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Municipal Constitutional Rights: A New Approach

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Introduction

The Constitution protects people, private corporations, states, and even branches of the federal government. But does it protect municipalities?[1]

For a long time, the answer was a resounding no. Municipalities were held to be creatures of the state, having no rights beyond those given to them by the state that created them.[2] Constitutionally, this doctrine, exemplified by *Hunter v. City of Pittsburgh*,[3] meant that when states gave powers to cities, this was a unilateral action, not a contract; if the state wanted to take back the powers, the Contracts Clause did not limit its ability to do so. Similarly, cities had no property rights against their creating states, so the Due Process Clause gave them no protection against state action.[4] In its most expansive form, this doctrine meant that no part of the Constitution granted any rights to municipalities or municipal residents qua residents. Thus, Justice Cardozo, in *Williams v. Mayor*, could write for the Court that "[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."[5]

Then, in *Gomillion v. Lightfoot* (1960), the Court was faced with Alabama's blatantly racial gerrymandering of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure . . . ."[6] The defendant officials invoked *Hunter* for the proposition that the state's power to shape the boundaries of municipalities was not limited by the Constitution. The Court rejected this argument, noting that *Hunter*'s "seemingly unconfined dicta" swept too far.[7] The state's

1. This Note concerns the limitations on the constitutional rights of localities. The legal literature in this area has focused on cities, towns, and counties, but other political subdivisions are affected, such as school districts and local statutory authorities for aviation, housing, health, and the like. Because the law today usually does not differentiate between these entities, and because there is no precise term that refers to all of them, I use the terms municipalities, political subdivisions, and localities interchangeably. There may be reasons for treating the constitutional rights of some of these entities differently, but that question requires the foundation that this Note seeks to establish, and I leave it for another author.

2. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

3. *Id.* I refer to this as the *Hunter* doctrine, even if a given case does not cite *Hunter* for the proposition. *See* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 Harv. C.R.-C.L. L. Rev. 1, 3 (2012) (defining the "*Hunter* doctrine" as the rule that "localities . . . cannot invoke the Constitution against their own states" because they "are mere instrumentalities of state governments").

4. Morris, *supra* note 3, at 3.

5. 289 U.S. 36, 40 (1933) (internal citations omitted).

6. 364 U.S. 339, 340 (1960).

7. *Id.* at 344.

power over its municipalities could not be used to violate an individual's Fifteenth Amendment right to vote.[8]

In the years since *Gomillion*, the Court has allowed municipalities to participate, alongside individuals, in constitutional litigation against the state. While the Court has not explicitly addressed the presence of the municipalities in these cases, the implication of cases like *Romer v. Evans*[9] and *Washington v. Seattle School District No. 1*[10] is that municipalities can suffer injury, and therefore have standing, when the state violates the constitutional rights of their residents.

Most recently, however, the Court has hinted at a return to *Hunter*'s *ancien regime*.[11] *Ysursa v. Pocatello Education Ass'n* held that a state could prohibit local governments from allowing employees to choose to contribute to a union's political action committee through automatic payroll deductions.[12] *Ysursa* held that, while this policy violated the First Amendment as applied to private employers, it did not touch the First Amendment when applied to public employers, including local governments, because it was akin to the state declining to speak.[13] Since local governments are "mere[] . . . departments" of the state, the silence imposed on them was no different than the silence imposed on the Idaho Department of Motor Vehicles.[14] This, of course, is a fiction. Cities are, among other things, sites of association. They are polities.[15] The DMV is not.

Ysursa exhibits the worst tendencies of *Hunter* and its progeny. It resorts to sweeping dicta rather than analysis. It forgets *Hunter*'s purpose. And it forgets that there has been a constitutional rights revolution since *Hunter* came down.

But *Ysursa* is not alone. Aside from *Gomillion*, there has been almost no meaningful analysis of the *Hunter* doctrine in decades. Most cases replace purposive or textual analysis with vague claims of sovereignty or rote references to *Hunter's* "seemingly unconfined dicta."[16]

8. *Id.* at 344-45.

9. 517 U.S. 620 (1996).

10. 458 U.S. 457 (1982).

11. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).

12. *Id.*

13. *Id.* at 362-64.

14. *Id.* at 362 (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923)).

15. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) ("[O]ur towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of 'ordinary civic life in a free society.'" (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

16. Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960) (describing *Hunter*'s "seemingly unconfined dicta"); *see Ysursa*, 355 U.S. at 363; Williams v. Mayor, 289 U.S. 36, 40 (1933); *Trenton*, 262 U.S. at 186-88.

As a result, massive fissures have developed between the lower courts' understanding of the doctrine. This is especially problematic because the Supreme Court takes few cases in this area of law. Courts disagree on the most basic questions of municipal rights. First, they disagree on what kind of a rule *Hunter* and its progeny establish—whether they mean that cities lack standing to bring constitutional claims against their creating states, lack the capacity to sue and be sued by their creating states, or lack constitutional rights against their creating states. The Ninth[17] and Tenth[18] Circuits construe *Hunter* as a doctrine of standing. New York state courts construe it as a doctrine about the capacity to sue.[19] By contrast, the Fifth Circuit[20] and the California Supreme Court[21] have squarely held that the rule is one of substantive constitutional law, although subsequent cases in the Fifth Circuit have raised some questions about this holding. The Sixth Circuit has adopted a similar position.[22]

Second, courts disagree on whether the *Hunter* doctrine applies to all constitutional rights or only certain constitutional rights. Courts generally hold that *Hunter* limits claims under the Contracts Clause, the Just Compensation Clause, and the Fourteenth Amendment. In addition, some courts, such as the

17. *See* Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1362 (9th Cir. 1998) ("[A] political subdivision of a state lacks standing under federal law to challenge the constitutionality of a state statute.").

18. *See* Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 630 (10th Cir. 1998) ("A political subdivision has standing to sue its political parent on a Supremacy Clause claim."); Hous. Auth. of Kaw Tribe of Indians v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991) (holding that a housing authority had no standing to sue under the Fourteenth Amendment, but did have standing to sue under the Fair Housing Act).

19. *See* City of New York v. State, 655 N.E.2d 649, 654 (N.Y. 1995) ("[M]unicipalities lack capacity to sue the State.").

20. *See* Rogers v. Brockette, 588 F.2d 1057, 1068 (5th Cir. 1979) ("[T]hese cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state of which it is a creature."). *But see* Donelon v. Louisiana Div. of Admin. Law *ex rel.* Wise, 522 F.3d 564, 568 n.6 (5th Cir. 2008) (criticizing *Rogers*, but not questioning its binding authority); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) ("[T]he Town of Ball has no standing to assert that the Parish's allocation formula for the tax avails contravenes the Fourteenth Amendment.").

21. *See* Star-Kist Foods, Inc. v. Cnty. of Los Angeles, 719 P.2d 987 (Cal. 1986) (allowing municipal defendants to raise a Commerce Clause challenge to a state tax exemption in a refund case).

22. *See* Carlyn v. City of Akron, 726 F.2d 287, 290 (6th Cir. 1984) (holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment do not limit the state's ability to control municipal boundaries).

Ninth Circuit, hold that it bars all federal constitutional claims.[23] Other courts hold that it allows certain constitutional claims; the Fifth[24] and Tenth[25] Circuits, for example, permit Supremacy Clause challenges, while the California Supreme Court allows dormant Commerce Clause challenges.[26] Note that, while the Ninth and Tenth Circuits agree that *Hunter* is a doctrine of standing, they disagree on what constitutional claims municipalities lack standing to bring. Thus, the legal recourse available to municipalities and other political subdivisions varies substantially in different regions of the country. For example, a public airport authority whose expansion is frustrated by municipal policies that may be preempted by federal law can sue to vindicate its rights in federal court in Connecticut,[27] but not in California.[28] Meanwhile, courts express no clear understanding of why—in a purposive, textual, or originalist sense—the Constitution protects municipalities much less than it protects other entities, including private corporations. Contrast this with the constitutional obligations of municipalities: as state actors, municipalities are bound by the Fourteenth Amendment, and there is a richly developed (albeit contested) body of law regarding when municipalities can be held liable under 42 U.S.C. § 1983.[29]

Thus, the *Hunter* doctrine, in its myriad manifestations, has three main flaws: purposelessness, inconsistency, and overbreadth.

