

Articles

DO "CREATURES OF THE STATE" HAVE CONSTITUTIONAL RIGHTS?: STANDING FOR MUNICIPALITIES TO ASSERT PROCEDURAL DUE PROCESS CLAIMS AGAINST THE STATE

MICHAEL A. LAWRENCE*

I. INTRODUCTION

WHEN it comes to constitutional rights vis-à-vis their creating states, municipal corporations and other political subdivisions get little or no respect. It has been said, for example, that the nature of the relationship between a municipal corporation and its creating state is such that the municipal corporation "cannot invoke the protection of the Fourteenth Amendment" and other constitutional provisions against the state.¹ The principle behind the limited power of municipalities is that "[b]eing 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."² State court precedent supports this basic proposition, with most state courts uniformly denying municipal corporations *any* constitutional protection vis-à-vis their creating states.³

This Article rejects the proposition that municipal corporations are completely lacking in constitutional rights vis-à-vis their creating states. In-

* Associate Dean and Professor of Law, Michigan State University Detroit College of Law; J.D., M.S., University of Wisconsin Law School. The author would like to thank Professor Fred Cheever of the University of Denver College of Law for his helpful comments and suggestions. Thanks also to the able research assistance of John Coronado.

1. *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923).

2. *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (footnote omitted); *see also* *City of Trenton v. New Jersey*, 262 U.S. 182, 189 (1923) (holding that Just Compensation Clause offers no bar to state's attempts to modify grant or charter it had previously given to city); *City of Newark*, 262 U.S. at 196 (stating that municipal corporation "cannot invoke the protection of the Fourteenth Amendment" and other constitutional provisions against its own state); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (stating that municipality cannot assert Contract Clause as bar to state's efforts to alter municipality's boundaries); E. B. Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment upon the Power of the States to Control Municipal Corporations*, 36 MICH. L. REV. 385, 396-97 (1938) ("[T]he contract, due process, and equal protection clauses of the national Constitution afford no protection whatever to municipal corporations, *in their own right*, as against the power of the states to control them.").

3. *See* I EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1.21 (John H. Silvestri & Mark S. Nelson eds., 3d ed. 1999) ("Unless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local government areas.").

stead this Article argues that in this context these “creatures of the state” do, in fact, possess at least some constitutional rights. The proposition that a municipal corporation *never* has standing to invoke the protection of the Constitution against its own state is belied by the United States Supreme Court’s suggestion in *Gomillion v. Lightfoot*⁴ that “[l]egislative control of municipalities, no less than any other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”⁵ With this statement, the Court implicitly recognized the possibility that a municipal corporation may indeed possess standing to assert that its creating state has exceeded constitutional limits while dealing with the municipality. In addition, other state and federal cases bolster the proposition that states’ power over their municipal corporations is limited in some respects by the Constitution.⁶

This Article describes the current parameters of municipal corporation standing, particularly in view of the emergence of a more fully-developed procedural due process jurisprudence during the last decades of the twentieth century. Next, this Article provides a careful examination of federal and state precedent involving standing for municipal corporations to assert claims against their creating states, together with a review of the Court’s current procedural due process doctrine. Finally, this Article concludes that municipal corporations have standing to assert certain procedural due process claims against the states that created them, even though they likely do not have standing to assert other claims, including those involving substantive matters of the state’s internal political organization.⁷ To the extent that the federal and state judiciaries have failed to draw an explicit distinction between procedural and substantive due process in this

4. 364 U.S. 339 (1960).

5. *Gomillion*, 364 U.S. at 344-45.

6. See, e.g., *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders Atl. County*, 893 F. Supp. 301, 315 (D.N.J. 1995) (“[M]unicipalities may assert claims against the creating state under the Supremacy Clause, but not under other substantive constitutional guarantees.”); *Shirk v. City of Lancaster*, 169 A. 557, 560 (Pa. 1933) (“[R]evenues derived in [a municipal corporation’s] private capacity, as a return from its water or other utility works, are trust funds, and cannot be controlled or taken directly for state purposes.”).

From an early date, the United States Supreme Court “noticed” the distinction between property held by a municipal corporation in its governmental capacity versus its private, proprietary capacity, and broached the possibility that there may be circumstances when the city might have a fourteenth amendment due process claim against the state for the deprivation of property held in the latter capacity. See *Hunter*, 207 U.S. at 179-80. For a further discussion of limitations on state power, see *infra* note 44 and accompanying text.

7. This Article asserts that municipal corporations have standing to assert procedural due process claims against their creating states for the deprivation of certain liberty and property interests that do not involve substantive matters of the state’s internal political organization. The additional issue of the possibility of state sovereign immunity for such an action through the Eleventh Amendment and individual state constitutional provisions, while critical, is beyond the scope of this Article.

context, principles of fundamental fairness and doctrinal consistency suggest they should begin to do so.⁸

Section II describes the contours of the state/municipal corporation relationship.⁹ Section III examines the limits of state supremacy by reviewing the Supreme Court's procedural due process doctrine in the context of municipal corporation standing, and then by analyzing judicial precedent concerning municipal corporation standing.¹⁰ Finally, Section IV briefly reiterates the assertion that Fourteenth Amendment procedural due process protections do indeed extend to municipalities in some circumstances.¹¹

8. For a discussion of why courts should draw a distinction between procedural and substantive due process, see *infra* note 58 and accompanying text. In the end, because so many aspects of state-local relations *do* involve "substantive matters of internal political organization," likely it will be the unusual case where the municipality would be able to maintain standing under the theory espoused in this Article. Moreover, even accepting this Article's premise that municipalities have standing to assert procedural due process claims against their creating states in cases not involving substantive matters of the state's internal political organization, it may well be the case that the procedural due process requirements of notice and adequate hearing are sometimes met through the state's legislative process itself, thus defeating the municipality's procedural due process claim. For a further discussion of the role of legislation in this issue, see *infra* notes 94-95 and accompanying text.

The importance of this Article's fundamental arguments is not diminished, however, despite the existence of these possibilities. Principles of fundamental fairness suggest that there must be *some* sort of recourse under the federal Constitution for a municipality in a case (though rare) where the state inappropriately attempts to deprive the municipality of an interest having nothing whatsoever to do with substantive matters of the state's internal political organization.

It is axiomatic that constitutional doctrine changes over time to accommodate our increased and evolving understanding of the Constitution, in all of its complexity. One need only look so far as the Fourteenth Amendment's Equal Protection Clause for an example supporting the proposition that our understanding of the Constitution is an evolutionary process: in 1896, the Court held that the government may segregate African Americans from Caucasians provided accommodations for both races were "equal but separate." *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). The Court explicitly repudiated that viewpoint half a century later in *Brown v. Board of Education*. See *id.* at 494-95 (stating that "in the field of public education the doctrine of 'separate but equal' has no place" and that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected"); see also *LAWYER'S WIT & WISDOM* 95 (Bruce Nash & Alan Zullo eds., 1995) (quoting Justice William Brennan, who stated that, "We current justices read the Constitution in the only way we can—as 20th-century Americans").

9. For a discussion of the relationship between states and the municipalities they create, see *infra* notes 13-32 and accompanying text.

10. For a discussion of case law concerning the standing of municipalities, see *infra* notes 39-53 and accompanying text.

