] *See* City of Trenton v. New Jersey, 262 U.S. 182 (1923).

[121] *City of Trenton*, 262 U.S. 182; City of Worcester v. Worcester Consol. Str. Ry. Co., 196 U.S. 539 (1905); Michigan *ex rel.* Kies v. Lowrey, 199 U.S. 233 (1905).

[122] *City of Trenton*, 262 U.S. 182; *Lowrey*, 199 U.S. 233.

[123] Williams v. Mayor of Balt., 289 U.S. 36, 48 (1933); City of Newark v. New Jersey, 262 U.S. 192 (1923).

[124] *Lowrey*, 199 U.S. at 239 (holding that the power of the state legislature to create and alter school districts is compatible with the republican form of government guaranteed by Article IV).

[125] For example, the Court has considered on the merits whether the U.S. government denied a city its rights under the Fifth Amendment's Takings Clause, *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), and whether a State had violated the Commerce Clause and thereby injured a city in a neighboring state, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

2. *A Question of Standing to Sue?*[126]

Another view of the *Hunter* doctrine is that it addresses standing to sue. Generally speaking, the U.S. Supreme Court divides standing into two subparts: (1) Article III standing, and (2) prudential standing.[127]

Article III standing, which embodies constitutional limits on the exercise of federal jurisdiction, seeks to ensure that the plaintiff bringing a particular claim has a concrete injury that can be traced to the conduct complained of and can be redressed by a court.[128] The *Hunter* doctrine cannot be easily categorized as an Article III doctrine. To begin with, not all of the local public entities in the *Hunter* line of cases were even claimants; some invoked the Constitution only defensively, as a shield against statutory claims.[129] Additionally, in cases where the Court barred localities from pursuing constitutional claims, the localities appeared handily to meet baseline Article III criteria.[130]

That brings us to prudential standing, a more promising post-*Erie* category for the *Hunter* doctrine. Prudential standing embodies certain "judicially self-imposed limits on the exercise of federal jurisdiction."[131] The Court has invoked prudential standing to avoid reaching the merits in four general circumstances: (1) The plaintiff seeks to raise another's rights;[132] (2) the plaintiff's alleged injury lies outside the so-called "zone of interests"

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[126] I offer two caveats. First, in the decades since the Court decided *Hunter* and announced the *Hunter* doctrine, federal standing doctrine has undergone revolutionary change. This article subjects the *Hunter* doctrine to modern legal understandings because courts so often apply standing doctrines in an effort to explain it. *See, e.g.*, Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1242 (9th Cir. 1996) (citing City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency, 625 F.2d 231 (9th Cir. 1980)). Second, this Article does not purport to present a comprehensive discussion of standing or capacity, or even local governmental standing or capacity. But it is worth discussing the *Hunter* doctrine's misclassification because it provides evidence of *Hunter*'s overreach into matters properly left to state law.

[127] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004).

[128] *Id.* at 11–12; *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465 (2008).

[129] *See, e.g.*, *Lowrey*, 199 U.S. 233.

[130] *See, e.g.*, Williams v. Mayor of Baltimore, 289 U.S. 36, 48 (1933) (challenging a state statute exempting a railroad from local taxation); City of Newark v. New Jersey, 262 U.S. 192 (1923) (challenging state statute affecting city's water rights under the Equal Protection Clause); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (challenging state statute affecting city's water rights under Takings, Contracts, and Due Process Clauses); City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905) (challenging under the Contracts Clause state's decision to release private railroad company from contractual obligation to municipal governments).

[131] *Elk Grove*, 542 U.S. at 11 (internal quotation marks and citations omitted). The *Elk Grove* Court explained that though the Court has not exhaustively defined the prudential dimensions of the standing doctrine, it typically encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* at 12 (internal quotation marks and citations omitted).

[132] *Id.*

covered by the legal provision at issue;[133] (3) resolving the dispute would require the Court to address sensitive questions of state law;[134] and/or (4) the conflict would be best resolved politically rather than in the courts.[135]

It would seem difficult to explain the *Hunter* doctrine's categorical ban on all local constitutional claims according to the first three prudential concerns. The Supreme Court and several lower courts have barred constitutional claims even when localities are attempting to assert their own institutional interests (that is, pursuing what I call "City Cases"). Further, they have done so under federal constitutional law to remedy injuries that appear to fall within the so-called "zone of interests" at issue in the case.[136]

But what about the fourth prudential concern, that the Court should decline jurisdiction when the underlying dispute presents a political question? At first glance, this seems a more promising justification for a ban on local constitutional enforcement, and at least one court has seized on the political question rubric to explain the *Hunter* doctrine.[137] Employing simple logic, one could imagine the Court thinking about this problem in one of several ways. The Court could refrain from exercising jurisdiction over state-local constitutional disputes based on the relationship between the parties (locality vs. state), the nature of the claims (constitutional vs. not), the nature of the forum (judicial vs. political), or some combination of these factors.

First, one could imagine the Court declining to decide these cases due to the relationship between the parties. The argument would be that the federal courts should stay out of legal disputes between localities and their states. However, that argument fails to explain the *Hunter* doctrine, because the Court does not have a rule categorically barring localities from bringing non-constitutional claims against their states.[138] If the *Hunter* doctrine turned on the relationship between the parties, we would expect it to bar all state-local legal disputes, not just constitutional disputes.

Second, one could imagine the Court declining to decide these cases due to the nature of the claims. The argument would be that localities sim-

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[133] *Id.* The so-called "zone of interests" test is an opaque requirement that purports to ensure that a plaintiff who has satisfied Article III is a proper party to invoke judicial resolution of the dispute. *See also* Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 34 (2006). It is not clear this test applies to constitutional claims. *See id.* at 35–44.

[134] *Elk Grove*, 542 U.S. at 12.

[135] Heather Elliott has explained that this final inquiry is sometimes grouped under a justiciability doctrine known as the "political question" doctrine. *See* Elliott, *supra* note 128, at 462 n.8, 465.

[136] *See supra* note 131 and accompanying text.

[137] *See* City of Jersey City v. Farmer, 746 A.2d 1018, 1021 (N.J. Super. Ct. App. Div. 2000).

[138] For example, the Court has considered on the merits whether states can commandeer federal funds granted to localities. Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985).

ply cannot bring constitutional claims into federal court. But that argument also does not explain the *Hunter* doctrine because the Court does not have a rule categorically barring local constitutional claims against defendants other than the plaintiff's own state.[139] If the *Hunter* doctrine turned on the nature of the claims, we would expect it to bar all local constitutional challenges, not just challenges to states.

Third, the Court could refrain from addressing the merits of the claim based on the notion that local-state constitutional disputes present political rather than judicial questions.[140] In the context of the *Hunter* doctrine, this "political question" argument has horizontal and vertical dimensions.

The horizontal argument would be that local-state constitutional disputes are best left to the (federal and/or state) political branches and that no court should go near them. However, this argument cannot explain *Hunter* because it clashes with so much of state law. In most states, local-state constitutional disputes are treated as justiciable. Of the fifty states, only seventeen prohibit localities from bringing state constitutional challenges into court, and the majority of those rely on *Hunter*.[141] These cases have a certain dog-chases-its-tail quality: If the logic of *Hunter* collapses, those cases collapse unless they can be justified by some other, legitimate doctrine. Of the remaining thirty-three states, fourteen permit some or all such challenges,[142] and nineteen have not addressed the question.[143] If a great many states believe that, as a category, local-state constitutional disputes belong in court, how can the federal courts reasonably hold the opposite, even as to disputes involving those states?