When *Hunter* is read too broadly, municipalities cannot enforce the Constitution. This can frustrate federal regulatory schemes and prevent individual rights from being vindicated. For example, the Ninth Circuit has invoked *Hunter*'s progeny to block a city from challenging a regional planning agency's land use regulations and transportation plans under the Takings and Supremacy Clauses,[30] a state-created health system from challenging a state Medicaid regu-

23. *See* Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1362 (9th Cir. 1998) ("[A] political subdivision of a state lacks standing under federal law to challenge the constitutionality of a state statute.").

24. *See Rogers*, 588 F.2d at 1057.

25. *See* Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 628 (10th Cir. 1998).

26. *Star-Kist Foods*, 719 P.2d at 987.

27. Tweed-New Haven Airport Auth. v. Town of E. Haven, Conn., 582 F. Supp. 2d 261 (D. Conn. 2008) (allowing a suit by a public airport authority against a town, without addressing the *Hunter* issue).

28. *Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d at 1362.

29. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Owen v. City of Independence, Mo., 445 U.S. 622 (1980); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

30. City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency, 625 F.2d 231 (9th Cir. 1980). The Supremacy Clause allegation here is particularly fascinating: the city alleged that the California Regional Planning Agency, a political subdivision of the state, acted in conflict with "the plans and ordinances of a similar administrative

lation under the Supremacy Clause,[31] and a public airport authority from challenging a city's action as preempted by federal aviation regulation.[32] These decisions frustrated Congress's decision to approve a bistate entity under the Compact Clause, federal Medicaid law, and federal aviation law, respectively.

Overly broad readings of *Hunter*-doctrine cases threaten individual rights when individual plaintiffs depend on municipal participation in their lawsuits, perhaps for resource reasons. In *Washington v. Seattle School District No. 1*, parents and the school district sued the state to vindicate the district's right to bus students in order to combat segregation.[33] In *Romer v. Evans*, individuals and municipalities sued the state to contest a state initiative removing their power to enact local antidiscrimination ordinances.[34] The Supreme Court allowed these suits to proceed, without mentioning *Hunter*. But strong readings of *Hunter*, including the Ninth Circuit's view and the reading suggested by the Court's recent decision in *Ysursa*, would have blocked the municipal participation. A proper understanding of *Hunter* and its progeny would not interfere with such suits.

This is not to suggest that *Hunter* decisions always overreach. To the contrary, *Hunter* has an important role to play in ensuring that claims of municipal right are not used to lock the state into policies that have outlived their usefulness. The problem is that the courts have forgotten this purpose of policy flexibility. As a result, *Hunter*'s reach is determined by the sweeping language of its case law, not the reasons for its existence.

The reliance on *Hunter*'s dicta rather than its rationale is especially problematic because *Hunter* is an odd sort of constitutional rule. It does not follow the usual rules of constitutional interpretation; it does not purport to be an interpretation of the words or structure of the Constitution. Rather, it is stated as a rule about the "nature of municipal corporations."[35] In this sense, it sounds

body, the Tahoe Regional Planning Agency—a bi-state agency established by Compact between California and Nevada and approved by Congress—in violation of the Supremacy Clause of the Constitution." *Id.* at 233.

31. Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104 (9th Cir. 1999) (relying on *S. Lake Tahoe*, 625 F.2d at 233). *But see* Putz v. Schwarzenegger, No. 10-00344 CW, 2010 WL 1838717, at *10 (N.D. Cal. May 5, 2010) (holding that public authorities created by county ordinance to deliver in-home supportive services "are not political subdivisions for purposes of standing" because they are "established for the sole and limited purpose of providing for the delivery of in-home supportive services," unlike the health care districts in *Palomar*, which could levy taxes, issue bonds, and use the power of eminent domain (internal quotation marks omitted)).

32. *Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d at 1364 (relying on *S. Lake Tahoe*, 625 F.2d at 233).

33. 458 U.S. 457 (1982).

34. 517 U.S. 620 (1996).

35. Hunter v. City of Pittsburgh, 207 U.S. 161, 177 (1907).

subconstitutional—or, as Kathleen Morris has argued,[36] like the kind of federal general common law that was widespread in the 1800s before *Erie Railroad Co. v. Tompkins*.[37] When *Hunter* is applied, it often means that constitutional values, if not constitutional rights per se, are limited. Courts should be reluctant to extend, without purpose, a subconstitutional rule in order to limit constitutional rights.

Reacting to *Hunter*'s uncertain but often sweeping nature, scholars in recent years have critiqued the *Hunter* doctrine,[38] called for its abolition,[39] or sought to soften its rougher edges.[40]

David Barron has argued for greater constitutional recognition of local governments, criticizing both *Hunter* and Dillon's Rule, which narrowly construes any grants of power to municipalities.[41] Recently, Kathleen Morris, in a work that inspired this Note, investigated *Hunter* in detail and concluded that: (1) the courts have come to understand the *Hunter* doctrine as a general doctrine of local powerlessness to be invoked whenever it helps resolve a case; (2) understood this way, the doctrine has no grounding in the Constitution or federal law, so it violates *Erie*; (3) stated this way, the doctrine has "the ring of" capacity to sue more than standing doctrine or substantive law, because it is focused on what localities intrinsically "are"; and (4) the logic underlying *Hunter*-the-case is not, and never was, strong enough to support what courts and scholars currently consider the *Hunter*-the-doctrine.[42] She and I part ways because I identify a purpose in *Hunter* worth keeping. Other commentators have argued for allowing municipalities to make one constitutional claim or another. They have variously argued that municipalities should be able to assert procedural

36. Morris, *supra* note 3, at 3.

37. 304 U.S. 64 (1938).

38. *See, e.g.*, Barron, *supra* note 15, at 565-68; Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1336-49 (1994). *See generally* Morris, *supra* note 3, at 9-11 (discussing the literature).

39. Morris, *supra* note 3, at 5.

40. *See, e.g.*, Barron, *supra* note 15 at 568-95; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 96-99 (1990).

41. Barron, *supra* note 15, at 507-08, 562-68, 595-612.

42. Morris, *supra* note 3, at 4, 18-19, 25-34.

due process claims against the state,[43] bring Supremacy Clause suits,[44] and sue other cities under 42 U.S.C. § 1983.[45]

This Note seeks to do what no other commentators have tried: to construct a full theory of the *Hunter* doctrine. I aim to build it with a guiding purpose that prevents it from growing to monstrous proportions.

First, I show that, despite the purposeless discussions of *Hunter* in much of the case law, *Hunter* does have a practical purpose: maintaining state flexibility over the powers and contours of its municipalities. This purpose is as vital today as it was years ago. State grants of powers or boundaries to municipalities should not "tie the hands" of the state,[46] forcing it to forever abide by decisions that made sense at one point in time but later outgrew their usefulness. At one point, a state might want many municipalities in a given area; later, good governance might require them to merge.[47] Or a state might want to exempt municipal activities from taxation; later, it might realize that this was in error.[48] A state might first decide that it was best to transport citizens across a river by a municipally run ferry; then, by a private toll bridge;[49] and, still later, by a publicly operated bridge free of tolls.[50] The Constitution should not be read to deny states this policy flexibility over time. Thus, under *Hunter*, the Constitution does not write the state's grants into stone by calling them contracts or property.[51]

43. *See, e.g.*, 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 (2002).

44. *See, e.g.*, 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).

45. *See, e.g.*, Caswell F. Hollway, IV, Comment, *City v. City: The Case for Full Municipal Personhood Under § 1983*, 2001 U. CHI. LEGAL F. 479.