11. For the Article's conclusion, see *infra* notes 99-100 and accompanying text.

II. THE MUNICIPAL CORPORATION

Municipal corporations are creations of the State.¹² These corporations “are usually regarded (in legal theory at least) as subordinate departments, auxiliaries, or convenient instrumentalities of the state for the purpose of local or municipal rule.”¹³ The municipal corporation has been variously described by state courts as “an arm of the state, a miniature state, an instrumentality of the state, an agency of the state, and the like.”¹⁴

It is clear that, as creations of the sovereign, municipal corporations are subject to a great deal of control by their creating states. Indeed, Judge McQuillin posits that “[u]nless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local governmental areas . . . [and] may establish reasonable preconditions to incorporation of local government units.”¹⁵

The scope and breadth of the state’s power is illustrated by the conventional wisdom regarding municipal corporation ownership of real property, which posits that the municipality’s power “to purchase or otherwise acquire real property can be questioned only by the state and the amount of real estate which a municipal corporation may hold is a question only for the state.”¹⁶ Implicit in this statement is the proposition that the state may affirmatively control the municipal corporation’s interest in real estate. It is the *state*, for example, that possesses the power of eminent

12. See 1 McQUILLIN, *supra* note 3, § 1.20 (discussing kinds of public local corporations). BLACK’S LAW DICTIONARY defines “municipal corporation” as: “a city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local affairs.” BLACK’S LAW DICTIONARY 1037 (7th ed. 1999). The preeminent treatise on municipal corporations describes the variety of municipal corporations:

The areas in which [municipal and] public corporations . . . operate may be urban, semi-urban, or rural. The urban or semi-urban areas usually embrace incorporated cities and towns, or municipal corporations proper, created for the purpose of local government. The rural areas, which are commonly quite extensive, generally take the name of county and township, and are chiefly administrative subdivisions of the state, although they often serve as divisions or districts for other purposes. Unincorporated towns, villages, hamlets, or boroughs lie in counties or townships, where they are usually subject to county or township administration. Another class of public local areas created [by the state] for particular purposes such as drainage, irrigation, reclamation, improvement, levee, benefit, taxing, etc., districts may also lie in whole or in part in other governmental areas. However, as these public quasi-corporations are created for special purposes and have an existence separate and apart from the areas in which they are situated, they are not, as organs of government, affected by the administration of the area in which they function, though they may be affected as a practical matter.

1 McQUILLIN, *supra* note 3, § 1.20 (footnotes omitted).

13. *Id.* § 1.19 (footnote omitted).

14. *Id.* § 2.08.10 (footnotes omitted).

15. *Id.* § 1.21.

16. 10 *id.* § 28.21 (footnotes omitted).

domain, “an inherent attribute of the sovereignty of the state to take or authorize the taking of any property within its jurisdiction,”¹⁷ regardless of the fact that the property may be “already devoted to a public use by a subdivision or agency of that state.”¹⁸ The power of eminent domain is “unrestricted, and does not emanate from constitution or statute, but is merely limited thereby.”¹⁹ Stated another way, “the power of eminent domain is older than the constitutions, it requires no constitutional recognition, it is not created or granted by constitution or statute, and is without restriction, except as the people have limited it.”²⁰

Of course the people *have* limited the states’ power of eminent domain, through the Fifth and Fourteenth Amendments of the United States Constitution, as well as through the constitutions of all fifty states and the District of Columbia.²¹ Indeed, a number of states have chosen to dele-

17. 11 *id.* § 32.02 (citing, for example, *United States v. Certain Lands in Louisville*, 78 F.2d 684 (6th Cir. 1935), and *Campbell v. Chase National Bank*, 5 F. Supp. 156 (S.D.N.Y. 1933)).

18. A. S. Klein, Annotation, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or As Between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293 § 3 (1971) (citing *People ex rel. Department of Public Works v. Los Angeles*, 179 Cal. Rptr. 2d 558 (1960) (holding that all property, including that already devoted to public use, is held subject to right of state to take and use it for other public purposes); *Welch v. Denver*, 349 P.2d 352 (Colo. 1960) (commenting that state has power to acquire, by condemnation or otherwise, lands of municipal corporation already devoted to public uses); *Bridgie v. Koochiching County*, 35 N.W.2d 537 (Minn. 1948) (explaining that legislature has complete control over property of municipal corporation, which it may take from control of officers of city and turn over to other state officers under direct supervision and control of state)).

19. 11 McQUILLIN, *supra* note 3, § 32.02 (citing, for example, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403 (1878)). Judge McQuillin explains that the case stands for the proposition that “[o]rganic provisions requiring just compensation for property so taken are a mere limitation on the exercise of the right and whether the conditions have been observed, is a proper matter for judicial cognizance.” *Id.* (footnotes omitted).

20. *Id.* § 32.02 (citing, for example, *Mesa v. Salt River Project Agricultural Improvement & Power District*, 373 P.2d 722 (Ariz. 1962); *Greater Hartford Bridge Authority v. Russo*, 188 A.2d 874 (Conn. 1963); *Forest Preserve District of Du Page County v. Brookwood Land Venture*, 595 N.E.2d 136 (Ill. 1992); *In re City of Rochester*, 121 N.E. 102 (N.Y. 1918); *State v. Superior Court*, 149 P. 652 (Wash. 1915)).

21. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); U.S. CONST. amend. XIV (making Fifth Amendment applicable to states by providing that no state may deprive any person property without due process of law); *Smyth v. Ames*, 169 U.S. 466, 526 (1898) (holding that state law deprives common carrier of its property without due process if law unreasonably establishes rates for transportation of persons or property); *Chicago Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (finding that Illinois statute violated due process clause by allowing extension of public street through private rails without compensation); 1 McQUILLIN, *supra* note 3, § 1.21 (“Due to the abuse of [the state’s] power, often for partisan politics, most state organic laws contain restrictions of some sort, especially limitations relating to counties, cities and towns.”). Of state constitutions, Judge McQuillin writes:

gate greater authority to municipal corporations by granting them “home-rule” status.²² The purpose of home-rule constitutional provisions is:

[T]o eliminate to some extent the authority of the legislature over the municipality, and to bestow on the municipalities coming under home rule full power of local self-government as to all subjects that are strictly of municipal concern, or germane to municipal functioning, and not in conflict with the constitution or applicable general laws Depending upon applicable constitutional provisions, a charter adopted under home rule may become the organic law of the municipality and supersede all general state laws in conflict with it relating to purely municipal affairs.²³

In contrast to the interpretation of *state* constitutional and statutory provisions, historically the judiciary has greatly circumscribed the protections available to municipal corporations under the United States Constitution. This approach is reflected in Judge McQuillin’s treatise: “The due process clause in the Constitution is of little importance so far as legislative control of municipal corporations is concerned,” due to the notion that “[m]unicipal corporations are political subdivisions of the state, created for exercising any governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause against action of the state government.”²⁴

That said, a few, mostly state courts, have extended greater federal constitutional protections to municipal corporations under certain narrowly defined circumstances.²⁵ One set of such circumstances involves ac-

After the middle of the 19th century, state constitutions contained numerous provisions, many in much detail, touching local government, both urban and rural. The constitutions of all states admitted into the union after that time dealt largely with this subject, and the majority of the states already in the union revised their constitutions, making provision, more or less elaborate, affecting local government. Many limitations, expressed and implied, were contained in those constitutional provisions relating to the powers of the legislature, concerning interference with local self-government.

Id.

22. See 1 McQUILLIN, *supra* note 3, §§ 3.21-3.23 (describing creation, purpose and varying types of home-rule charters).