The vertical component of the political question argument would be that the U.S. Constitution should respect state sovereignty by declining to step between localities and their states. This argument might find allies among process federalists, who favor the preservation of state and local au-

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[139] For example, the Court has considered on the merits whether the U.S. government denied a city its rights under the Fifth Amendment's Takings Clause. United States v. 50 Acres of Land, 469 U.S. 24 (1984). The Court has also considered whether a State violated the Commerce Clause and thereby injured a city in a neighboring state. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[140] *See, e.g.*, Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967); Hammonds v. City of Corpus Christi, 226 F. Supp. 456 (S.D. Tex. 1964), *aff'd*, 343 F.2d 162 (5th Cir. 1965), *cert. denied*, 382 U.S. 837 (1965).

[141] Those states are Alaska, Arizona, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, Vermont, and Wisconsin. *See* Kathleen S. Morris, *States on Constitutional Enforcement*, http://www.harvardcrcl.org/morris-states-on-constitutional-enforcement. These holdings are doctrinally suspect to the extent they borrow *Hunter*'s questionable logic.

[142] Those states are Alabama, California, Georgia, Illinois, Indiana, Minnesota, New Jersey, New York, Oregon, Pennsylvania, South Dakota, Texas, Virginia, and Washington. *See id.*

[143] Those states are Arkansas, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Rhode Island, Utah, West Virginia, and Wyoming. *See id.*

thority to legislate policy choices free of federal interference.[144] However, this argument also fails to explain *Hunter* because, again, the Court has never announced a procedural bar to other types of state-local legal conflicts.[145] Since constitutional law is supreme, it would defy logic to rule, per the political question doctrine, that federal statutory disputes between localities and their states are justiciable, but federal constitutional disputes between the same entities are not.[146] In sum, none of the standing or related justiciability doctrines satisfactorily explain the *Hunter* doctrine.

If it wanted to, the Court certainly could create a new prong under the prudential standing doctrine that bars local constitutional claims, but it has not yet done so. Instead, to the extent the Court has applied the *Hunter* doctrine, its sole justification is *Hunter*'s general federal rule of local powerlessness vis-à-vis state government. Accordingly, as things stand, the *Hunter* doctrine does not neatly map onto prudential standing.

3. A Question of Capacity to Sue?

A third view of the *Hunter* doctrine is that it deals with capacity to sue.[147] "Capacity [addresses whether] a party [has a] personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest or is the real party in interest."[148] It concerns, in sum, "the personal qualifications of a party to litigate. . . ."[149] A party that lacks the inherent authority to sue is said to lack "capacity." In a capacity inquiry, the focus is on the plaintiff's intrinsic characteristics. A plaintiff may lack capacity to sue if, for example, she is not of sound mind, has not reached a certain age, or is otherwise legally disabled.

Per the Court's own analysis in the *Hunter* line of cases, the *Hunter* doctrine bars local constitutional enforcement because of the "nature" of local governments. It bars localities from invoking the federal constitution against their own states because of what they "are." They "are" "subdivi-

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[144] *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) ("The whole point of federalism . . . is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking. Federalism is a way to capture this advantage, by assuring that federal policymakers leave suitable decisions to be made in the first instance by state politicians in state institutions.").

[145] *See, e.g.*, Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 270 (1985) (holding that states cannot commandeer federal funds granted to localities by federal statute).

[146] The courts are split on this question. The Ninth Circuit has suggested that the *Hunter* doctrine also bars localities from invoking federal statutes against their own states. *See* Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1244 (9th Cir. 1996) (barring claims under both the Supremacy Clause and the Federal Impact Aid Law, 20 U.S.C. §§ 236–244 (1994)).

[147] *See* Tepperman-Gelfant, *supra* note 48; Olsen, *supra* note 118.

[148] 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1559 (3d ed. 1998).

[149] *Id.*

sions of the state";[150] "creatures of the state";[151] "mere instrumentalities of the State, for the convenient administration of government."[152] As such, they lack the necessary independence that is a precondition to alleging a constitutional violation against their states. This type of analysis, which focuses on the plaintiff's intrinsic characteristics, maps better onto the doctrine of capacity to sue than onto any substantive constitutional or standing doctrine.

One might wonder whether, and why it matters whether, the *Hunter* doctrine is about standing, substantive constitutional law, or capacity to sue. It does matter, for the following reason. 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. But if the *Hunter* doctrine is about capacity to sue, it is not just surprising but disturbing that courts invoke that doctrine to bar local constitutional enforcement. Congress has directed the federal courts to defer to, rather than trump, state law in deciding capacity questions, and they typically do.[153] If the *Hunter* doctrine truly *is* about capacity to sue, the lower federal courts overreach their authority every time they apply it.

The Court's decision in *Erie* sets the *Hunter* doctrine, and the rule of local powerlessness, adrift. As lower court cases applying the *Hunter* doctrine attest, the courts lack a firm doctrinal and theoretical grasp on the nature of localities and their place in our constitutional democracy.[154]

IV. Why We Should Not Mourn the Loss of *Hunter*

A. Hunter*'s Conceptual Confusion*

Courts and scholars are understandably reluctant to consider overruling precedent. However, assuming *Erie* effectively overruled *Hunter*, we should not mourn *Hunter*'s loss because it was poorly reasoned from the start. *Hunter*'s general rule of local governmental powerlessness rests on three foundational assumptions. They are: (1) A state's sovereignty inheres in its government; (2) state legislatures originally created all local governments and can abolish them at will, even over the objection of the People; and (3) local governments act solely as instrumentalities of state governments.

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[150] Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("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 to them.").

[151] City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 549 (1905).

[152] Bd. of Comm'rs of Tippecanoe Cnty. v. Lucas, 93 U.S. 108, 114 (1876); *see also* Ysursa v. Pocatello Educ. Ass'n, 555 U.S 353, 363–64 (2009); Williams v. Mayor of Baltimore, 289 U.S. 36, 48 (1933).

[153] *See* Fed. R. Civ. P. 17(b).

[154] *See* Schragger, *supra* note 5, at 396 (describing localities as politically and "doctrinally untethered").

These assumptions constitute *Hunter*'s analytic support structures. If they fail, *Hunter* fails, so they warrant careful examination.

1. Hunter*'s First Assumption: A State's Sovereignty Inheres in Its Government*

This sovereignty discussion must begin with an important caveat. A great deal of literature addresses which state entity or group constitutes "the sovereign" for purposes of the relationship between the federal and state governments.[155] That question is undeniably one of federal constitutional law.

By contrast, this Article and *Hunter* address the question of which state entity or group constitutes "the sovereign" for purposes of the relationship between localities and their states. That question is properly answered with reference to state constitutional law.[156] Accordingly, this Article's claims about sovereignty are grounded entirely in state constitutional law, and intended to be limited to the context of local government law. This Article takes no position on whether state governments are "the sovereign state" for purposes of federal law.