46. City of Covington v. Kentucky, 173 U.S. 231, 238 (1899).

47. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) (holding that a Pennsylvania act providing for the union of contiguous municipalities was not unconstitutional); *see also* Kelly v. Pittsburgh, 104 U.S. 78 (1881) (holding that a state has the power to determine which parts of its territory fall within city limits).

48. *See Covington*, 173 U.S. at 231-32 (holding that a provision of a Kentucky act exempting specified property from taxation did not prevent the Kentucky legislature from withdrawing the exemption).

49. *See* Town of E. Hartford v. Hartford Bridge Co., 51 U.S. 511 (1850) (holding that a Connecticut act discontinuing a ferry when a bridge was built was not unconstitutional).

50. *See* Williams v. Eggleston, 170 U.S. 304 (1898).

51. There is a textual basis for this as well—the Constitution speaks of only two levels of government, not three. I thank Richard Briffault for this reminder.

Second, I set out to construct a coherent *Hunter* doctrine structured around that purpose of state policy flexibility. I show that *Hunter* must be a doctrine of substantive constitutional law, rather than one of standing or of capacity to sue, because policy flexibility can only be preserved by a doctrine that protects state statutes from constitutional challenges regardless of procedural posture, party identity, or forum. *Hunter* limits the rights of municipalities themselves, but it should not limit the rights of individuals, nor the rights of municipalities to protect their interests under the Supremacy Clause. Furthermore, I argue that a proper understanding of *Hunter* should allow municipalities *themselves* to claim some constitutional rights against their creating states. For example, municipal free speech is an area where the demand of state policy flexibility is weak enough, and the ability of municipalities to vindicate constitutional values is strong enough that the case for municipal rights is persuasive.[52]

Third, I consider *Hunter*'s application when political subdivisions challenge actions other than those by state legislatures. Courts have held that *Hunter* bars constitutional challenges by one municipality to the actions of another. Cases applying *Hunter* in this way interpret the doctrine incorrectly. *Hunter* limits municipal actions only to allow state policy control. Municipal challenges to actions of other municipalities do not interfere with state policy. So municipalities should have standing to challenge such actions just as they have standing to challenge private actions that interfere with municipal property.

It is often remarked that the Constitution does not see localities.[53] This claim sweeps too broadly. In truth, the Constitution sees localities, but only once states create them. In this way, localities are like property rights. State and federal law construct property rights together: states create the rights, and federal due process creates further protections around those rights. Similarly, localities are constructed in the first instance by state law, but once so constructed they become the products of federal law as well.

I. *Hunter*'s Purpose and Its Problems

A. Hunter*'s Historic Purpose*

Hunter's origins go back centuries into the history of European law. Specifically, the doctrine emerged from the much older European understanding that corporate bodies exist at the grace of the sovereign. This conception of corpora-

52. *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637 (2006). Fagundes's thought-provoking article explores whether state and local governments should have free speech rights. It does not discuss the *Hunter* issue of local governments' having rights against their creating states.

53. *See, e.g.*, Morris, *supra* note 3, at 2 (observing but disagreeing with the "[c]ommon legal wisdom" that "the Constitution does not 'see' local public entities, that they are constitutionally invisible").

tions was obviously of great political benefit to Europe's monarchs, as it gave them control over the creation of private organizations.

Medieval common law viewed corporations as fictitious persons that could not exist without a grant from the sovereign.[54] As the common law corporate concept developed, "the king's courts were concerned chiefly with municipal . . . groups."[55] The courts held that the special franchises of boroughs (a kind of municipality) could exist only by royal grant; where boroughs had long existed, the courts constructed the legal fiction of the "lost grant" so as to maintain the notion that municipal corporations were dependent on the sovereign will.[56] This doctrine gave the king "a ready means of keeping lesser groups in subordination to the state . . . and since incorporation would be granted only for a price, a ready means of raising revenue was furnished."[57] It is not surprising, then, that "the heyday of the concession theory was during the period of the Stuarts when royal absolutism was at its height."[58] This was the time of the brothers Charles II and James II, whose father had been deposed and executed by the Parliamentary forces during the English Civil War.[59]

But, try as they might, the Stuart kings did not resolve the question for all time. In 1680, as part of his campaign to pressure boroughs into electing less whiggish representatives, Charles II brought an action *quo warranto* against the City of London, threatening to remove its charter and chartered properties.[60] Charles II won the case—and while London never actually returned its charter, other boroughs quickly capitulated and did so.[61] But by 1688, the political tide had turned, and before the Parliamentarians overthrew him in the Glorious Revolution, James II issued "A Proclamation for restoring Corporations to their Ancient Charters, Liberties, Rights and Franchises."[62] After the Glorious Revolution, London's arguments became, in Hendrik Hartog's words, "enshrined as constitutional gospel," and the privileges of English boroughs became "unquestioned vested rights."[63] Thus, at the time American cities were receiving their charters—New York received its charter from the royal governor at the same

54. The common law borrowed this idea from the canon law. *See* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 981 (1929).

55. *Id.* at 982.

56. *Id.*

57. *Id.* at 983.

58. *Id.*

59. *Id.* at 983 n.23.

60. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 28 (1983).

61. *Id.*

62. *Id.*

63. *Id.* at 28-29 (internal quotation marks omitted).

time that James was "waging war" on the chartered rights of England's boroughs[64]—the legal status of cities in England was a subject of great contestation. But in America, it was states, not municipalities, whose rights would be enshrined as quasiconstitutional.[65]

Until the early 1800s, there was no real law of *municipal* corporations.[66] Public and private corporations were not differentiated.[67] Instead, the differences in legal status were between incorporated bodies, which included chartered cities and private corporations, and unincorporated bodies, which included towns and counties.[68] Corporations, whether public or private, were considered independent entities, with special privileges against the state—and for that reason, they were dangerous.[69]

In fact, the Revolutionary War and Jacksonian eras were marked by great skepticism about the role of public and private corporations. Many Americans believed that all types of corporations were antiegalitarian and monopolistic.[70] These concerns did not come out of nowhere. Corporations often did have special franchises that they might abuse. For example, New York City's monopoly over the ferry between Manhattan and Long Island "was the most important issue in the political life of the young city of Brooklyn."[71] Indeed, "the antebellum history of Brooklyn is replete with mass public meetings, petitions, and memorials to the state legislature and the New York Common Council, and reports of local agitation over the quality, price, and quantity of ferry service."[72] The ferry fee was alleged to be a "tribute exacted" from Brooklyn, an "unjust and onerous tax," and a way of "taxing nonresidents by other (unlawful) means."[73] Brooklynites believed, not without reason, that they had "an equal interest, and naturally an equal claim," in "the vast income of ferries."[74] The insufficient number of ferries was an even bigger problem.[75]

64. *Id.* at 29.

65. *See id.* at 210 (noting the distinction between the rights of municipalities in early nineteenth century America and England).

66. *Id.* at 185.

67. *Id.*

68. *Id.* at 186 (distinguishing between incorporated and unincorporated bodies); *id.* at 198 (distinguishing between incorporated and unincorporated municipalities).

69. *Id.* at 186.

70. *Id.*; Barron, *supra* note 15, at 498-99.

71. HARTOG, *supra* note 60, at 242.

72. *Id.* at 244.

73. *Id.* at 245.

74. *Id.* (quoting NATHANIEL S. PRIME, A HISTORY OF LONG ISLAND, FROM ITS FIRST SETTLEMENT BY EUROPEANS, TO THE YEAR 1845; WITH SPECIAL REFERENCE TO ITS ECCLESIASTICAL CONCERNS 375 (New York, Robert Carter 1845)).