23. *Id.* § 3.21.10 (footnotes omitted).

24. 2 EUGENE McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.20 (Dennis Jensen & Gail A. O’Grady eds., 3d ed. 1996) (citing, as examples of cases that state that municipalities, as creatures and instruments of state, are without standing to attack constitutionality of statute on due process grounds, *Yonkers Commission on Human Rights v. City of Yonkers*, 654 F. Supp. 544 (S.D.N.Y. 1987); *Meador v. Salem*, 284 N.E.2d 266 (Ill. 1972); *Mounllake Terrace v. Wilson*, 549 P.2d 497 (Wash. 1976); *Associated Hospital Service v. City of Milwaukee*, 109 N.W.2d 271 (Wis. 1961)); see *City of Hamilton v. Fairfield Twp.*, 678 N.E.2d 599, 612 (Ohio 1996) (noting that due process clause does not apply to municipalities).

25. See, e.g., *Proprietors of Mt. Hope Cemetery v. City of Boston*, 33 N.E. 695, 695 (Mass. 1893) (involving power of state legislature to compel city to transfer

knowledging the distinction between property held by a municipal corporation in its governmental capacity and that held in its private or proprietary capacity.²⁶ Courts have held, for example, that:

As to the property it . . . holds for its own private purposes, a city is to be regarded as a constituent in State government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the State as regards such property, is a right of regulation, and . . . is not a right of appropriation.²⁷

Accordingly, some courts have concluded that:

Property of the first class is to be regarded as “public” property, and hence not protected by the constitutional inhibition in question, while property of the second class is as much “private” as property of an individual landowner, with the result that it may not be taken by another subdivision or agency of the state without payment of just compensation.²⁸

This approach is epitomized by the Wisconsin Supreme Court’s direct statement in *Madison Metropolitan Sewerage District v. Committee on Water Pollution*.²⁹ In that case the court stated that, “the Fourteenth Amendment . . . applies only to property held by a municipality in its proprietary capacity.”³⁰

It is against this backdrop that we might hypothesize whether a particular municipal corporation (City) enjoys any protection (aside from any

cemetery property held by it to private corporation, and stating that “[the state’s] legislative power of control [over its cities] is not universal and does not extend to property acquired by a city or town for special purposes, not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation”). By contrast, the *Mt. Hope Cemetery* court noted that the state may execute significant control in requiring the city to transfer *public* property—without compensation—to some other agency of the state appointed to perform similar or other public purposes. *See id.* The United States Supreme Court extended similar protection to municipal corporations in *City of Boston v. Jackson*, 260 U.S. 309, 316 (1922), *aff’g* *City of Boston v. Treasurer & Receiver Gen.*, 130 N.E. 390 (Mass. 1921). The Court stated that the city’s property rights in its street railway system were of a proprietary nature so that they could not be taken by the state for use by another state agency without first making reasonable compensation to the city. *See id.* (extending due process rights to city).

26. *See Mt. Hope Cemetery*, 33 N.E. at 695 (distinguishing between city property held for “special purposes” and that held as public land).

27. *People ex rel. Bd. of Park Comm’rs v. Common Council*, 28 Mich. 227, 240 (1873).

28. Annotation, *Eminent Domain: Power of One Governmental Unit or Agency to Take Property of Another Such Unit or Agency*, 91 L. Ed. 221, 248 (1946).

29. 50 N.W.2d 424 (Wis. 1951).

30. *Madison Metro.*, 50 N.W.2d at 436 (citing *Town of Bell v. Bayfield County*, 239 N.W. 503 (Wis. 1931)).

applicable state constitutional or statutory provisions, which vary widely) under the Fourteenth Amendment Due Process Clause in the event that its creating state (State) seeks to acquire certain of City's real property (Property). Property is acquired by City on the open market for private development purposes with funds raised by City from private investors, whereby City will develop the property into a shopping center. In its proprietary capacity, City plans to engage the services of a private contractor to build the shopping center and to contract with a management company to manage the project. City has embarked upon this plan having seen the success that other cities have had in entering the market with proprietary, essentially private, enterprises.

State decides that it needs City's Property for a state office building. It asserts that it need not compensate City or provide any sort of hearing because City is a "creation of the state," and State thereby "has plenary power to abolish at [its] pleasure" this particular property interest of City.³¹ For its part, City recognizes that State's power of eminent domain is broad, and that State may well succeed in acquiring Property, but City asserts that at the very least State must give City procedural due process and compensation because State is attempting to take a "property" interest protected by the Fourteenth Amendment. The question is: Does State need to comply with the Fourteenth Amendment Due Process Clause and provide City with procedural due process? While conventional doctrine, as applied by most courts, might say "No," this Article answers with an emphatic "Yes."

III. MUNICIPAL CORPORATIONS HAVE STANDING TO ASSERT FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS CLAIMS AGAINST THEIR CREATING STATES

A. *Constitutional Limits on a State's Power over Its Municipal Corporations*

The United States Supreme Court addressed the matter of the relationship between states and their municipalities in *Gomillion v. Lightfoot*.³²

31. 1 McQUILLIN, *supra* note 3, § 1.21. For a discussion of how municipalities are subject to control by their creating states, see *supra* notes 12-30 and accompanying text.

32. In *Gomillion*, the Court considered the validity of an act of the Alabama legislature that redefined the City of Tuskegee's boundaries in such a way as to exclude the great majority of African-Americans, while leaving unaffected the white constituency. See 364 U.S. at 340 (explaining claim of Tuskegee's African-American residents to enjoin state from enforcing act). The constitutional provisions at issue in *Gomillion* were the Due Process and Equal Protection Clauses of the Fourteenth and Fifteenth Amendments, the latter providing that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

The Court in *Gomillion* held that the Fifteenth Amendment limits a state's right to re-draw the boundaries of a municipal corporation in such a way as to limit the right to vote. See *Gomillion*, 364 U.S. at 345 (paraphrasing the Fifteenth Amendment, which forbids states from passing any law that deprives citizen of his

It stated that, “the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of the consequences. Legislative control of municipalities, no less than any other state power, lies within the scope of relevant limitations imposed by the United States Constitution”³³ The Court further held that:

[A] correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.³⁴

Gomillion thus sets forth the important principle that there are constitutional limits to the degree of control that may be asserted by a state over municipal corporations, through legislation or otherwise.³⁵ The Fifth Circuit Court of Appeals, interpreting *Gomillion* in *Rogers v. Brockett*,³⁶ elaborated upon this point: “[W]e do not think [the cases] hold that a municipality never has standing to sue the state of which it is a creature.”³⁷ Rather, the Fifth Circuit opined that “*Hunter*, *Trenton*, and allied cases are substantive holdings that the Constitution does not interfere in states’ internal political organization. They are not decisions about a municipality’s standing to sue its state.”³⁸

vote because of his race); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 633 (1969) (allowing states to retain power to impose reasonable citizenship, age and residency ballot requirements, while prohibiting states under the equal protection clause from requiring that residents own or lease taxable property to vote in elections for school board).

33. *Gomillion*, 364 U.S. at 344.

34. *Id.* at 344-45. In other words, a court must undertake, *on a case-by-case basis*, an inquiry into whether a state’s action is subject to a “relevant limitation [] imposed by the . . . Constitution;” or, by contrast, whether the state’s action “is unrestrained by the particular prohibitions of the Constitution” at issue. See *id.* (discussing that in some circumstances, Constitution restrains state’s power).