Hunter's first foundational assumption is that, for purposes of evaluating the local-state governmental relationship, a state's government is equal to the sovereign state. The *Hunter* doctrine relies heavily on the concept of sovereignty. Defining the term "sovereignty" is tricky because it has different meanings in different contexts.[157] This Article defines "sovereign" for *Hunter* purposes as the entity or actor(s) with ultimate authority in a given constitutional framework.[158] The sovereign may delegate but never entirely cedes power; it can always recover that which is delegated.[159]

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[155] For a discussion of state sovereignty in the federal context, see Amar, *supra* note 20, at 1435–38; *see also* Briffault, *supra* note 41, at 1309 ("Among scholars, a historical account of the Constitution as a compact of the *people* of the United States has supplanted to a significant degree the common understanding that the United States was formed out of a compact of the states.") (emphasis in original) (citations omitted).

[156] *See* Amar, *supra* note 20, at 1435–38; WILLIAMS, *supra* note 101, at 32 ("The texts of virtually all state constitutions proclaim their foundation in popular sovereignty . . . .").

[157] *See* Gerken, *supra* note 34, at 13 (noting the opacity of the term "sovereignty" and defining and applying a working definition of sovereignty for the purpose of that article).

[158] *See* Eaton, *supra* note 21, at 442 ("[T]he people are the source of all legal power and authority in the United States. Sovereignty is and remains in the people. The sovereign is the person, or body of persons, over whom there is politically no superior.") (internal quotation marks and citations omitted).

[159] California's Proposition 8 provides an illustration of this shifting power dynamic. In 2008, the California Supreme Court, which the state constitution charges with interpreting the law, struck down California's marriage laws as unconstitutional. *See* In re Marriage Cases, 183 P.3d 384 (Cal. 2008). In direct response, a majority of California voters voted to overturn that decision by amending the state constitution. CAL. CONST. art. 1, § 7.5 (added by Initiative Measure (Prop. 8, § 2, approved Nov. 4, 2008, eff. Nov. 5, 2008)). *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding the validity of Proposition 8). In this manner, the People of California (via the state constitution) delegated lawmaking to legislators and constitutional

In the course of its analysis, the *Hunter* Court conflates state government with the "sovereign state." In other words, *Hunter* assumes that state governments are sovereign vis-à-vis localities. However, the idea that state governments are sovereign in the manner *Hunter* describes is incorrect as a matter of state constitutional law. The fifty state constitutions determine which entity is "the sovereign" within the states.[160] And all fifty state constitutions identify the People—not their government—as sovereign in their states.[161]

The Court first equates state government with the sovereign State in 1845 in *Maryland v. Baltimore & Ohio Railroad Co.*:

> [Counties] depend upon the will of *the legislature*, and are modified and changed, and the manner of their appointment regulated at the pleasure of *the state*. . . . [They] are nothing more than certain portions of territory in which *the state* is divided for the more convenient exercise of the powers of government.[162]

In this passage, the Court impliedly equates "the state" with the legislature; reduces counties to "nothing more than . . . [geographic] territory"; and presumes that since, at its pleasure, "the state" can "modif[y] or change" local government, so can its legislature. The Court assumes state governments are the sovereign state throughout the *Hunter* line of cases, including *Board of Commissioners of Tippecanoe County v. Lucas*,[163] *City of Worcester v. Worcester Consolidated Street Railway Co.*,[164] and, of course, *Hunter v. Pittsburgh*.[165]

Let us pause to consider what we might mean by the phrase "the state." One could use that term to convey a number of ideas, including: (1) The physical territory that makes up the state (state *qua locus*);[166] (2) the collection of individuals who reside within that physical territory and consent to be governed (state *qua populus*); (3) the state constitution, which declares that the People are sovereign, and through which the People invent legal and

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interpretation to the courts, but when it came down to deciding what the law of California would be, they ultimately reasserted their sovereignty.

[160] *See* Eaton, *supra* note 21, at 442; *see also* Morris, *supra* note 141.

[161] *See* Morris, *supra* note 141.

[162] Maryland v. Balt. & Ohio R.R. Co., 44 U.S. 534, 550 (1845) (emphasis added).

[163] 93 U.S. 108, 114 (1876).

[164] 196 U.S. 539, 548–49 (1905) (a municipal corporation is "the creature of *the state*," which "exists by virtue of the exercise of the power of *the state* through its *legislative department*"; it is "not only a part of *the state*, but is a portion of its *governmental power*") (emphasis added).

[165] 207 U.S. 161, 179 (1905) ("In all these respects *the 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.") (emphasis added). This conception of localities has spread to a number of other doctrinal areas.

[166] *See* Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1186 (1996).

political structures and delegate power amongst them (state *qua doctrina*);[167] or (4) the state government, which consists of the state-level (as opposed to local-level) institutions to which the People (via the state constitution) have delegated a portion of their sovereign power (state *qua ordinatio*).

When we parse the idea of "the state" in this way, we see immediately that under state constitutional law there is a world of difference between the ultimate, sovereign authority of the state *qua populus* and the partial, delegated, non-sovereign authority of the state *qua ordinatio*.[168] We see, further, that the sovereign state has a great deal more power than the state legislature, a part of the government to which the People in all fifty states delegated only a portion of the government's overall power. The *Hunter* doctrine's assumption that a state's government is the sovereign state is thus its first analytical misstep.[169]

This assumption helps to justify the *Hunter* doctrine because that case suggests that a local constitutional claim against state government amounts to an attack on the sovereign. To the contrary, a locality that brings such a claim does so to defend the sovereign State (that is, the People and their constitutional values) from allegedly renegade state actors.[170] Regardless of whether the reviewing court ultimately finds in the locality's favor, such a claim is properly viewed as having been brought to champion and defend, rather than attack, the sovereign.[171]

2. Hunter*'s Second Assumption: State Legislatures Created and Can Abolish Local Governments at Will*

Hunter's second foundational assumption is that, as a categorical matter, state governments originally created all local governments and can abolish them at will, even over the objection of the People. This creation myth runs through many cases in the *Hunter* line, including *City of Worcester v.*

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[167] *See* WILLIAMS, *supra* note 101, at 3, 25 ("[S]tate constitutions owe their legal validity and political legitimacy to the state electorate . . . ."). *But see* Baker & Rodriguez, *supra* note 9, at 1344–45 (arguing that, as a practical matter, state courts, not state constitutions, determine the vertical distribution of power within a state).

[168] *See* Amar, *supra* note 20, at 1435–39, 1485.

[169] *See* Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977). This Article does not address whether federal law should ever, for any purpose, treat state governments as the sovereign state.

[170] *See* Amar, *supra* note 20, at 1427.

[171] *See id.* at 1429. Amar's views on Eleventh Amendment jurisprudence have struggled to gain traction in the Court. But regardless of how sovereignty is perceived for federal purposes, one cannot deny that, pursuant to the state constitutions, in the states the people are sovereign. In the context of determining whether within a particular state the people or the government are sovereign, the federal courts ought not replace an established state constitutional rule with an opposing federal doctrine.

Worcester Consolidated Street Railway Co.,[172] *Hunter v. Pittsburgh*,[173] and *Williams v. Mayor and City Council of Baltimore*.[174]

As a matter of historical fact, our nation had local governments well before it had state governments, states, or even colonies. To take just one example, four original towns existed "before there was any Rhode Island. They made it by their union."[175]

More importantly, the idea that state governments created localities is wrong as a matter of law. The original state constitutions presupposed the existence of localities, just as the federal Constitution presupposed the existence of states.[176] Almost without exception, the original state constitutions acknowledged the pre-existence of local public entities, including but not limited to counties, cities, towns, and townships.[177] Most went further, in terms of direct delegation of power by creating certain localities and/or local public officials,[178] granting power directly to certain localities and/or locally elected officials,[179] and/or requiring local elections for certain local positions.[180]

And today, most state constitutions delegate to localities considerable authority to determine their own powers and functions. Thus, as of our Nation's founding, "the United States enjoyed three levels of successful [democratic] governmental operations—national, state, and local."[181] As a matter of state constitutional law (not legislative discretion), localities in those

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[172] 196 U.S. 539, 548–49 (1905) (explaining that a municipal corporation is "the creature of the state," which "exists by virtue of the exercise of the power of the state through its legislative department," and "[t]he legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city").