75. *Id.*

There were also legitimate complaints about the democratic foundations of city governance. In 1800, sixty-two percent of adult men in New York City could vote in state assembly and congressional elections, but only twenty-three percent could vote in municipal elections.[76] Philadelphia was even worse—its "'closed' corporation . . . effectively excluded most residents of the city from participation in its affairs . . . ."[77] Moreover, cities of the day followed the English model in having no separation of executive, legislative, and judicial powers.[78] Mayors were appointed, lacked a veto, and, along with aldermen, presided over municipal courts.[79] In the first half of the 1800s, influenced by the separation of powers model at the state and federal level, mayors became more like governors and presidents. They became popularly elected and, in some cities, gained a veto. This was a gradual process, though—mayoral elections spread in the 1820s and 1830s,[80] while the mayoral veto took longer. Baltimore was the first city to grant its mayor the veto, in 1797, while Boston and Philadelphia did not do so until 1854.[81] In some large cities, mayors did not lose their judicial role until the 1900s.[82]

The difference between public and private corporations began to develop in the early 1800s. In order to gain the political legitimacy needed to support greater regulation at the municipal level, the Corporation of New York City emphasized its public rather than proprietary qualities, and in doing so associated itself with the legislature's power.[83] By emphasizing that its lawmaking powers derived from the legislature, New York gained greater legitimacy to make law. Around the same time, political struggles led New York City to become more democratic, with lower suffrage requirements and more election of local officials.[84]

Meanwhile, courts, both state and federal, began distinguishing between public and private corporations. The Supreme Court's distinction between the state's plenary power over public corporations and its limited power over pri-

76. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 330 (1998).

77. HARTOG, *supra* note 60, at 36. Partly for that reason, Philadelphia's city government was much less active, with more work done by statutory authorities. *Id.* at 36-37.

78. THE OXFORD COMPANION TO AMERICAN LAW 548 (Kermit L. Hall et al. eds., 2002).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 549.

83. HARTOG, *supra* note 60, at 203.

84. BURROWS & WALLACE, *supra* note 76, at 330-31.

vate corporations is often dated to *Dartmouth College v. Woodward* (1819),[85] but it was actually first expressed four years earlier in *Terrett v. Taylor*.[86] In *Terrett*, the Court considered whether Virginia's legislation divesting the Episcopal Church of property acquired before the Revolutionary War violated the Contracts Clause.[87] The Court held that, whereas legislatures "may, under proper limitations, have a right to change, modify, enlarge or restrain" public corporations such as municipalities as long as they "secur[e] . . . the property for the uses of those for whom and at whose expense it was originally purchased," legislatures cannot destroy or divest private corporations of property "without the consent or default of the corporators."[88] Because the Episcopal Church was a private corporation, the legislative divestment violated the Contracts Clause.

The *Dartmouth College* case, concerning acts of New Hampshire affecting Dartmouth's charter, affirmed this distinction between public and private corporations.[89] In matters concerning corporations that are "employed in the administration of the government . . . the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States."[90] Private institutions, by contrast, are not subject to such legislative plenary power, for they are "endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter."[91] As Justice Washington elaborated in his concurrence, because a public corporation is "the mere creature of [a] public institution," it "may be controlled, and its constitution altered and amended by the government, as public interest may require."[92] The *Dartmouth College* Court continued: "Such legislative interferences cannot be said to impair the contract by which the corporation was formed because there is in reality but one party to it," that is, the government.[93]

85. 17 U.S. (4 Wheat.) 518 (1819).

86. 13 U.S. (9 Cranch) 43, 51-52 (1815).

87. *Id.* at 52.

88. *Id.*

89. *Dartmouth College*, 17 U.S. (4 Wheat.) at 518.

90. *Id.* at 629-30.

91. *Id.* at 630.

92. *Id.* at 660-61 (Washington, J., concurring).

93. *Id.* at 661. The later case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), narrowed the gap between public and private corporations. Where *Dartmouth College* held that the grant of powers to a municipality is never a contract, *Charles River Bridge* held that, in general, state franchise grants are not presumed to be exclusive, giving the state greater flexibility in the future. Thus, scholars "have argued that the Supreme Court in *The Charles River Bridge Case* favored development by destroying the privileges and vested rights of the old bridge's proprietors, and endorsing the creation of the new bridge." Robert E. Mensel, *"Privilege Against Public Right:" A Reappraisal of the*

Note that *Terrett* and *Dartmouth College* sound in the common law of corporations rather than constitutional interpretation. They do not look at the text or purpose of the Contracts Clause. Rather, they stake out a view on the nature of public corporations.[94] Of course, they are from a pre-*Erie* time, when general federal common law was entirely acceptable.[95] And state court cases were moving in a similar direction, widening the gap between public and private corporations.[96] There was also action in the political realm—New York's 1846 state constitution removed the protection afforded to prerevolutionary royal grants and the requirement of a two-thirds vote by both houses of the legislature on matters regarding corporations.[97] "By the mid-1840s the notion that special privileges or grants might continue to protect some cities from the reach of the sovereign had become too absurd to be treated seriously."[98]

In the 1800s and early 1900s, numerous cases applied the reasoning of *Terrett* and *Dartmouth College* to hold that state laws taking away municipal powers did not violate the Contracts Clause. These cases concerned issues including the state's control over public services,[99] the taxing power,[100] and the boundaries of

Charles River Bridge Case, 33 DUQ. L. REV. 1, 6 (1994); *see also* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 591-92 (1994) ("The clear message from the *Charles River Bridge* case was that the Supreme Court supported business competition as essential for economic development.").

94. *Cf.* Morris, *supra* note 3, at 18 ("At face value, *Hunter* announced a federal general common law rule of the type that *Erie* [*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] later extinguished. The *Hunter* Court announced that it intended to define the nature of municipal corporations . . . ." (internal quotation marks omitted)).

95. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

96. HARTOG, *supra* note 60, at 199, 209-11.

97. *Id.* at 216.

98. *Id.*

99. *See* City of Trenton v. New Jersey, 262 U.S. 182 (1923) (holding that a state can require a city to pay for diversion of water from a river, notwithstanding the fact that the city purchased rights from a private company before the state water charges were enacted); City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919) (holding that a state can regulate rates and service at which natural gas is provided to city and its inhabitants, notwithstanding a contract between the city and the company); City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905) (holding that a state can require a city to upkeep portions of street covered by street railway track, notwithstanding contract between the city and a railway company to the contrary); Covington v. Kentucky, 173 U.S. 231, 238 (1899) (holding that a state can tax a municipal waterworks, a previous exemption notwithstanding, because "the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption, and subject the property in question to taxation"); Williams v. Eggleston, 170 U.S. 304 (1898) (holding that a state can change

municipalities.[101] They established that the Contracts Clause did not make the grant of boundaries, franchises, powers, or tax exemptions irrevocable by the state, nor did a city's decision to enter into a contract regarding the provision of services block future legislation regarding those services. Because legislation granting powers to municipalities never constituted a contract, legislative reversal never impaired a contract. This doctrine was subsequently expanded to the Fourteenth Amendment, so that municipal powers were not considered "property," the deprivation of which required due process. Claims under the Contracts and Due Process Clauses were held to "depend ultimately upon the same arguments. If the legislature of the State has the power to create and alter school districts and divide and apportion the property of such district no contract can arise, no property of a district can be said to be taken . . . ."[102] Municipal claims under the Just Compensation Clause were similarly rejected.[103]

The best way to understand these cases is as an effort to ensure that the state legislature retained flexibility in its policy towards municipalities. For example, in 1819, Illinois passed a law requiring that slave owners who emancipated their slaves give a bond to the county for their maintenance.[104] In 1825, Illinois repealed the law. In the interim, Edward Coles freed ten slaves in Madison County, and the county brought an action against him for the debt of two thousand dollars. Coles argued that the 1825 legislation eliminated the debt, while the County responded that, if so, the 1825 legislation violated a contract between the state and the county created by the financial obligations of the 1819 legislation, thereby violating the Contracts Clause (and the analogous clause of the Illinois Constitution). The Illinois Supreme Court disagreed. The financial benefit of the 1819 legislation to the county was not irrevocable. While the legislature could not interfere with private corporations, "all public incorporations which are established as a part of the police of the state, are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed, *to suit*

municipal franchises regarding transportation over the Connecticut River); Town of E. Hartford v. Hartford Bridge Co., 51 U.S. 511 (1850) (same).