35. See *id.* (discussing limitations on state action). The last phrase of the earlier quote from *Gomillion*, “through legislation or otherwise,” raises a key point: *Gomillion* has been cited (overbroadly, this Article suggests) for the proposition that in those cases where a municipal corporation may in fact have standing to challenge an action of its creating state, the municipality is limited to challenging a state legislative action. *Gomillion* suggests otherwise, however: “Legislative control of municipalities, no less than any other state power, lies within the scope of relevant limitations imposed by the United States Constitution.” *Id.* In other words, just as legislative control of municipalities must comply with the limitations set forth under the Constitution, the exercise of “other state power” over municipalities—*e.g.*, judicial or executive—must also comply. See *id.* at 344 (suggesting that all exercises of state power over municipalities must comply with federal Constitution).

36. 588 F.2d 1057 (5th Cir. 1979).

37. *Rogers*, 588 F.2d at 1068.

38. *Id.* at 1069. The issue in *Rogers* involved whether a local school district, which the court likened to a municipal corporation, had standing to challenge the constitutionality of a state statute requiring certain school districts to participate in

The important point to be derived from *Rogers*, as it interprets *Gomillion*, is the proposition that a municipality lacks standing to sue the State when the suit involves *substantive matters* of the State's authority to structure its own *internal political organization*.³⁹ Extrapolating from this proposition, when the suit does *not* involve substantive matters of the State's internal political organization, municipal corporation standing is *not* necessarily foreclosed. In other words, the Constitution may, at least potentially, "interfere" in such state activities.⁴⁰

Rogers, when combined with *Gomillion*, which suggests that the Constitution imposes some limitations on state control over municipal corporations, indicates that there are instances when a municipal corporation has standing to assert that the state has violated a constitutionally protected right.⁴¹ Seen in this light, a more precise reading of *Gomillion* is that "Hunter and kindred cases" stand for the more narrow proposition that "the State's authority [to determine substantive matters of internal politi-

a federal subsidized breakfast program. *See id.* at 1067 n.19, 1068 (establishing that local school district is analogous to municipality and then granting standing to school district) (citing *Gomillion*, 364 U.S. at 344). The school district objected to being required by the state to participate in the program, arguing that because the federal program itself did not require the participation of any state or school district, the federal law should prevail under the Supremacy Clause; hence, the district should be allowed to choose not to participate. *See id.* at 1060 (explaining school district's claim against state). The Fifth Circuit allowed the school district standing to pursue its claim. *See id.* at 1060-67 (analyzing reasons why school district had standing for its claim against State of Texas); *see also* Comment, *Municipal Corporation Standing to Sue the State: Rogers v. Brockette*, 93 HARV. L. REV. 586, 592 (1980) (asserting that the *Hunter* line of cases "establish no more than that the particular constitutional guarantees in question confer no rights upon a municipal corporation that can be invoked against the state").

Similarly, in *San Diego Unified Port District v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981), the federal district court held that a local port district, which is analogous to a municipal corporation because it is a creation of the state, had standing to challenge the constitutionality of state legislation imposing a curfew on aircraft flights, where federal law had no such rule. *See id.* at 290 (stating that "[p]olitical subdivisions can be profoundly affected by state actions which conflict with federal law"). The court stated that "[t]he Supremacy Clause does not confer a 'right' on any individual, but it does compose a general limitation on state power." *Id.* On appeal, the Ninth Circuit declared that "[w]hile there are broad dicta that a political subdivision may never sue its maker on constitutional grounds, . . . we doubt that the rule is so broad" as to prevent the school district from bringing suit. *Gianturco*, 651 F.2d at 1309-10 n.7 (citation omitted).

39. *See Rogers*, 588 F.2d at 1069 (citing substantive principle that "Constitution does not interfere in states' internal political organization").

40. *See id.* at 1070 (indicating that merits of case determine whether or not Constitution may "interfere" in state activities).

41. *See Gomillion*, 364 U.S. at 344 (stating that state does not have "plenary power to manipulate in every conceivable way for every conceivable purpose"); *Rogers*, 588 F.2d at 1070 (defining criteria associated with inquiries into standing as "the extent of an actual injury and of a genuine case or controversy," and determining that application of this criteria provides school district, likened to municipal corporation, standing to sue state).

cal organization] is unrestrained by the particular prohibitions of the Constitution considered in those cases.⁴²

This proposition is supported by the Court's early statement in *Hunter* itself:

It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals [I]t has been held that as to the latter class of property the legislature is not omnipotent.⁴³

In the ninety-plus years since *Hunter*, the careful distinction the Court drew between property held by a municipal corporation in its governmental capacity and that held in its private, proprietary capacity has become blurred, along with the attendant possibility the Court implied that the city might have a Fourteenth Amendment due process claim against the State for the deprivation of property held in the city's private and proprietary capacity.⁴⁴ This failure is not due to the Court's basic re-thinking of the principle in the years since *Hunter*, but rather is due to the fact that the issue has never since reached the Court in such precise terms as it did in

42. *Gomillion*, 364 U.S. at 344. Despite the possibility offered by such a reading of broadly extending due process rights to municipal corporations, this Article does not attempt to do so. There are serious concerns with perpetuating a revival of this doctrine for individuals, much less for municipal corporations. Instead, the Article firmly asserts that when the subject of the suit involves not substantive matters, but rather the *procedure* by which the state has deprived the municipality of a liberty, property or other interest conferred by the state, Congress or the Constitution (at least insofar as the interest does not involve matters of the state's internal political organization), the municipal corporation *does* have standing to sue the state on procedural due process grounds.

43. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

44. The Court stated in *Hunter*:

If the distinction [between property held by a municipal corporation in its governmental versus private, proprietary capacity] is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. . . . [T]he question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based has several times been noticed [by the Court].

Id. at 179-80 (citations omitted). The City of Allegheny failed to argue at trial that it held the property at issue in a private and proprietary capacity. *See id.* at 180 (noting that such argument did not appear in record and did not appear to be supported by facts). Therefore, the court did not directly address the constitutionality of a state taking municipal land held in a private capacity. *See id.* (stating that issue presented to court was "entirely different" from question of taking of privately-held municipal lands). Implicit in *Hunter*, however, is the possibility that the court *might* have considered Allegheny's claim that it had been deprived of property without due process of law, had it been able to accurately allege that the property deprived was held by the city in its private and proprietary capacity.

Hunter, and the lower federal courts for their part have never adequately considered the question.⁴⁵

For example, the Sixth Circuit in *South Macomb Disposal Authority v. Township of Washington*,⁴⁶ stated in dicta that “a municipal corporation, in its own right, receives no protection from the Equal Protection or Due Process Clauses vis-a-vis its creating state.”⁴⁷ This Article submits that for two reasons *South Macomb* overgeneralizes the issue. First, *South Macomb* fails to distinguish between substantive due process and procedural due process. Second, this case fails to distinguish between matters involving a state’s internal political organization and those which do not, such as property held by the municipality in its private and proprietary capacity.

While it appears that municipal corporations lack standing to challenge state activities involving substantive matters of internal political organization, the question of whether a municipality has standing to pursue *procedural* claims *not* involving matters of internal political organization is not clear.⁴⁸ Neither the Supreme Court nor any other federal court has

45. See, e.g., *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 501 (6th Cir. 1986) (considering question of whether political subdivisions of states can challenge constitutionality of another political subdivision’s ordinance on due process and equal protection grounds).