[173] 207 U.S. 161, 178–79 (1907) ("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 . . . . The state, therefore, at its pleasure, may modify or withdraw all such powers . . . . [T]his may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.").

[174] 289 U.S. 36, 40 (1933) ("A municipal corporation, 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.").

[175] Eaton, *supra* note 21, at 448; *see also* Herget, *supra* note 21, at 1001–02. As Herget explains, "[t]he New England towns were very important units of government, more important in some respects than the colonial or state government. Counties and townships in other states performed like functions, and sixteen cities had received significant powers through corporate charters by the time of the Revolution." *Id.*

[176] *See* Morris, *supra* note 19.

[177] *See id.*

[178] *See id.*

[179] *See id.*

[180] *See id.*

[181] Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 304 (1987) ("Both in fact and in law, the traditional description of municipalities as 'mere instrumentalities of the State for the convenient administration of their affairs,' is inaccurate. Since early colonial times, municipalities have served both as administrative subunits carrying out state policy and as independent structures for local policymaking reflecting the will of the smaller community." (quoting Mt. Pleasant v. Beckwith, 100 U.S. 514, 529 (1880))).

states: Determine their own forms of government and internal organization; decide what functions to perform; raise, borrow, and spend revenue; determine personnel policies; initiate policies independently; and claim immunity from some state legislation.[182] It is therefore incorrect to treat localities as state governmental creatures.

Nor can state legislatures categorically abolish local governments, as *Hunter* would have it, "with or without the consent of the citizens, or even against their protest."[183] The People of a state may change local governments' constitutional status to curtail or expand local powers as they choose. But once they have created, delegated power to, or presumed the existence of a locality, the legislature must respect their constitutional existence and the scope of their powers.[184] The original state constitutions of nearly all fifty states created, delegated power to, and/or presumed the existence of at least one form of local office or government. Since then, many state constitutions have added new localities or increased the powers of existing localities.[185] So, while the People in any state can eliminate all local governments, there was never a time—and likely never will be—when a state's government can constitutionally take that step.

One might reply that, since localities have no intrinsic (that is, extra-constitutional) "right" to exist, the Court is right to declare them powerless. But, of course, in our constitutional system no public entity—not even the Court—has an extra-legal "right" to exist. Nor do private corporations have an extra-legal "right" to exist. Yet the Court has not declared state or federal public entities, or private corporations, to be "powerless" vis-à-vis their states, and for good reason. The mere fact that an entity did not "exist" in the legal sense before a constitutional provision, legislative act, or executive decision created it tells us next to nothing about the scope of its powers,

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[182] *See* Baker & Rodriguez, *supra* note 9, at 1337–38, 1346–48, 1363, 1366–67; Michael E. Libonati, *Local Government Autonomy*, 62 LA. L. REV. 97, 98 (2001) (summarizing U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY (1993)).

[183] WILLIAMS, *supra* note 101, at 3 ("A state constitution serves as a charter of law and government for the state—the supreme law of the state—and prescribes in more or less detail the structure and functions of state and, sometimes, local government."); *see also* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 19–20, 62 (1998); Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

[184] *See* Owens v. Maze, 132 S.W.3d 874, 876 (Ky. Ct. App. 2003) (ruling that if the state constitution presupposes the existence of a public entity, the state legislature lacks the authority to abolish it; it can only be abolished by constitutional amendment); City of Gretna v. Bailey, 75 So. 491, 498 (La. 1917) (ruling that legislature could not create a city court where the state constitution established local justice of the peace courts); Holt v. Denny, 21 N.E. 274, 283 (Ind. 1889) (ruling that the Constitution's acknowledgement of localities implies that they continue to have powers that preceded that document's drafting, and the legislature cannot interfere with those powers notwithstanding its general power to enact legislation); Le Roy v. Hurlbut, 24 Mich. 44 (1871) (ruling that where the state constitution provided for the election of certain local elected positions, the legislature lacked the authority to appoint those positions).

[185] *See* Baker & Rodriguez, *supra* note 9, at 1337–38.

roles in governance, or relationship to public entities. For that, one must look to the applicable constitutional provision.

There is an irony here: The *Hunter* Court sought to respect states by reducing localities to nothing. Yet, in reality, by creating a federal rule defining the "nature" of all localities and their relationships to state government, *Hunter* disrespected the states. It effectively supplanted state constitutional law and history with a federally-invented creation myth.[186]

3. Hunter*'s Third Assumption: Local Governments Are Mere Instrumentalities of State Governments*

The *Hunter* doctrine's third foundational assumption is that local public entities are mere instrumentalities of state governments. By this logic, a locality "is like a state administrative agency, serving the state in its narrow area of expertise, but instead of being functional specialists, localities are given jurisdictions primarily by territory, although certain local units are specialized by function as well as territory."[187] Yet, scholarship in this area has shown fairly decisively that the "state subdivision" conception of localities does not accurately describe localities' collective role in our national life.[188] That idea is incorrect doctrinally and politically.

As a descriptive matter, David Barron has written that:

> [The *Hunter* Court] ignored the degree to which local communities may provide the vital institutional context within which people live their public lives in a constitutional democracy. A local community is not simply a type of state administrative agency to be shaped at will to serve the need of the central state. It is, in a fundamental sense, the locus for those human interactions that comprise what we conceive to be democratic life in a constitutional system committed to self-government.[189]

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[186] *Hunter*'s irony turned to blasphemy after 1938, when the Court decided *Erie*. *See* discussion *supra* Part III.

[187] Briffault, *supra* note 12, at 8 (explaining *Hunter*'s view on this point). Cases in the *Hunter* line that reinforce this assumption include: Maryland v. Balt. & Ohio R.R. Co., 44 U.S. 534, 550 (1845) ("The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides."); Bd. of Comm'rs of Tippecanoe Cnty. v. Lucas, 93 U.S. 108, 111 (1876) (explaining that municipalities are "mere instrumentalities of the State, for the convenient administration of government"); City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 548–49 (1905) ("[A] municipal corporation is not only a part of the State, but is a portion of its governmental power."); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("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.").

[188] *See* Barron, *supra* note 2, at 2243; Williams, *supra* note 10.

[189] Barron, *supra* note 11, at 56–64.

As a doctrinal matter, "no city is as thoroughly under the thumb of the state as a matter of state law as the state creature metaphor suggests."[190] Instead, "cities enjoy a number of [state constitutional] protections from state statutory attempts to restrict local lawmaking discretion."[191]

That is not to suggest, of course, that local officials *never* act as instrumentalities of state government; they do in some instances because their actions are dictated by state law.[192] But at other times they act as instrumentalities of their constituents. One way to make sense of this duality is to consider the cases dividing "mandatory" from "discretionary" acts.[193] At times, state law requires localities to take specific actions; in those moments, localities are engaging in mandatory acts as agents of state government. At other times, the People and/or legislature have left it to localities to make their own policy choices. In the latter case, localities are engaging in discretionary acts as agents of their constituents.