100. *See, e.g.*, Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 38-39 (1933) (holding that a state can exempt property of a single railroad from state and local taxes); *Covington*, 173 U.S. at 238 (holding that a state can tax a municipal waterworks, a previous exemption notwithstanding).

101. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Attorney Gen. *ex rel.* Kies v. Lowrey, 199 U.S. 233 (1905) ("The legislature of a State has absolute power to make and change subordinate municipalities."); Forsyth v. City of Hammond, 166 U.S. 506 (1897) (holding that a state can authorize a city to annex contiguous territory without the consent of the owner); Kelly v. Pittsburgh, 104 U.S. 78 (1881); Laramie Cnty. Comm'rs v. Albany Cnty. Comm'rs, 92 U.S. 307 (1875).

102. *Kies*, 199 U.S. at 239.

103. *Trenton*, 262 U.S. at 183, 185-87.

104. *See* Coles v. Cnty. of Madison, 1 Ill. (Breese) 154 (1826); *see also* HARTOG, *supra* note 60, at 199 (discussing and quoting *Coles*).

the ever varying exigencies of the state."[105] This holding was critical—otherwise, the fact that the state's emancipation policy implicated counties would make emancipation policy immutable, even as public opinion about the evils of slavery shifted.

The two cases of *Town of East Hartford v. Hartford Bridge Company*[106] and *Williams v. Eggleston*[107] provide clear examples of how the Supreme Court protected states' flexibility over municipalities' role in providing public services. Both cases concerned transportation over the Connecticut River, a route that affected the citizens of multiple towns. Around 1680, the Connecticut legislature had granted a ferry franchise to Hartford.[108] Half of the franchise was transferred to East Hartford upon that town's creation by the legislature in 1783.[109] In the early 1800s, Connecticut passed a series of acts providing for a toll bridge over the river, to be operated by the Hartford Bridge Company. These acts alternately restricted and restored the towns' ferry rights. The Court held in *Town of East Hartford* that these acts did not violate the Contracts Clause because the original grant of the ferry rights sounded in public law, not contract.[110] Both the relationship of the state to the town and the subject matter of the action were probative.[111] The laws "related to public interests," and "the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature."[112]

The events that prompted *Williams v. Eggleston* began in 1887, when Connecticut decided to turn the toll bridge into a free public highway.[113] After cycling through a variety of funding mechanisms, in 1895 the legislature delegated the maintenance duties to a new bridge and highway district, whose board and funds would come from five nearby towns.[114] Hartford supplied four of the eight board members and was responsible for seventy-nine percent of the funding; the remaining smaller towns had one board member each and a varying share of the budget responsibilities.[115] When Glastonbury refused to pay its share, the board sought a writ of mandamus compelling it to do so. Glaston-

105. *Coles*, 1 Ill. (Breese) at 160 (emphasis added).

106. 51 U.S. 511 (1850).

107. 170 U.S. 304 (1898).

108. *Town of E. Hartford*, 51 U.S. at 532.

109. *Id.*

110. *Id.* at 534.

111. *Id.*

112. *Id.*

113. 170 U.S. 304 (1898).

114. *Id.* at 304-08.

115. *Id.* at 307.

bury defended its refusal to pay on due process and equal protection grounds.[116] Glastonbury's equal protection argument emphasized that "these five towns are put into a class by themselves, organized into a single municipal corporation, and separated from other towns in the state by being subjected to different control in respect to highways."[117] The Court denied this claim on classical state supremacy grounds: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such . . . the Federal Constitution does not limit the power of the state."[118]

The Connecticut River cases, *Town of East Hartford v. Hartford Bridge Company* and *Williams v. Eggleston,* illustrate the flexibility purpose of state creature doctrine later exemplified by *Hunter*. The best way to transport people over the Connecticut River changed over time, and the rule established in these cases ensured that the state's policy was not constrained by the demands of a prior time.

Similarly, states should not be locked into certain arrangements of municipal boundaries that made sense at one time but no longer facilitate the demands of good governance. *Kelly v. Pittsburgh*[119] and *Hunter v. City of Pittsburgh*[120] show how the Court has protected states' flexibility over municipal boundaries. They both concerned the boundaries of the city of Pittsburgh. *Kelly* began when the Pennsylvania legislature expanded the city limits of Pittsburgh. This placed Mr. Kelly's land within Pittsburgh's city limits, increasing his tax burden. Mr. Kelly challenged the city's decision to tax his farmland as city property as a matter of due process. The Court rejected this challenge.[121] In doing so, the Court went out of its way to make clear, though Mr. Kelly did not claim otherwise, that "the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land."[122] The allocation of territory to municipalities "is one of the most usual and ordinary subjects of State legislation."[123]

The second Pittsburgh boundary case, and the most famous[124] of the state supremacy cases, is *Hunter v. City of Pittsburgh*.[125] Pennsylvania had a law pro-

116. *Id.* at 308.

117. *Id.* at 309-10.

118. *Id.* at 310.

119. 104 U.S. 78 (1881). This was the first Supreme Court case about a dispute over municipal boundaries in which a party claimed Fourteenth Amendment rights.

120. 207 U.S. 161 (1907).

121. *Kelly*, 104 U.S. at 81.

122. *Id.* at 80.

123. *Id.* at 81.

124. Barron, *supra* note 15, at 562 ("Although the cases are legion that assert that state law defines the scope of local governmental power, none has done so more forcefully, or more famously, than *Hunter v. City of Pittsburgh.*").

viding for the consolidation of contiguous cities if the majority of their combined citizenry voted to merge. The merger of Pittsburgh and Allegheny was put to a vote. A majority of Pittsburgh residents voted in favor, and though Allegheny residents voted against, they were vastly outnumbered. The city of Allegheny and residents of that city sued to prevent the consolidation of the two cities, claiming that the law deprived them "of their property without due process of law, by subjecting [them] to the burden of the additional taxation which would result from the consolidation."[126] The Court held that "principles long settled" established that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."[127] As a result, "[t]he number, nature, and duration of the powers conferred upon these [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . unrestrained by any provision of the Constitution of the United States."[128] This sweeping statement describes the outer limits of the *Hunter* doctrine.

The policy flexibility argument remains as strong today as it ever was. As the Illinois emancipation, Connecticut River, and Pittsburgh boundary cases show, the world changes and policy should often change with it. New York State should be able to grant New York City greater taxing authority[129] without worrying that it will be unable to remove that power if it becomes more a source of abuse than benefit. The Constitution should not impose a one-way ratchet, where states can only grant powers to municipalities, not take them away.

Once we understand why *Hunter* is important, we can understand what shape it should take and where it should—or should not—apply. I now turn to that discussion.

B. Hunter*'s Problems*

The problem with *Hunter* is that it has not caught up to our modern Constitution. In the beginning, *Hunter* only limited the operation of the Contracts Clause, because that was the only part of the Constitution that purported to limit state power over municipalities. After the Reconstruction Amendments became law, the Supreme Court confronted the question of whether those limitations on state power applied to the power of states over municipalities. It decided, in the late 1800s and early 1900s, that the Amendments did not protect municipalities. In so deciding, the Court did not focus on the text or purpose of

125. 207 U.S. 161 (1907).

126. *Id.* at 177.

127. *Id.* at 178.

128. *Id.* at 178-79.