46. 790 F.2d 500 (6th Cir. 1986).

47. *S. Macomb*, 790 F.2d at 505. *South Macomb* involved a lawsuit against a township by a municipal corporation whose purpose was to dispose of solid waste, alleging that the conditions the township imposed for a soil removal permit violated the Fourteenth Amendment. See *id.* at 501 (considering municipal corporation’s argument that conditions were not requirements under zoning ordinance and were imposed out of animosity, and that no other “similarly situated landowner” was required to meet such conditions). Stating that “a political subdivision of a state cannot challenge the constitutionality of another political subdivision’s ordinance on due process and equal protection grounds” for the same reasons as a political subdivision receives no protection vis-à-vis its creating state, the court held that the municipal corporation lacked standing to pursue its lawsuit. See *id.* at 505 (discussing court’s reasoning for its holding). The court cites numerous cases and a 1938 *Michigan Law Review* article in support of its holding. See *id.* at 505 (quoting E. B. Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment upon the Power of the States to Control Municipal Corporations*, 36 MICH. L. REV. 385, 396-97 (1938) (asserting that “the contract, due process, and equal protection clauses of the national Constitution afford no protection whatever to municipal corporations, in their own right, as against the power of the states to control them”)).

South Macomb distinguishes *Rogers*, *Gianturco* and *Gomillion* by stating that “[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation,” but that the political subdivision categorically may *not* invoke the protections of the Fourteenth Amendment. *Id.* at 504. As discussed above, see *supra* notes 31-34 and accompanying text, *Gomillion* does not support this distinction.

48. See *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (“The respondents invoke generalities expressing the State’s unrestricted power—unlimited, that is by the United States Constitution—to establish, destroy or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely reorganize the breadth and importance of this aspect of the State’s political power.”); see also *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (5th Cir. 1979)

fully addressed the distinction between procedural and substantive due process in this context.⁴⁹ As the Supreme Court cautions:

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.⁵⁰

An examination of the cases cited by *South Macomb* in support of its broad conclusion that a municipal corporation receives *no* protection vis-à-vis its creating state from the Equal Protection or Due Process Clauses demonstrates that the Sixth Circuit indeed has overgeneralized the rule concerning municipal corporation standing.⁵¹ Specifically, in *South Macomb* the court failed to distinguish between substantive due process and procedural due process as it related to municipal corporation standing to challenge matters not affecting the state's internal political organization.⁵²

(citing "decisions [that] are frequently said to establish that a municipality has no standing to sue the state that created it").

49. The early *Hunter* case is as close as the Supreme Court has come to discussing the possibility of procedural due process rights for a municipal corporation in the face of a state's acting to deprive it of property the city holds "in its private and proprietary capacity," but the Court did not reach the issue. See *Hunter*, 207 U.S. at 180 (stating that "[t]he question has never arisen directly for adjudication in this court").

50. *Gomillion*, 364 U.S. at 343-44.

51. See *S. Macomb*, 790 F.2d at 505 (citing cases in support of its propositions). The court conceded that "[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation," but concludes that, otherwise, "a municipal corporation, in its own right, receives no protection from the Equal Protection or Due Process Clauses vis-a-vis its creating state." *Id.* The *South Macomb* court cited the following cases: *City of South Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting from denial of certiorari); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979); *San Diego Unified Port District v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978). *S. Macomb*, 790 F.2d at 504-05. Again, this Article suggests that the *South Macomb* court mistakenly limits its comment to legislation.

52. See *S. Macomb*, 790 F.2d at 505 (stating that "a municipal corporation in its own right, receives no protection from the Equal Protection or Due Process Clause vis-à-vis its creating state"). All of the cases cited by the court deal fundamentally with the state's power to control the substance of the state's internal political organization and power vis-à-vis the municipal corporation. See *id.* at 504-05 (citing *City of S. Tahoe*, 449 U.S. at 1041-42 (White, J., dissenting); *Gomillion*, 364 U.S. at 342-47; *Rogers*, 588 F.2d 1057; *Gianturco*, 457 F. Supp. 283). Whether the *procedure* by the state in undertaking its action meets constitutional muster either is not at issue, or is not addressed, by the courts in these cases. See *id.* at 504 (describing issue as "actually quite narrow: whether a political subdivision of a state receives any protection from the Due Process or Equal Protection Clauses of the Fourteenth Amendment vis-a-vis another political subdivision of the same state").

Many decisions denying municipal corporations standing involve *substantive* matters, and therefore do not affect the standing of municipalities to challenge the

B. *Procedural Due Process Analysis*

The Fourteenth Amendment to the Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law”⁵³ For *procedural* due process claims, the Due Process

constitutionality of state *procedures*. In *City of Moore v. Atchison, Topeka & Santa Fe Railway Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983), for example, the Tenth Circuit denied the City of Moore standing to challenge the State of Oklahoma’s authority to exempt certain companies from the city’s zoning power—*i.e.*, a matter that involves the *substance* of the state’s internal political organization and power with respect to the city. *See id.* 511-12 (holding that “political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds”).

Similarly, in *Delta Special School District No. 5 v. State Board of Education*, 745 F.2d 532 (8th Cir. 1984), the Eighth Circuit denied standing to a school district to challenge the State of Arkansas’ authority to develop an administrative appeal process for student school transfers within a school district—a matter which, though “procedural” in the sense that it involves a state’s development of a process for student appeals within a school district, nonetheless goes to the *substance* of the state’s internal political organization and power with respect to the municipal corporation. *See id.* at 533 (upholding district court’s ruling that political subdivisions of state cannot invoke protection of Fourteenth Amendment against state). Likewise, the Fifth Circuit, in *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980) (*per curiam*), held that a county lacked standing to challenge the state of Georgia’s authority to confer tax exemptions on certain companies to the relative advantage of certain, but not all, counties—*i.e.*, a substantive matter involving the state’s internal political organization. *See id.* at 1308 (quoting *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 (1933)). The *Williams* Court stated that, “[a] municipal corporation . . . has no privileges or immunities under the federal Constitution which it may invoke in opposition of the will of its creator.” 289 U.S. at 40, 53.

The Second Circuit weighed in on the matter in *City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973), holding that New York City could not challenge the State of New York’s social security financing and reimbursement policies as they applied to the City. *See id.* at 929 (citing *Williams*). That same year, the Second Circuit denied the City of New York standing to challenge the State of New York’s authority to require AFDC recipients, only in certain municipalities and districts, to register for training and employment—*i.e.*, substantive matters of internal political organization. *See Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973) (discussing city’s lack of standing to assert constitutional claims against its state). Finally, in the Seventh Circuit, the District Court for the Northern District of Indiana held that Lake County lacked standing to challenge Indiana’s legislative scheme to distribute federal AFDC funds among counties—*i.e.*, once again, a substantive matter subject to state discretion. *See County Dep’t of Pub. Welfare of Lake County v. Stanton*, 545 F. Supp. 239, 242-43 (N.D. Ind. 1982) (concluding that “municipal corporations have repeatedly been denied the right to challenge state legislation allegedly violative of the federal Constitution”) (quoting *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976)).

Again, the point to be gleaned from all of these cases is that they ultimately involve matters concerning the state’s authority to structure the *substance* of the state’s relationship with the municipal corporation—*i.e.*, its authority to set the substantive parameters of its own “internal political organization.” None explicitly involve the adequacy of the *procedure* used to deprive a municipal corporation of a particular property or liberty interest not involving matters of internal political organization.