To take one high-profile example, in 2004, two San Francisco officials challenged California's marriage laws in very different ways. First, the Mayor ordered the County Clerk to begin issuing marriage licenses to same-sex couples in violation of a state statute. Reviewing that order, the California Supreme Court essentially found that, in the course of administering the state's marriage laws, county officials[194] are engaged in mandatory acts on behalf of state government. In that capacity, they were bound to follow state law.[195]

A few months later, the San Francisco City Attorney filed suit in state court challenging the very same provisions of state law under the California Constitution's privacy, equal protection and due process provisions.[196] In that instance, the Supreme Court did not question the City's authority to challenge state law, and for good reason. Unlike the County Clerk, in filing suit, the City Attorney was acting in his discretion as an agent of his constituents, not as an agent of state government.[197]

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[190] Barron, *supra* note 2, at 2243.

[191] *Id.* at 2243 n.92 (citing papers by Gerald E. Frug, Richard Ford, Richard Briffault, and Roderick Hills); *see also* Baker & Rodriguez, *supra* note 9, at 1337–38.

[192] *See, e.g.*, Lockyer v. City & Cnty. of S.F., 96 P.3d 459, 473 (Cal. 2004).

[193] *See, e.g.*, Federiso v. Holder, 605 F.3d 695, 699 (9th Cir. 2010).

[194] San Francisco is both a city and a county. In California, counties administer state marriage laws.

[195] *See Lockyer*, 96 P.3d at 473.

[196] *See* In re Marriage Cases, 183 P.3d 384 (Cal. 2008). City Attorney Herrera was able to file suit because California law permits localities to bring state constitutional challenges against state governmental action. Herrera has since filed suit in federal court challenging California's Proposition 8 under the U.S. Constitution. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). No party has questioned his standing to do so.

[197] Joseph Blocher makes a parallel argument at the state level, namely, that when Attorneys General sue the U.S. Government under the Constitution they do so as agents of the People of their State. *See* Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011).

Even the Court itself has parted ways with *Hunter*'s logic on the question of the role of localities. For example, in *Avery v. Midland County*,[198] which established that "one person, one vote" applies to local elections, the Court emphasized that localities play a quasi-independent role in our constitutional democracy:

> [I]n providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision-making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule *which are immune from legislative interference*.[199]

Similarly, as a political matter, elected local officials serve not one but two masters. To reduce localities to arms of state government is to imagine that local elections are irrelevant, that they are not an independent source of power. But, of course, local elections do matter, and they convey independent power. Unlike a state governmental actor assigned to a locality, elected local officials answer not to some state official, but to the local electorate. As Richard Briffault puts it:

> [D]espite their formal status as political subdivisions of the state, most general purpose local governments—counties and municipalities—are *primarily* accountable to their local electorates. In practice, they function as representatives of local constituencies and not field offices for state bureaucracies.[200]

The *Hunter* doctrine would only make sense if localities acted exclusively as instrumentalities of their state governments. Because localities also act as units of representative democracy, the *Hunter* doctrine does not make sense.[201]

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[198] 390 U.S. 474, 481 (1968). For an excellent article discussing *Avery*'s impact on *Hunter*, see Briffault, *supra* note 2, at 347–48.

[199] *Avery*, 390 U.S. at 481 (emphasis added); *see* Holt v. City of Tuscaloosa, 439 U.S. 60, 79–88 (1978) (Brennan, J., dissenting) (arguing that "a municipality exercises 'governing' and 'law-making' power over its police jurisdiction," creating a right to participate in the City's political processes); Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (1960) ("[T]he Court 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."); Vill. of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); City of Covington v. Kentucky, 173 U.S. 231 (1899); Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879); *see also* Neuman, *supra* note 181, at 304.

[200] Briffault, *supra* note 41, at 1318 (emphasis added); *see also* Briffault, *supra* note 2, at 347–48; Neuman, *supra* note 181, at 304.

[201] *See* David J. Barron, *The Promise of Tribe's City: Self-Government, the Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 812 (2007) (explaining that legal limits on local governments are holding back their development). Discussing the federal-state relationship, Jessica Bulman-Pozen and Heather Gerken have explained that state governments may also

B. Why Hunter *Matters*

Hunter has contributed powerfully to a national political and legal culture that devalues and underutilizes local public entities.[202] Localities have enormous untapped potential as enforcers of constitutional norms and full participants in law and policy debates. But treating localities as mere instrumentalities of state government, and categorically depriving them of full participation in our nation's constitutional debates, relegates the nation's most directly accessible and accountable democratic agents to third- or fourth-place status, below not only the federal and state governments, but also below private corporations, non-profit organizations, private associations, labor unions, and the like.

Hunter also matters because it provides analytical support to the *Hunter* doctrine, which operates to bar and chill most localities from enforcing the Constitution either on behalf of themselves or their constituents. Absent *Hunter*, a locality able to satisfy capacity and standing requirements, and able to state a claim, could bring a Constituent Case to remedy overreach by state government. And, absent *Hunter*, a locality could bring a City Case to protect its own governmental or commercial interests. To take a few examples, it seems intuitively correct that, absent the *Hunter* doctrine, an injured locality should be able to enforce the Supremacy[203] and Commerce Clauses.[204] In addition, since localities enter into contracts, they should be protected by the Impairment of Contracts Clause. Since they own property, they should be protected by the Due Process and Takings Clauses. Since they are commonly plaintiffs and defendants in lawsuits, they should be protected by the clauses guaranteeing due process and trial by jury. Since they oversee public expenditures, they should be able to invoke the Establishment Clause.[205]

Finally, *Hunter* matters because—via the *Hunter* doctrine—it has cast localities solely as violators, never champions, of constitutional norms. After all, localities are sued every day for alleged constitutional violations. Allowing localities to participate in constitutional litigation as plaintiffs as well

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play different roles over time. They may act as "autonomous sovereigns" one moment, "cooperative servants" the next, and rebels the next. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009). Bulman-Pozen and Gerken refer to this third category as "uncooperative federalism." *See id.*; *see also* Herget, *supra* note 21, at 1007 (noting that although it has been doctrinally convenient for courts to view localities solely as ministerial arms of state government, they have also always exercised independent power). The same analysis applies to localities, which, like states, wear multiple hats. *See* Morris, *supra* note 24, at 52–53; *see also* Neuman, *supra* note 181, at 304.

[202] In *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, Richard Schragger similarly argues that the deprivation of power can have a deleterious effect on a locality's political culture. 115 YALE L.J. 2542, 2545–46 (2006).

[203] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 133–34 (2004) (permitting a municipality to pursue a claim under the Supremacy Clause).

[204] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (permitting a city to pursue a constitutional claim against a neighboring state).

[205] *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

as defendants would transform local public law offices into public interest law firms that advance their constituents' views of constitutional norms.[206] Right now, *Hunter* completely forecloses that possibility.