129. *See* Erin Adele Scharff, *Taxes as Regulatory Tools: An Argument for Expanding New York City's Taxing Authority,* 86 N.Y.U. L. REV. 1556 (2011) (arguing persuasively for granting New York City independent taxing authority).

the Reconstruction Amendments. Rather, it relied on the "nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors."[130]

Of course, since then, the world has not stood still. The constitutional rights revolution greatly expanded the meaning and reach of the Reconstruction Amendments.[131] In 1960, in *Gomillion v. Lightfoot,* the Court recognized that the Fifteenth Amendment reduced the breadth of the *Hunter* doctrine.[132] *Gomillion* held that African-American residents of Tuskegee could state a claim under the Fifteenth Amendment against Alabama's blatantly racial gerrymandering of the city "from a square to an uncouth twenty-eight-sided figure . . . ."[133] The defendant officials invoked *Hunter* for the proposition that the state's power to shape the boundaries of municipalities was not limited by the Constitution. The Court rejected that argument, holding 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.[134]

Thus, "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . 'The power of the State to alter or destroy its corporations is not greater than the power of the state to repeal its legislation.'"[135] Because the racial gerrymandering at issue would have undermined the plaintiff's right to vote, it violated the Fifteenth Amendment.[136] *Gomillion* therefore treated *Hunter* as a substantive limitation on "particular prohibitions of the Constitution."[137]

While *Gomillion* represented a strong statement about the limitations on state power over municipalities, after *Gomillion*, the Court has been rather quiet about what remains of *Hunter.* Though the Court has subsequently allowed a number of suits challenging state power over municipalities—under the First

130. *Hunter*, 207 U.S. at 178.

131. *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 27 (1998) (introducing "[t]he U.S. Rights Revolution").

132. 364 U.S. 339 (1960).

133. *Id.* at 340.

134. *Id.* at 344.

135. *Id.* (quoting Graham v. Folsom, 200 U.S. 248, 253 (1906)).

136. *Id.* at 345. The Court subsequently held that *Gomillion* should have been decided under the Fourteenth rather than the Fifteenth Amendment. Shaw v. Reno, 509 U.S. 630, 645 (1993).

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

Amendment,[138] the Equal Protection Clause,[139] and the Supremacy Clause[140]—it has done so without addressing the *Hunter* issue. As a result, the lower courts, groping around in the darkness, have gone down very different paths. Some have a near-totalizing view of *Hunter*, prohibiting municipalities from claiming any constitutional rights,[141] while others take a more nuanced view.[142] Substance and procedure are intertwined. A number of courts have grown to understand *Hunter* as a rule of standing, which in the Ninth Circuit leads to the conclusion that municipalities cannot bring any constitutional or statutory claims against their creating states.[143] Wright and Miller summarize, perhaps too sweepingly:

> Although it may be that at times a municipality can assert rights against its state under federal statutes, the Fourteenth Amendment does not confer rights on municipal corporations against their states. The same

138. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (ultimately upholding a challenged state statute).

139. *See* Romer v. Evans, 517 U.S. 620 (1996) (ruling for plaintiff municipalities and individuals challenging a statewide voter initiative prohibiting municipalities from including sexual orientation in local antidiscrimination ordinances, without expressing any discomfort with the presence of the municipalities in the litigation); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (agreeing on the merits and expressing no concern with the presence of the school district plaintiffs in the litigation, when plaintiff school districts, along with the United States and several community organizations as intervenors, challenged a statewide voter initiative placing limitations on local busing initiatives, even granting them fees, thereby explicitly validating their status as litigants).

140. *See* Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) (holding for a school district suing a county by invalidating a state statute as inconsistent with the federal Payment in Lieu of Taxes Act under the Supremacy Clause); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) (holding that Congress had validly authorized the Federal Power Commission to bestow the power to condemn state-owned land on the City of Tacoma). While *Tacoma* explicitly discusses Congress's power to legislate under the Commerce Clause, not the Supremacy Clause, it is about federal power trumping state power.

141. Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998).

142. The Fifth and Tenth Circuits allow Supremacy Clause challenges. *See* Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 628 (10th Cir. 1998); Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979). The California Supreme Court permits dormant Commerce Clause challenges. Star-Kist Foods, Inc. v. Cnty. of Los Angeles, 719 P.2d 987 (Cal. 1986).

143. *See Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d 1360. While the Tenth Circuit holds that *Hunter* is a rule of standing that only applies to certain constitutional provisions, the more natural result of treating *Hunter* as a rule of standing is, per the Ninth Circuit, to make it a totalizing rule that blocks all constitutional claims, and perhaps even all statutory claims. *Compare Branson*, 161 F.3d at 628 (allowing Supremacy Clause challenges), *with Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d at 1362 (prohibiting all constitutional challenges).

> rule applies when a municipal corporation seeks to sue another municipal corporation created by the same state, and the lack of constitutional right cannot be circumvented by attempting to rely on proprietary rather than governmental interests.[144]

Thus, courts have cited the *Hunter* doctrine to prevent a variety of substate entities from suing the state and each other.[145] Public corporations are held to lack the constitutional rights that their private counterparts hold, even when public and private corporations serve the same functions. Consider the long-running dispute between the City of Burbank and the Burbank-Glendale-Pasadena Airport Authority. The Burbank-Glendale-Pasadena Airport Authority, a "Joint Powers Agency" created by the cities of Burbank, Glendale, and Pasadena pursuant to California Government Code § 6500, sought to acquire one hundred and thirty acres of privately held land in Burbank to build a new terminal.[146] California law permits a city to require that, if a publicly owned airport seeks to expand onto new land, the city or county where the property is located must first hold a hearing and approve the plan.[147] The City of Burbank adopted review procedures pursuant to this statute; the procedures essentially restated the terms of the statute.[148] The airport authority sued, challenging the statute and review procedures as a violation of federal law and therefore the Supremacy Clause. The court held that the airport authority, as a political subdivision, could not challenge the constitutionality of a state statute or procedures in fed-

144. 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.11.1 n.46 (3d ed. 2012).

145. *See* text accompanying notes 30-32; *see also* Hous. Auth. of Kaw Tribe v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991) (prohibiting a state-created Indian Housing Authority from challenging a municipal action under the Equal Protection Clause); S. Macomb Disposal Auth. v. Twp. of Washington, 790 F.2d 500, 503-04 (6th Cir. 1986) (prohibiting a municipally owned waste disposal corporation from challenging a town's ordinance under the Due Process and Equal Protection Clauses); City of New Rochelle v. Town of Mamaroneck, 111 F. Supp. 2d 353, 357-58 (S.D.N.Y. 2000) (prohibiting one town from challenging another town's ordinance under the Due Process and Equal Protection Clauses, but allowing a dormant Commerce Clause challenge). *But see* Putz v. Schwarzenegger, No. 10-00344 CW, 2010 WL 1838717, at *10 (N.D. Cal. May 5, 2010) (holding that public authorities created by county ordinance to deliver in-home supportive services "are not political subdivisions for purposes of standing" because they are "established for the sole and limited purpose of providing for the delivery of in-home supportive services," unlike the health care districts in Palomar, which could levy taxes, issue bounds, and use the power of eminent domain (internal citations and quotations omitted)).

146. *Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d 1362.

147. *Id.*

148. *Id.*

eral court.[149] Meanwhile, parallel litigation was ongoing in state court. The state court of appeals reached the merits on the Supremacy Clause claim, holding that federal law regulating airport noise and safety did not preempt the state statute at issue.[150] The effect of the *Hunter* rule in the Ninth Circuit, then, was to drive litigation over federal preemption into state court. A private airport authority could get a federal court to review its preemption claim, but a public airport authority could not. By contrast, a similar case in Connecticut, involving a preemption dispute between New Haven's Tweed Airport and the Town of East Haven, was litigated in federal district court, where the airport succeeded in its preemption claim.[151] Compounding the absurdity, a federal district court within the Ninth Circuit has held that public health authorities created by county ordinance to deliver in-home supportive services could sue state officials for violations of the federal Medicaid Act, because they were not political subdivisions.[152] Thus, the county, which itself could not sue the state or its officials over federal law, could create an entity that could sue!