53. U.S. CONST. amend. XIV, § 1.

Clause involves a two-step analytical inquiry. First, has the State in some way deprived a “person” of “life,” “liberty” or “property” interests within the meaning of the Due Process Clause?⁵⁴ Second (assuming the first question has been answered in the affirmative), what sort of “process” is “due”?⁵⁵

The Supreme Court discussed the importance of the distinction between substantive and procedural due process in *Cleveland Board of Education v. Loudermill*.⁵⁶

The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. . . . The right to due process “is conferred, not by [the state’s] legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”⁵⁷

In other words, once it can be said that a person—whether that person is an individual citizen, a private corporation, or a municipal corporation—possesses a protectable life, liberty, or property interest, the state no longer has the discretion to determine the minimum process by which that interest may be deprived.⁵⁸ Rather, the *Constitution* determines the minimum process that will be due.⁵⁹ The Court has stated that at a minimum, “the fundamental [constitutional] requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁶⁰

54. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (providing clear holding on Due Process Clause substantive rights).

55. See *id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

56. 470 U.S. 532 (1985).

57. *Loudermill*, 470 U.S. at 541.

58. For discussion of a municipal corporation’s status as a “person” under the Fourteenth Amendment, see *infra* notes 66-78 and accompanying text. For discussion of what constitutes a “property interest” for purposes of the Fourteenth Amendment Due Process Clause, see *infra* notes 80-82 and accompanying text.

59. See *Loudermill*, 470 U.S. at 541 (“[O]nce it is determined that the Due Process Clause applies, ‘the question remains what process is due.’ The answer to that question is not to be found in the [state] statute.”) (quoting *Morrissey v. Brewer*, 408 U.S. at 481).

60. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). It follows from *Mathews* that in order to have a “meaningful” hearing in a “meaningful manner,” it is first necessary to have adequate “notice” of the hearing.

1. *A Municipal Corporation Is a "Person" For Purposes of the Fourteenth Amendment*

Most of the Supreme Court's jurisprudence under the procedural due process inquiry involves whether the government has deprived an *individual* or a *private corporation* of a liberty or property interest.⁶¹ Whether a *municipal corporation*, by contrast, qualifies for such protection under the Fourteenth Amendment has not been squarely addressed by the Supreme Court, and for their part the lower federal courts have failed to explore fully the nuances of procedural due process doctrine as it may apply to municipal corporations.⁶²

To proceed to an analysis of whether a municipality in a particular case has been denied procedural due process rights under the Fourteenth Amendment, it is necessary to ask the preliminary threshold question whether a municipality is a "person" for purposes of the Due Process Clause. It is well-settled that "[a] *private* corporation is clearly a 'person' within the meaning of the Equal Protection and Due Process Clauses," but from a very early date the Supreme Court has questioned whether a *public* corporation is entitled to the same protections as a private corporation.⁶³ In *Trustees of Dartmouth College v. Woodward*,⁶⁴ Chief Justice Marshall explained that a state's power to regulate a private corporation is limited by the Constitution, whereas the Constitution does not act as a bar for the state's regulation of its own public corporations, even though the two corporations may provide identical services.⁶⁵

61. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960) (stating that African-American petitioners alleged that Alabama act redefining city boundaries violated Due Process and Equal Protection clauses of Fourteenth Amendment); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 622 (1969) (stating that petitioners, residents of school district, alleged that state's requirement that they own or lease taxable property to vote in election for school board violated their rights under Constitution's Equal Protection Clause).

The nature of the interests at stake in these cases vary. They may be real property, as in takings cases, or life/liberty/property interests created by, and/or guaranteed by, statutory entitlement or by the Constitution. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that welfare recipient's interest in continued receipt of welfare benefits was "statutory entitlement" that amounted to "property" within meaning of Due Process Clause).

62. See, e.g., *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (5th Cir. 1999) (citing Supreme Court and lower court cases addressing municipality's standing to sue state). For a further discussion of lower court cases, see *supra* note 38 and accompanying text.

63. *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936)) (emphasis added).

64. 17 U.S. (4 Wheat.) 518 (1819).

65. See *Dartmouth College*, 17 U.S. (4 Wheat.) at 589, n.(c) (distinguishing between legislature's power regarding private corporations and its power regarding public corporation). *Dartmouth College* involved a successful Contract Clause challenge to a New Hampshire law that changed Dartmouth College from a private to a public institution. See *id.* at 666 (finding law changing charter to be unconstitutional). *Dartmouth College* is a pre-Civil War case, of course, and the Fourteenth

That said, lower federal courts have acknowledged that under certain circumstances municipal corporations may be considered “persons” under the Fourteenth Amendment. In *Township of River Vale v. Town of Orangetown*,⁶⁶ the Second Circuit treated a New Jersey township as a person under the Due Process Clause when it held that the township had standing to assert a claim against a town in the neighboring state of New York for damages caused to the township by that town’s zoning change.⁶⁷ When a case involves a claim by a municipal corporation against another state or one of the other state’s local units, as was the case in *Township of River Vale*, it is unquestioned that “the broad supremacy doctrine [of states over their local governments] is not apposite.”⁶⁸

This Article submits that “the broad supremacy doctrine”⁶⁹ of states over their local governments is similarly “not apposite” with regard to the

Amendment had not yet been created and ratified. Together with the other “Civil War Amendments” (the Thirteenth and Fifteenth Amendments), the Fourteenth Amendment marked a “fundamental realignment of federal and state power,” whereby “[i]nstead of viewing the Constitution as a protection from federal power and the states as a bulwark against federal interference, at least some people came to see constitutional rights as a basis for the *assertion* of federal power to protect individuals against *state* interference.” GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 495-96, 506 (3d ed. 1996). Notions of states being required to afford persons due process—both substantive and procedural—were decades in the future at the time *Dartmouth College* was decided in 1819. Nonetheless, *Dartmouth College* stands as precedent to the extent that a state’s power to regulate private corporations is limited by the Constitution, whereas the Constitution does *not* act as a bar for the state’s substantive regulation of its own internal political organization (including the “organization” of municipal corporations). See *Dartmouth College*, 17 U.S. (4 Wheat.) at 561 (discussing various sorts of corporations and varying levels of control state exercises over them).

66. 403 F.2d 684 (2d Cir. 1968).

67. See *River Vale*, 403 F.2d at 686 (1968) (holding that municipal corporation is entitled to Fourteenth Amendment protection).

68. JEFFERSON B. FORDHAM, *LOCAL GOVERNMENT LAW* 52 (2d rev. ed. 1986). While cases supporting this proposition suggest the existence of limits on a state’s power over its municipal corporations, they cannot be cited as direct authority in support of municipal corporation standing because most of these cases involve *individual citizens* bringing suit to allege deprivations of their own individual liberties. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960) (stating the “legislative control of municipalities, no less than any other state power, lies within the scope of relevant limitations imposed by the United States Constitution”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (prohibiting states under Equal Protection Clause from requiring residents to lease or own taxable property to vote in school board elections).

69. FORDHAM, *supra* note 68, at 52; see *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (“The enforcement by the State of the provision of the act imposing upon the City the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the state.”). A fundamental proposition of the “state supremacy” principle is that a “State may withhold, grant or withdraw powers and privileges [from a public corporation] as it sees fit.” *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

local governments' procedural due process claims.⁷⁰ Using our hypothetical as an example, where City acquires certain Property on the open market for private development purposes with funds raised from private investors, City has acquired and holds Property in a manner that is totally independent of its relationship with State.⁷¹ In this instance, City essentially has taken on the characteristics of an individual "person" who would otherwise be protected by the Fourteenth Amendment were it not a municipal corporation. There is no principled reason not to extend constitutional procedural due process protections to City when State attempts to take Property for its own use, thereby depriving City of its proprietary property interest.