V. Joining the Normative Debate: Should Localities Enforce Constitutional Norms?

Two broad assumptions underlie this Article's policy discussion. First, this Article assumes that, generally speaking, robust constitutional enforcement is a good thing, so the law should err on the side of encouraging such cases.[207] One might reasonably argue that eliminating local constitutional enforcement would serve judicial economy or that constitutional disputes are best decided in political rather than judicial fora. These points, though worth considering, are beyond the scope of this Article.[208]

Second, this Article does not promote a particular view of the Constitution or a substantive political agenda. It embraces no ideology other than the belief that including local public entities in constitutional debates may serve to strengthen those debates, along with the efficacy of local governments and local public law offices.[209] Local politics and policy priorities would—indeed, should—shape each locality's constitutional case docket. Atlanta's docket would likely not resemble Chicago's, which would not resemble Miami's, which would not resemble San Francisco's, and so on. After all, cities, counties, and other local governments can be "laboratories," too.[210]

The policy considerations raised by local constitutional enforcement may be sorted into four general subject categories: autonomy, democracy, competency, and federalism.

A. *The Autonomy Question*

We begin by considering the argument that local constitutional enforcement undermines local autonomy. Generally speaking, those who favor local autonomy prefer a system in which local democratic majorities—which are of course state and federal minorities—enjoy legal and political independence from the policy preferences of state and federal majorities. Needless

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[206] *See* discussion *infra* Part VI.C.

[207] Local constitutional cases fulfill what Akhil Reed Amar has called the "remedial imperative." Amar, *supra* note 20, at 1484–92.

[208] Scholarly debates over local power tend to cluster around these themes. *See* discussion, *supra* Part I.

[209] Cristina M. Rodriguez takes a similar position in discussing local governments and immigration policy in *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 591 (2008). *See also* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 375–76 (2007) (arguing that our democracy is strengthened by a healthy struggle over the meanings of constitutional norms).

[210] New State Ice Co. v. Lineman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

to say, the concern that a particular law or policy may undermine local autonomy is serious and carries a great deal of weight.

As applied to local constitutional enforcement, the autonomy argument is entirely correct. It cannot be denied that, when successful, local constitutional enforcement results in court opinions that subject every locality in the relevant jurisdiction to state and/or federal constitutional norms. We must therefore ask whether and when other values relevant to local governmental and democratic efficacy outweigh the value of autonomy.

One might begin this weighing process by considering the distinction between autonomy and power. Scholars often use the terms autonomy and power interchangeably. If a doctrine weakens local *autonomy*, the thinking goes, those who favor local *power* should be against it.[211] But those terms are not always interchangeable. By "autonomy" I mean independence or freedom: the ability to act without being impeded by another.[212] By "power" I mean strength or might or force: the ability to do or accomplish something.[213] Applying these definitions to localities, "autonomy" refers to a locality's ability to pass independent (sometimes overlapping, sometimes interstitial) laws across a range of subject matter areas also addressed by state and federal law (e.g., health care, financial regulation, environmental pollution, etc.). "Power" translates into a locality's ability to improve the lives of its constituents, whether it does so by creating local laws or leveraging state or federal laws.

If "autonomy" and "power" *were* synonymous, one could reasonably assume that what a legal rule does to the former, it does to the latter. But since they are *not* synonymous, we should not assume they rise and fall together. Indeed, somewhat counter-intuitively, a legal rule that undermines autonomy might simultaneously *enhance* power, and vice versa.

As David Barron and Richard Schragger have argued, local constitutional enforcement does seek to enforce federal or state law, possibly at the expense of local decision-making.[214] But such cases also enhance local power. When a locality brings a constitutional claim, it does more than turn up the volume on the underlying constitutional debate. It also forces its state government to publicly engage that debate.[215] By contrast, if the same local-

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[211] The existing scholarship generally assumes that more local autonomy would be preferable in some respects; the debate tends to be over whether local autonomy would come at too high a price. Richard Briffault and Richard Ford have pointed out that local autonomy has painful side effects. *See* Briffault, *supra* note 12, at 5–6; Briffault, *supra* note 36, at 355 ("Local autonomy enables . . . suburbs to protect their resources from the fiscal needs of nearby cities while securing their independence from involvement in the resolution of urban or metropolitan economic or social problems."); *see also* Ford, *supra* note 166, at 1183 (calling autonomy, "at least in the strong sense . . . an impossible and dangerous dream").

[212] *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 880–83 (1994) (describing the "negative libertarian," or non-interference, conception of autonomy).

[213] *See id.*

[214] *See* discussion *supra* Part I.

[215] *See, e.g.*, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (by filing suit, city forced state to respond in open court to constitutional challenge to ballot measure); In re Marriage Cases, 183

ity were to enact local legislation allowing marriage between same-sex couples, the locality will have spoken but the state government is free to ignore it. Moreover, if a locality wins a constitutional case, its constituents are protected throughout the relevant constitutional jurisdiction, whether federal or state. If it passes a local ordinance, protection for its constituents ends at the local border.[216]

One can imagine other examples in which a locality might willingly trade autonomy for power. A city that is displeased by the state or federal response to problems surrounding immigration or health care might choose *autonomy* by passing local ordinances addressing those subjects. But it might rather enter into an agreement with the state and/or federal governments, or enforce state or federal law against those governments, to solve its local immigration or public health problems. The latter options might solve the problem more effectively and efficiently than enacting (and forever administering) a local ordinance.[217]

Barron has argued for substantive limits on local constitutional enforcement in part because localities should not be able to force extra-local (federal and state constitutional) norms on other cities.[218] But a local governmental litigant has only so much power. It can open the conversation by filing a complaint; it can make arguments; it cannot force outcomes. The courts ultimately decide what our federal and state constitutions mean. If a different locality holds a contrary view on the merits, it can intervene as a party or amicus curiae.

While local autonomy is a laudable goal, local constituents may ultimately reap more benefits if localities move towards increasing and leveraging access to state and federal power than if they push for greater local autonomy.[219] Moreover, as a purely political matter, pushing for an increase in localities' ability to tap into state or federal power may be less threatening to state and federal actors than pushing for more local autonomy, because

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P.3d 384 (Cal. 2008) (by filing suit, city forced state to respond in open court to constitutional challenges to marriage statutes).

[216] Schragger, *supra* note 202, at 2557. Richard Schragger similarly argues that increased autonomy does not always lead to increased power. *Id.*

[217] To provide a concrete example, a city that wishes to discourage undocumented immigrants from settling within its borders might act autonomously by passing an ordinance that forbids residents from housing or employing undocumented immigrants. Alternately, it might leverage federal power by entering into an agreement with U.S. Immigration and Customs Enforcement through which its police officers operate as agents of the federal government. *See* Rodriguez, *supra* note 209, at 591 (discussing "section 287g of the Immigration and Nationality Act, which authorizes states and localities to enter into agreements with the federal government, which in turn authorize local and state officials to arrest and detain individuals for immigration violations and to investigate immigration cases").

[218] Barron, *supra* note 2, at 2221.

[219] As Richard Briffault has correctly observed, federal and state power are "not necessarily the enemy of local power." Briffault, *supra* note 36, at 356.

state and federal officials have potentially more influence over the exercise of that power.[220]

The economic and technological revolutions of recent decades are causing localities to become more sophisticated, more nationally and globally intertwined, and generally more active in law and policy arenas formerly reserved to state, national and international actors.[221] Given these trends, advocating for localism-as-increased-autonomy may be not only more difficult, but less useful, than advocating for localism-as-increased-power.

B. The Democracy Question

We might also consider how allowing local constitutional enforcement would impact our democracy. Would such cases undermine democratic values by taking discretion away from states and localities, or strengthen them by encouraging citizens at the local level to engage in state and federal constitutional debates? This Article offers three distinct points on local constitutional enforcement and democracy.