Nor is it just the lower courts that have forgotten *Gomillion* and returned to "the seemingly unconfined dicta of *Hunter* and kindred cases."[153] As discussed in the Introduction, the Supreme Court's recent holding in *Ysursa v. Pocatello Education Ass'n*[154] is a maximalist reading of *Hunter*, with no mention whatsoever of *Gomillion* or the subsequent cases where it allowed municipal claims but was silent on the *Hunter* issue. *Ysursa* concerned a state law prohibiting employers from allowing employees to select payroll deductions for a union's political action committee. The court below had held that this policy violated the First Amendment as applied to private employers but not as applied to the state as an employer. Neither of these conclusions was contested on appeal. Instead, the issue was whether the law violated the First Amendment as applied to municipal employers. The Court held that the analysis was the same for municipal as state employers, since local governments are mere "departments" of the state.[155]

Ysursa also casts doubt on the ability of municipalities to sue when states violate individual rights by manipulating municipal powers. The Court allowed municipal participation in *Washington v. Seattle School District No. 1*,[156] where

149. *Id.*

150. City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28, 38 (Cal. Ct. App. 1999).

151. Tweed-New Haven Airport Auth. v. Town of E. Haven, Conn., 582 F. Supp. 2d 261 (D. Conn. 2008). Here, the district court did not even mention the *Hunter* issue.

152. Putz v. Schwarzenegger, No. 10-00344 CW, 2010 WL 1838717, at *10 (N.D. Cal. May 5, 2010).

153. Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960).

154. 555 U.S. 353 (2009).

155. *Id.* at 362 (citing Trenton v. New Jersey, 262 U.S. 182, 187 (1923)).

156. 458 U.S. 457 (1982).

parents and the school district sued the state to vindicate the district's right to bus students to combat segregation, and in *Romer v. Evans*,[157] where individuals and municipalities sued the state to contest a state initiative removing their power to enact local antidiscrimination ordinances. But if a municipality truly "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator,"[158] it is not clear if a municipality can suffer an injury sufficient to confer standing against its creating state. Yet *Ysursa* did not mention the potential conflict with these cases.

II. Reconstructing *Hunter*

This Part seeks to construct a coherent theory of *Hunter* that achieves the purpose of state policy flexibility without being overbroad. I begin with the question, contested in the lower courts, of what kind of a rule *Hunter* is—that is, whether it is a rule of substantive constitutional law, standing, or capacity to sue. After demonstrating that *Hunter* is a rule of substantive constitutional law, I turn to *Hunter*'s substantive reach. I show that the Constitution (1) protects municipal residents from state action that, by manipulating municipal powers or boundaries, would violate individual rights; (2) ensures the supremacy of federal law regarding municipalities; and (3) should even grant rights to municipalities themselves if those rights would not overly impinge on state policy flexibility. Finally, I examine how the Constitution protects municipalities from nonlegislative state actions, such as those by municipalities and administrative agencies. I show, contrary to all authority, that *Hunter* should not deprive municipalities of constitutional rights against each other, but that it should limit municipal constitutional rights against state administrative agencies acting legislatively.

A. Hunter *Is a Rule of Substantive Constitutional Law*

Courts disagree about whether the *Hunter* doctrine is a rule of standing,[159] capacity to sue and be sued,[160] or substantive constitutional law.[161] But as the

157. 517 U.S. 620 (1996).

158. *Ysursa*, 555 U.S. at 363 (quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933)).

159. *See* Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1362 (9th Cir. 1998); Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 628 (10th Cir. 1998); Hous. Auth. of Kaw Tribe v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir. 1991).

160. *See* City of New York v. State, 655 N.E.2d 649 (N.Y. 1995).

161. *See* Rogers v. Brockette, 588 F.2d 1057, 1058 (5th Cir. 1979) (squarely holding that *Hunter* is a doctrine of substantive constitutional law); Star-Kist Foods, Inc. v. Cnty. of Los Angeles, 719 P.2d 987 (Cal. 1986) (same); *see also* Carlyn v. City of Akron, 726 F.2d 287, 290 (6th Cir. 1984) (also indicating that *Hunter* is a substan-

Fifth Circuit observed in *Rogers v. Brockette*, *Hunter* is driven by a substantive purpose regarding the relationship between the Constitution and the "internal political organization of states."[162] This substantive purpose shows that it must be a rule of substantive constitutional law. And, at some level, the Supreme Court seems to have understood this, as evidenced both by the cases where it has applied *Hunter* and by the cases where it has declined to apply it.

As discussed in the previous Part, the *Hunter* doctrine is important because it allows states to maintain flexibility in their municipal policy. As demography, the economy, and technology change, the state might sensibly want to change the powers or boundaries of its municipalities. If municipal powers or boundaries are constitutionally cognizable contracts or property, state flexibility is inhibited. *Hunter* prevents such powers and boundaries from being set in stone by the Constitution. It avoids a one-way ratchet problem, whereby municipalities accrue more and more rights and independence of the state over time.

In order to fulfill the purpose of state policy flexibility, *Hunter* must be a rule about what states can do to municipalities. It must be a constant rule about policymaking authority—what laws states can enact—that holds true regardless of what procedural posture the law is challenged under or what court the law is challenged in.

If *Hunter* were a doctrine of standing or capacity to sue, by contrast, private parties might be able to get a court order invalidating laws changing a city's boundaries or revoking municipal franchises, because in a suit between private parties and the state, *Hunter* would not apply. In that world, the powers that states grant to cities would be contracts protected by the Contracts Clause, but only private parties could bring suit seeking to enforce those rights.[163] It is hard to fathom what purpose such a rule would further. It would certainly not give states a broad writ of policy flexibility; rather, they would have a patchwork of flexibility depending on whether actions would be challengeable by private parties.

Moreover, municipalities could act to undermine state flexibility by using contracts to give private parties a particularized interest sufficient to confer standing. This cannot be right. The principle that the Contracts and Due Process Clauses do not lock the state into its initial arrangement of municipal powers and boundaries cannot depend on whether the municipality happens to be plaintiff or defendant. Furthermore, if *Hunter* were a rule of standing that applied regardless of constitutional or statutory provision, it would reach further than its purpose demands. As I discuss in the next Section, state policy flexibility does not demand that *Hunter* prevent municipalities from bringing suits

tive doctrine, by stating that "[t]he sweeping language of *Hunter* and *Holt* has been modified in respect to manipulation of municipal boundaries for purposes of race discrimination in voting").

162. 588 F.2d at 1069.

163. In this alternate universe, the private parties would either have to show Article III standing or bring suit in state court and satisfy that state's standing requirements.

to vindicate individual rights, federal regulatory regimes, or even certain municipal rights.

Why, then, have a number of courts construed *Hunter* as a doctrine of standing? Unfortunately, the circuit court opinions treating *Hunter* as a doctrine of standing do little to aid our investigation. The Ninth Circuit's rule comes from one short paragraph in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*.[164] That decision quoted the Second Circuit's holding in *City of New York v. Richardson* that "[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."[165] But *Richardson* did not frame its holding in terms of standing. And in *South Lake Tahoe*, the Ninth Circuit gave no further explanation for its holding that the city lacked standing, apart from a series of citations to Supreme Court cases from the early twentieth century. In fact, *South Lake Tahoe* does not even mention the standing conclusion in the text—its only appearance comes in the paragraph heading. As the California Supreme Court stated in declining to follow *South Lake Tahoe*, "[r]egrettably, the *South Lake Tahoe* decision provides little guidance as to the court's reasoning in choosing a per se rule."[166] Yet, the Ninth Circuit has continued to follow the *South Lake Tahoe* rule.[167]

The view that *Hunter* is a rule of standing seems to come from language in two Supreme Court cases from the 1930s. In the first, *Williams v. Mayor of Baltimore*, municipal officials from Baltimore and Annapolis alleged that a Maryland statute exempting a railroad from state and local taxes was invalid under the Equal Protection Clause and the Maryland constitution.[168] Justice Cardozo, writing for the Court, first dispatched with the equal protection claim with words that are now often quoted[169]: "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."[170] Then, after dealing with the Maryland claim on the merits, he noted that the Court had "assumed, without deciding, that the respondents, though without *standing* to invoke the protection of the Federal Constitution, will be heard to complain of a violation of the Constitution of the state."[171] He explained that "[t]heir standing for that purpose, at least in the state courts, is a

164. 625 F.2d 231, 233 (9th Cir. 1980).