Most states and their legislatures have given effect to this assertion, at least implicitly, through the enactment of various constitutional and statutory provisions; and a number of state courts have likewise given effect to the proposition by requiring that states compensate cities for the taking of certain types of proprietary property from cities.⁷² Moreover, at least one state court has recognized the very principle proposed in this Article—namely, that municipal governments should have standing to assert procedural due process claims against their creating states.⁷³ In a 1994 case, the Colorado Court of Appeals stated in dicta that, "[i]n contrast [to a ban on asserting substantive due process claims], municipal corporations are not barred from asserting procedural due process claims."⁷⁴

70. It is this Article's position that a state certainly *may* "withhold, grant or withdraw [*some*] powers and privileges" from a municipal corporation as it sees fit, but when a state attempts to withdraw interests having nothing to do with substantive matters of the state's internal political organization, the state must comply with procedural due process requirements of the Fourteenth Amendment. *Trenton*, 262 U.S. at 187.

71. For the establishment of the hypothetical, see *supra* note 31 and accompanying text.

72. For a discussion of self-imposed limits on states' power to interfere with local government, see *supra* note 22 and accompanying text.

73. See *City of Colorado Springs v. Bd. of Comm'rs of the County of Eagle*, 895 P.2d 1105, 1119 (Colo. Ct. App. 1994) (distinguishing between substantive and procedural due process claims by municipalities). *Colorado Springs* involved cities in Colorado that applied to the Board of County Commissioners for a special use permit to conduct a major extension of an existing water collection system and a permit to conduct a municipal water project, pursuant to the Land Use Act and other land use regulations. See *id.* at 1109 (referring to City of Aurora and City of Colorado Springs as "the cities"). The Board denied the permits, and the cities filed an action in protest. See *id.* (noting that "the cities" filed C.R.C.P. 106 action protesting denial). The trial court ultimately "ordered the Board to approve the permits because it found that the Board had violated due process by improperly refusing to consider a final wetlands mitigation report submitted to the Army Corps of Engineers." *Id.* The Colorado Court of Appeals reversed on this point, concluding that the "County regulations [were] within the authority granted in connection with the administration of activities of state interest and [were] not violative of any constitutional provisions. Thus, the decision of the Board [was] reinstated." See *id.* at 1120 (citing *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304 (Colo. 1986)).

74. *Id.* at 1119.

Stating the proposition another way, once it can be said that the municipal corporation has acquired a protectable property or liberty interest (at least to the extent the interest does not affect matters involving the state's internal political organization), any effort by the State to deprive the municipality of that interest will trigger procedural due process protections. As the Supreme Court has explained, "The right to due process 'is conferred, not by [the state's] legislative grace, but by constitutional guarantee.'"⁷⁵

2. *Municipal Corporations Can Have "Property Interests" Under the Fourteenth Amendment Due Process Clause*

To assert a procedural due process claim, a person must successfully argue the deprivation by the state of a "life, liberty, or property" interest.⁷⁶ This Article focuses on the "property" aspect of the Due Process Clause, since property—especially *real* property—is the more tangible and certain of the "liberty" and "property" interests.⁷⁷ It is undisputed that real property is "property" within the meaning of the Due Process Clause, and that any deprivation by the state of a person's real property may be done only after the state has afforded the person notice and an adequate hearing.⁷⁸

75. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

76. U.S. CONST. amend. XIV, § 1; *see Loudermill*, 470 U.S. at 541 (explaining due process rights).

77. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.3.4 (1997) (noting that term "life," even if it were relevant in context of municipal corporation standing, "in the due process clause is rarely the subject of controversy").

78. *See id.* § 7.3 (noting lack of controversy caused by term "property" in Fourteenth Amendment). It can also be argued that certain other rights and responsibilities granted to municipal corporations through state legislation are also in the nature of "property" interests, in the same way that statutory entitlements for individuals have been held to be property for purposes of the Due Process Clause. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (explaining that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that individuals receiving welfare benefits have a "property interest" in continuing to receive those benefits, and that government must provide due process if it seeks to withdraw those benefits); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783-87 (1964) (arguing that government entitlements constitute a form of "new property" to which procedural due process protections should extend).

Given limiting statements by the Supreme Court on the matter of what constitutes liberty and property for purposes of due process analysis and the ideological leanings of the current Court, it seems unlikely that the Court would accept an argument that a state's legislative grant to a municipal government of Home Rule powers, for example, constitutes a "property" interest, the deprivation of which must comply with procedural due process requirements. *Cf. Bishop v. Wood*, 426 U.S. 341, 347 (1976) (holding that employee's discharge was not deprivation of property interest protected by Fourteenth Amendment). Nonetheless, this Article asserts that procedural due process rights for municipalities *should* extend at least to those indisputable property interests having nothing to do with substantive mat-

Municipal corporations often own real property. As previously discussed, a distinction can be made between property held by the municipal corporation in its governmental capacity as compared to that held in its private, proprietary capacity.⁷⁹ Some courts hold that:

[P]roperty of the first class is to be regarded as "public" property, and hence not protected by the constitutional inhibition in question, while property of the second class is as much "private" as property of an individual landowner, with the result that it may not be taken by another subdivision or agency of the state without payment of just compensation.⁸⁰

In other words, under this approach "the Fourteenth Amendment . . . applies only to property held by a municipality in its proprietary capacity."⁸¹ Accordingly, it must be so that a Fourteenth Amendment "property interest" does indeed exist, and the state may deprive the municipality of this interest only upon affording it due process of law.

3. *What Sort of "Process" Is Due?*

Under procedural due process analysis, once it is determined that the state is attempting to deprive a "person" of a "life, liberty, or property" interest, the Constitution requires, at a minimum, that the person have the opportunity to be heard "at a meaningful time and in a meaningful manner."⁸² In conducting its inquiry, a court should consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest

ters involving the state's internal political organization, with the full understanding that most disputes between states and their municipalities probably *do* turn on "substantive matters of internal political organization," and are therefore beyond constitutional protection. For a discussion of a municipality's standing to sue, see *infra* note 95 and accompanying text. Moreover, adequate process may well already be afforded through the legislative process, as discussed *infra* notes 92-94 and accompanying text.

79. For a discussion of the legal distinction between publicly-held and privately-held municipal property, see *supra* notes 26-30 and accompanying text.

80. Annotation, *supra* note 28, at 248 (indicating when state courts have given protection to municipalities); see also *supra* note 42 (noting that this Article supports premise that only when state has procedurally deprived municipality of liberty, property or other interest does municipality have standing to sue on procedural grounds).

81. *Madison Metro. Sewerage Dist. v. Comm. on Water Pollution*, 50 N.W.2d 424, 436 (Wis. 1951). For support for the proposition that state interest with proprietary nature must be reasonably compensated before it can be used by another state agency, see *supra* notes 26-30 and accompanying text.

82. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For a discussion of what minimum due process is due under Fourteenth Amendment for property interest, see *supra* notes 59-60 and accompanying text.

through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁸³

In a case such as that posed in our hypothetical, where State seeks to acquire real Property held by City in its private and proprietary capacity, State should be expected to provide process similar to that which would be afforded an *individual* person holding property that the government seeks to acquire. In other words, courts should apply the three-factor *Mathews v. Eldridge*⁸⁴ test in determining whether the State's "process" passes constitutional muster:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁸⁵

In our hypothetical, City's "private" interest to hold and use Property is a fundamental property right and weighs heavily in the *Mathews* balancing test.⁸⁶ At the very least, if City has expended funds of its own to acquire and develop Property to any significant extent, State's action can have grave economic consequences for City. The risk of "erroneous deprivation" of City's property interest is great if the State is under no obligation to accord basic due process of law to the City any time State decides that it wants City's property.⁸⁷ Principles of fundamental fairness should discourage states from trying to get "something for nothing"—even from those noxious "creatures of the state."⁸⁸ In addition, the "probable value" of requiring State to observe basic principles of due process in a case where it seeks to deprive City of property held in City's private and proprietary capacity is that such a requirement would give effect to the Supreme Court's statement that "[l]egislative control of municipalities, no less than any other state power, lies within the scope of relevant limitations imposed by the United States Constitution."⁸⁹ The Court further stated that, "[t]he

83. *Id.* at 335.

84. 424 U.S. 319 (1976).

85. *Mathews*, 424 U.S. at 335 (articulating three-part test).

86. *See id.* at 335-39 (weighing private interest at risk).

87. *Id.* at 335 (noting that degree of potential deprivation must be considered in assessing validity of administration's decision-making process).

88. *See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (stating that, regardless of granted power, municipality remains "creature of the state").

89. *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960). For a discussion of the facts and resolution of *Gomillion*, see *supra* note 32 and accompanying text.

State [does not have] plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations”⁹⁰ Moreover, long-recognized distinctions between property held by municipal corporations in their governmental capacity and that held in their private and proprietary capacity would be reemphasized by an insistence on observing procedural due process in such circumstances.⁹¹ Finally, requiring the State to accord procedural due process to City might lead to marginally greater administrative and other costs for State.⁹² In the final analysis of the hypothetical, factors one and two of the *Mathews* balancing test far outweigh factor three, leading to the natural conclusion that the current process of denying municipal corporations procedural due process protections from certain actions of their creating states is unconstitutional. In sum, under *Mathews*, State must provide City adequate procedural due process if it seeks to deprive City of property held in City’s private and proprietary capacity.

It should be observed that, lest an objection is raised that allowing municipal corporations standing to pursue procedural due process claims against their creating states would open the floodgates of litigation, in many cases a strong argument can be made that the municipality already receives the required procedural due process through the normal legislative process.⁹³ Specifically, the legislative process involves the opportunity for debate among state legislators, some of whom represent the district encompassing the municipal corporation. Under this argument, the interests of the municipality, therefore, are arguably adequately represented by the political process, and the municipality in effect receives the necessary “hearing” required under the Due Process Clause.⁹⁴

90. *Gomillion*, 364 U.S. at 344.

91. For a discussion of a municipality’s standing to sue on due process grounds, see *supra* notes 26-30 and accompanying text.

92. *Cf. Mathews*, 424 U.S. at 348 (noting that financial cost alone is not “controlling factor” in determining whether due process is met, but that court must weigh government’s interest). Additional costs for State would be payment of just compensation to municipal corporations for the Property State takes from City. To the extent that state statutory and constitutional provisions already require payment of just compensation, the act of imposing *federal* procedural due process requirements does not in fact increase State’s cost.

93. The balance would be tipped too far in favor of the municipality, the argument goes, if a municipality can assert that the state has deprived it of its right to procedural due process any time the state legislature decides to withdraw, change, or withhold a municipality’s liberty or property interest. This is far from the case, though, in our hypothetical case where State attempts to take Property held by City in its private and proprietary capacity.

94. *See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (stating that “[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”).

Indeed, the legislative-process-as-adequate-hearing argument, when combined with the state's authority to determine matters involving the substance of its internal political organization free of constitutional constraint⁹⁵ (and because the great majority of actions affecting municipal corporations probably involve such matters), leads one to suppose that it still may be the unusual case where the municipal corporation would be able to argue successfully that its procedural due process rights have been violated. Despite the fact that the end result likely would be the same whether or not the municipality has standing—namely, the municipality fails in its effort to overturn the state's action—the means used in coming to that result are altogether different, and the distinction is of prime importance in terms of the principles of doctrinal consistency and fundamental fairness.

In one case—where the municipal corporation *does* have standing to bring the procedural due process claim—the municipality is properly recognized as a “person” able to assert certain procedural due process rights, but which simply has not prevailed on the merits of procedural due process analysis. This is a far cry from the alternative case—where the municipal corporation has no standing—whereby the municipal corporation is summarily denied any opportunity for judicial review regardless of the nature or grievousness of the state's action. Again, the distinction in the means used here make all the difference in whether the principles of justice underlying the Due Process Clause are (or are not) being vindicated.

For purposes of doctrinal consistency, then, the approach advocated in this Article—namely, that a municipality *does* have standing to pursue a procedural due process claim when the creating state seeks to deprive the municipality of a liberty or property interest not involving substantive matters of the state's internal political organization—is the preferred approach. This approach is also more in keeping with the notion that “[t]he essence of procedural due process is fundamental fairness.”⁹⁶ Specifically, notwithstanding the existence of state constitutional or statutory provisions,⁹⁷ it is important to the health and efficiency of state-local government relations that the Due Process Clause require states to observe at least minimal procedural requirements vis-à-vis their municipal corpora-

95. See *Rogers v. Brockette*, 588 F.2d 1057, 1064 (5th Cir. 1999) (holding that United States Constitution does not limit state's ability to abolish or reorganize political subdivision).

96. *City and County of Denver v. Eggert*, 647 P.2d 216, 224 (1982); see also *Mathews*, 424 U.S. at 333 (stating that “the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society”) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *id.* (stating that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

97. For a discussion of state constitutional and statutory provisions, see *supra* note 21 and accompanying text.

tions. To accept less would sanction *any* impairment by a State of a municipal corporation's interests so long as it was cloaked in the garb of the line of cases cited in *South Macomb*.⁹⁸ As asserted by the Supreme Court in a different context, "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."⁹⁹

IV. CONCLUSION

Conventional wisdom holds that "a municipal corporation, in its own right, receives no protection from the Equal Protection or Due Process Clauses vis-à-vis its creating state,"¹⁰⁰ due to the municipality's historical status as "a [mere] agency of the state."¹⁰¹ This Article argues, after a careful examination of federal and state precedent involving standing for municipal corporations to assert claims against their creating states, together with a review of the United States Supreme Court's current procedural due process doctrine, that such statements are overbroad, and that municipal corporations *do* in fact have standing to assert procedural due process claims against their creating states in cases not involving substantive matters of the state's internal political organization. Judicial recognition of this distinction would go a long way toward furthering principles of fundamental fairness and doctrinal consistency in state-local relations, and toward according a measure of deserved respect to those constitutionally-maligned "creatures of the state," municipal corporations.

98. See *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) (noting that relationship between public corporation and its creating state has led court to conclude that municipal corporations cannot invoke Fourteenth Amendment protection).

99. *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (quoting *Frost v. Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926)).

100. *S. Macomb*, 790 F.2d at 505. For a further discussion of the *South Macomb* case, see *supra* note 47 and accompanying text.

101. 1 McQUILLIN, *supra* note 3, § 2.08.