The first point is that welcoming localities into constitutional cases as plaintiffs would democratize constitutional litigation. At present, our national docket of constitutional cases consists largely of conversations between private, specialized legal organizations and the federal judiciary.[222] Non-profit legal organizations are comprised of unelected experts that focus on a single issue or cluster of issues. They cannot be elected or removed, hired or fired. Specialized legal organizations offer unique substantive expertise, but they are immune from oversight by those whose interests they serve. In other words, while they are important players in our nation's constitutional debates, it seems profoundly undemocratic for the laws to allow specialized private legal organizations, but not local public entities, full participatory access to constitutional litigation.[223]

The second, broader point about local constitutional enforcement and democracy is this: Allowing localities to pursue constitutional claims would bring constitutional litigation closer to the People.[224] At present, localities

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[220] *See, e.g.*, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered portions of 8 U.S.C.); *see also* Theda Skocpol, *The Tocqueville Problem: Civic Engagement in American Democracy*, 21 SOC. SCI. HIST. 455, 461, 468 (1997) (explaining in the context of local volunteer associations that, historically, they flourished because they plugged into extra-local governments).

[221] Judith Resnik, *New Federalism(s): Translocal Organization of Government Actors (TOGAs) Reshaping Boundaries, Policies, and Laws*, *in* WHY THE LOCAL MATTERS 83 (2010) (exploring the increasingly sophisticated range of local governmental activities and alliances).

[222] *See, e.g.*, THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIL LIFE 288–93 (2003); *see also* Theda Skocpol, *Advocates Without Members*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 498–504 (Theda Skocpol & Morris P. Fiorina eds., 1999).

[223] The non-democratic result is arguably made worse when plaintiffs are represented solely by non-profits from outside the community.

[224] *See* Gerken, *supra* note 45, at 1763.

can be defendants but not plaintiffs in constitutional cases. There is something deeply disturbing about a legal system that casts local governments only as violators—never champions—of the Constitution. Moreover, permitting—even encouraging—localities to engage in constitutional and other public interest litigation would give local constituents (that is, all of us) the sense that our local public law offices are, at least in part, public interest law firms; that they represent not just local public entities, but the citizens behind them, likely strengthening the bond between local governments and their constituents.[225]

This argument finds indirect support in Robert Post and Reva Siegel's notion of "democratic constitutionalism." Post and Siegel argue in favor of social movements rather than local governments as sites for popular engagement with constitutional norms.[226] But their central insight—that the Constitution's authority depends on its democratic legitimacy, which in turn depends on whether Americans see it as *their* Constitution—supports local constitutional enforcement. Indeed, one might even view local constitutional enforcement as one of the purest forms of democratic constitutionalism. While Post and Siegel cast governments in the familiar role of the alleged constitutional violators,[227] in the context of local enforcement, localities are the Constitution's champions. So, while Post and Siegel envision democratic constitutionalism as a process that necessarily toggles back and forth between "electoral politics" and "constitutional lawmaking,"[228] local constitutional enforcement fuses politics and lawmaking by casting elected leaders as active agents in constitutional lawmaking.

The opposite of democratic constitutionalism is what we have now, namely, constitutional disengagement. In *City Making*, Gerald Frug surveyed the extensive scholarship decrying the American disconnect between citizens and government, with a special emphasis on local government.[229] Local constitutional enforcement may help close the gap between the People and their governments. When local citizens find allies in locally elected officials, and listen as those officials represent their local view on constitutional values in a court of law, it may well bind those citizens in new ways to the Constitution and the body politic.

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[225] This argument is more than theoretical. In the midst of San Francisco's court disputes over the marriage laws, lawyers from the San Francisco City Attorney's Office marched in the annual gay pride parade. As they approached, the crowds lining the parade route could be heard shouting, "Here come our lawyers!" The marriage case and other constitutional cases have forged a deep connection between the City Attorney and his constituents; in 2009 he ran unopposed and was almost unanimously re-elected to a third term in office.

[226] *See* Post & Siegel, *supra* note 209, at 375–76.

[227] *Id.* at 374.

[228] *Id.*

[229] *See* FRUG, *supra* note 21, at 19–25; *see also* Williams, *supra* note 10. Similarly, Richard Schragger has expressed concern that our national political culture is "increasingly alienated from governance generally, and from local governance in particular." Schragger, *supra* note 5, at 396.

Some may claim that the law should discourage local constitutional enforcement because it risks factionalizing our democracy and increasing intergovernmental discord.[230] That concern is certainly valid, but does not seem terribly weighty when placed in a broader context. The fact is that federal, state, and local governments are in near constant tension over any number of heated issues. Given the interconnectedness of our multiple layers of government, such conflicts will surely continue. It seems unlikely that local constitutional challenges will have much net effect on intergovernmental tensions overall. Moreover, among the forms that local rebellion might take, filing a lawsuit seems relatively tame, since a court of law is such a carefully controlled public forum for resolving constitutional disputes.

One could argue that such public disagreements might ultimately strengthen rather than weaken our democracy. While lawsuits certainly raise tension, they also serve as a "dynamic form of contestation, the democratic churn necessary for an ossified national system to move forward."[231] Viewed in context, the risk to smooth democratic functioning that may attend local constitutional enforcement probably does not justify a complete ban on such cases.

The third point about local constitutional enforcement and democracy is this: As courts and scholars consider whether localities should be permitted access to the Constitution, they might consider the wide array of groups and entities that enjoy constitutional protection. For example, the Court recently reaffirmed its commitment to granting private corporations—and by extension their private shareholders—the full panoply of constitutional rights.[232] And as we have seen, the nation's 39,000 localities are not just units of representative democracy but also public corporations with commercial and governmental interests. Because those interests are financially backed by local taxation, local constituents are in some sense shareholders in local public entities. It is worth considering whether democracy and the public interest are served by granting private corporations backed by shareholders, but not public corporations backed by taxed constituents, access to at least some constitutional provisions.

C. The Competency Question

The next policy question is whether local public entities are sufficiently competent to engage fully in constitutional litigation. It may well be that, as things currently stand, local public law offices are not staffed up to pursue affirmative constitutional cases. Moreover, as compared to the national and state governments, and perhaps even to private entities that engage regularly

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[230] *See* Post & Siegel, *supra* note 209, at 375–76 (responding to similar arguments in the backlash context).

[231] Gerken, *supra* note 34, at 10; *see also* Post & Siegel, *supra* note 209, at 381–83 (discussing the democratic and constitutional merits of robust "norm contestation").

[232] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

in constitutional litigation, some localities may be relatively untested in this area.[233]

Having said that, facts on the ground show that localities are accustomed to evaluating and enforcing constitutional norms. As Alec Ewald has written, civil servants are the individuals who primarily "run the Constitution."[234] "[T]hey reduce its grand principles to practice by their actions both routine and extraordinary."[235] To provide just a few examples, mayor's offices routinely announce time, place, and manner restrictions to rally requests. Sheriff's offices develop strip search policies to be applied to pretrial detainees. Public hospitals determine whether patients are entitled to abortions. Police chiefs develop policies on the permissible use of force during an arrest. Public contracting agencies evaluate the constitutionality of programs designed to remedy race discrimination. Legislative aids draft ordinances in the shadow of the Supremacy Clause. And for their part, local public law offices routinely help their clients make a wide range of constitutional determinations.

Indeed, local judgments about the Constitution's meaning are routinely challenged in federal court, where localities (not states) are held financially responsible for their own errors in judgment.[236] On the whole, localities are probably the most active members of what Ewald called the "'interpretive community' that gives the Constitution its meaning."[237] Accordingly, if one may accurately claim that localities are constitutionally incompetent, we might consider that a serious problem, and prioritize increasing local constitutional competency.

One might respond to the concern about local constitutional incompetence with a counterargument: In light of their regular (albeit non-litigation) experience interpreting multiple constitutional provisions in multiple contexts, localities would bring a unique and rich body of knowledge to constitutional cases. In other words, there are good reasons to see localities as uniquely *competent*, rather than uniquely *in*competent, to interpret the Con-

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[233] For example, John Dillon wrote that persons who ran local governments were unfit "by their intelligence, business experience, capacity, and moral character" to be trusted with real power. JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS 85–86 (2d ed., rev. New York, James Cockcroft & Co. 1873); *see also* FRUG, *supra* note 21, at 6, 19 (explaining that the conventional view is that local governments are inherently selfish, shortsighted, parochial, and ineffectual); Schragger, *supra* note 5, at 403. Schragger has argued that the uncertain character of the law regarding the place of local government in our lives reflects a deep and abiding national ambivalence, "a romantic vision of participatory democracy in small-scale settings accompanied by a mistrust of local officials and a suspicion that local power is often abused." Schragger, *supra* note 5, at 394. For more on John Dillon, see discussion, *supra* Part I.A.

[234] ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 3 (2009).

[235] *Id.* at 160 n.10 (quoting JOHN ROHR, CIVIL SERVANTS AND THEIR CONSTITUTIONS 141 (2002)).

[236] *See* Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285 (1883) (ruling that a tort judgment against a locality cannot be collected from the state).

[237] EWALD, *supra* note 234, at 13.

stitution. Their participation in constitutional litigation would enhance, rather than diminish, the quality of such litigation and, by extension, judicial decision-making.

D. The Federalism Question

Finally, we might consider how the *Hunter* doctrine, and *Hunter* itself, fits into the broader federalism discussion. We have 39,000 local public entities in this country, but we lack a theory that fully explains their place in our constitutional architecture.[238] This is a major topic that is well beyond the scope of this Article, but it is worth offering a few observations about the *Hunter* doctrine's relation to federalism.

First, the Constitution says nothing about localities. When it comes to vertical governance structures, the Founders drafted that document to negotiate the relationship between the federal government and the states. The Founders' silence with respect to localities could be interpreted in any number of ways. One could argue that the Founders' silence means they did not intend for the Constitution to govern how states treat their own localities. By that logic, localities qua localities should not be permitted to bring constitutional claims against their own states. One could push that argument even further, by arguing that the Founders did not intend for any body of federal law or branch of the federal government to step between localities and their states. By that broader logic, the federal courts should not consider any legal disputes, whether brought under federal or state law, between localities and their states; Congress should not grant localities standing to sue their states under any federal statutes;[239] and agencies in the executive branch should not enter into contractual relationships or form other legal alliances with localities without the express approval of their states.[240]

Or, one could interpret the Founders' silence regarding localities quite differently. Bearing in mind constitutional limits on the exercise of federal power vis-à-vis state governments, one could argue that the Founders did not intend to say one way or the other whether localities could enforce constitutional norms. One could argue, further, that the Founders would not have wanted the Court to wade into questions surrounding the "nature" of localities and their relationship to the states. In other words, rather than reading into the Founders' silence a positive federal rule of local powerlessness vis-à-vis state governments, we could read into it an intention to allow state

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[238] *See* Gerken, *supra* note 34, at 13.

[239] Certain federal statutes contemplate that localities might enforce federal law against their own states. *See, e.g.*, Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101(a)(17), 60121 (2006) (including localities as "persons" entitled to sue to enforce the Act's provisions, some of which mandate certain state action).

[240] For example, section 287(g) of the Immigration and Nationality Act authorizes localities to enter into agreements with the federal government without requiring state governmental approval. Immigration and Nationality Act of 1952 § 287(g), 8 U.S.C. § 1357(g) (2006). *See* Rodriguez, *supra* note 209, at 591 (discussing local agreements under INA section 287(g)).

constitutions and statutes to determine the nature of localities and their relationship to the states.

This leads to a broad conceptual point about structural constitutional law. Our nation has fifty-one constitutions, and each one of them has structural provisions intended to "design" their corner of our democracy.[241] One view of the federal and state constitutions—and by extension, federal and state governments—is that they occupy different space, like separate floors in a building. But another view is that the fifty-one constitutions—along with the governance structures they contemplate—are distinct yet interrelated, like the various systems of the human body. We might think of the federal government as the nation's major organ systems, largest bones, and central nervous system; the state governments as its major muscle groups, minor organ systems, and medium-sized bones; and local governments as its connective tissue, nerve endings, and tiniest bones. Viewing the structural provisions of all fifty-one constitutions as interconnected parts of a federalist whole may help bring local governments into sharper relief.

VI. Imagining an Alternative Theoretical Framework for Local Government Law

Setting aside *Hunter*'s general doctrine of local powerlessness would clear a path for scholars to develop an alternative theoretical framework for local government law.[242] At present, the Court's view of localities can be fairly summed up as such: They 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). Local government scholarship has been stuck in this doctrinal mess for decades, and has attempted in vain to make sense of it. It may not be possible to develop an overarching theory of local government law.[243] Perhaps not, but there is little point in even trying until *Hunter* is discarded.

My call for a deeper, more nuanced theoretical framework for local government law is connected to Heather Gerken's recent call for the scholarship to relax sovereignty's grip on constitutional theory and push federalism "all the way down" to the local level. Having done so, she argues, scholars can focus attention on "the institutions neglected by federalists and their localist counterparts," namely, all non-city localities.[244] She explains that because scholarship has not looked beyond states, except at cities, "we lack

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[241] *See generally* Cass R. Sunstein, Designing Democracy: What Constitutions Do (2001).

[242] Gerken, *supra* note 34, at 13.

[243] *See* Briffault, *supra* note 36, at 356 ("The different kinds of local governments, with their diverse needs and often conflicting concerns, cast real doubt on the utility of 'local government' as a category for advancing legal analysis.").

[244] *See* Gerken, *supra* note 34, at 12–13 (referring specifically to non-city localities, which have been largely ignored even in the local government scholarship); *see also* Briffault, *supra* note 2, at 347–48.

a set of common terms—let alone a full-blown theory—for the sites that fall just below states and cities on the governance flow chart."[245] Discarding *Hunter* would help clear the way for legal scholarship to develop theories that root localities in our constitutional system.

Doing so may help localities fulfill their promise as governmental agents and units of representative democracy. This is not a liberal or a conservative point, but rather, a point about democracy and good government. David Barron has said, correctly, that "legal limits [rather than practical or political limits] are . . . often the critical barriers to [cities'] capacit[ies] to implement their own visions of the future."[246] Setting aside *Hunter*'s general presumption of local powerlessness would allow scholars to fold localities into theories of federalism and reconsider the relationship between localities and the Constitution. These are the next major challenges for scholarship at the intersection of local government and constitutional law.

[245] Gerken, *supra* note 34, at 2.
[246] Barron, *supra* note 201, at 812.