165. 473 F.2d 923, 929 (2d Cir. 1973).

166. *Star-Kist Foods*, 719 P.2d at 990.

167. *See* Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104 (9th Cir. 1999); Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998).

168. 289 U.S. 36 (1933).

169. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009).

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

171. *Id.* at 47-48 (emphasis added).

question of state practice, as to which the federal courts do not exercise an independent judgment," and that the Maryland courts have assumed that "municipal corporations assailing a statute of exemption or other special legislation have an interest in the controversy which entitles them to be heard."[172]

The second case, *Coleman v. Miller*, considered whether Kansas state legislators could invoke the Supreme Court's appellate jurisdiction to challenge the Secretary of State's conclusion that the legislature had ratified the Child Labor Amendment to the U.S. Constitution.[173] The Secretary of State challenged the Court's jurisdiction on the grounds that petitioners had no standing to have the judgment of the state court reviewed. In rejecting this claim, the Court noted "other instances in which the question of what constitutes a sufficient interest to enable one to invoke our appellate jurisdiction has been involved."[174] It observed that "[t]he principle that the applicant must show a legal interest in the controversy . . . has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged rights and obligations."[175] This language also frames the *Hunter* issue in standing, but it is far from a thorough discussion of how the modern doctrine of standing applies to *Hunter* cases.

These cases do use the word "standing." But as the Fifth Circuit has pointed out, when they were decided,

> "standing" generally meant something somewhat different from what it means today. A party had standing or a "right to sue" if it was correct in its claim on the merits that the statutory or constitutional provision in question protected its interests; standing was not seen as a preliminary or threshold question. In speaking of "standing," cases in the *Hunter* and *Trenton* line meant only that, on the merits, the municipality had no rights under the particular constitutional provisions it invoked. This is why the *Hunter* and *Trenton* series of cases did not mention the criteria we now associate with inquiries into standing the extent of an actual injury and of a genuine case or controversy, for example.[176]

With our current conception of standing, it is not even clear how one would show that municipalities can never show the Article III requirements for standing of injury-in-fact, causation, or redressability against their creating state.[177] The use of "standing" in *Williams* and *Coleman* sounds more like the prudential

172. *Id.*

173. 307 U.S. 433 (1939).

174. *Id.* at 441.

175. *Id.*

176. Rogers v. Brockette, 588 F.2d 1057, 1070 (5th Cir. 1979) (citations omitted).

177. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (defining the requirements of Article III standing).

zone-of-interests standing requirement, which "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[178] The zone-of-interests test goes to the relationship between a party and the statutory (or constitutional) provision at issue. But for that very reason, its logic merges with the view of *Hunter* as a rule of substantive constitutional law holding that the Constitution grants no such rights to municipalities. And unlike the substantive constitutional law approach, the zone-of-interests approach fails to explain three major features of the *Hunter* line of cases: that *Hunter* applies (1) when municipalities are defendants, not just plaintiffs;[179] (2) in state court, not just federal court; and (3) when residents, not just municipalities, bring suit.

First, standing does not limit the arguments that a party can make in defense if it is sued. But in *City of Trenton v. New Jersey*, the Court applied *Hunter* to block the claims of the municipal defendant, Trenton.[180] The state brought an action against the city in state court, seeking to recover $14,310 under a 1907 state law requiring payments for diversions of river water for the public water supply beyond a certain amount.[181] Trenton claimed that it had received the right to divert unlimited water from the Delaware River from the Trenton Waterworks company, which had been granted that right by the state in 1852.[182] Trenton therefore alleged, in defense, that the 1907 law violated the Contracts, Takings, and Due Process Clauses.[183]

The Supreme Court disagreed. Assuming that the Trenton Waterworks "received a perpetual right," it did not "follow that the State as against the City is bound by contract," because "[t]he relations existing between the State and the water company were not the same as those between the State and the City."[184] Whereas the water company was "privately owned and therefore safeguarded by

178. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987); *see also* Morris, *supra* note 3, at 22-24 (discussing why prudential grounds of standing do not explain the *Hunter* doctrine). While the zone-of-interests test is usually associated primarily with cases brought under the Administrative Procedure Act, *Clarke*, 479 U.S. at 395, Justice Scalia has argued that it should apply to constitutional claims as well. Wyoming v. Oklahoma, 502 U.S. 437, 468-73 (1992) (Scalia, J., dissenting). *See generally* 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, 35-44 (2006) (discussing the application of the zone-of-interests test to constitutional cases).

179. *See* Morris, *supra* note 3, at 22.

180. 262 U.S. 182 (1923).

181. *Id.* at 183.

182. *Id.* at 184.

183. *Id.* at 183.

184. *Id.* at 185.

the constitutional provisions" at issue, the city was a mere "subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the state as may be entrusted to it."[185] Thus, Trenton could not avoid liability by challenging the constitutionality of the 1907 law.

If the *Hunter* rule is a doctrine of standing, then *Trenton* makes no sense, because the city was the defendant. Nor is *Trenton* the only case where the *Hunter* doctrine was used to block the claims of a defendant. *Williams v. Eggleston*[186] and *Attorney General ex rel. Kies v. Lowrey*[187] are similar. Depicting *Hunter* as a doctrine of standing does not explain the Court's decisions in these cases.

Second, the Supreme Court cannot review state court decisions about standing,[188] but the Supreme Court has affirmed state court decisions on *Hunter* grounds.[189] It could only have done so if the decision below were a substantive constitutional decision. If *Hunter* were a rule of federal court standing, it would not have applied in the state court below, because federal standing doctrine never applies in state courts.[190] The state courts could have adopted a *Hunter*-like rule as part of *state* standing doctrine—but the Supreme Court would have had no power to review such a rule, as state standing doctrine is "entirely a matter of state law."[191] Thus, the fact that these decisions were affirmed means that *Hunter* must be a rule of substantive constitutional law.

The third problem with conceiving of *Hunter* as a doctrine of standing is that standing depends on the specific plaintiffs bringing suit. In *Hunter* itself, the plaintiffs included both residents of Allegheny and the city itself. If the doctrine was truly one that limited the standing of municipalities, the courts should have dismissed the city from the suit while allowing the residents to maintain it. But the court held against all of the plaintiffs.

Thus, the underlying purpose of *Hunter* matches how the Court has applied it. *Hunter* does not make sense as a doctrine of standing, either purposively or doctrinally.

Similar arguments disprove the minority view that *Hunter* is about municipal capacity to sue and be sued.[192] The capacity to sue and be sued is "defined as

185. *Id.* at 185-87.

186. 170 U.S. 304 (1898).

187. 199 U.S. 233 (1905).

188. Virginia v. Hicks, 539 U.S. 113, 120 (2003).

189. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); City of Trenton v. New Jersey, 262 U.S. 182 (1923).

190. *Hicks*, 539 U.S. at 120 ("[O]ur standing rules limit only the *federal* courts' jurisdiction over certain claims. '[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.'" (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989))).

191. *Id.*

192. *See* City of New York v. State, 655 N.E.2d 649 (N.Y. 1995); *cf.* Morris, *supra* note 3 (arguing that *Hunter* sounds in capacity).

a party's personal right to come into court."[193] For example, depending on state law, children[194] and dissolved corporations[195] may lack the capacity to sue or be sued.

If *Hunter* were about the capacity to sue and be sued, it would not fulfill the purpose of state policy flexibility. Private parties would be unaffected by the doctrine. If private parties had standing, they could bring suit alleging that a state law affecting municipal powers or boundaries violated the Contracts or Due Process Clause. This would deny states policy flexibility.

Furthermore, if an entity does not have the capacity to sue and be sued, its inability to sue is total. It does not vary depending on the legal claim it wishes to bring. Capacity "should not be confused with the question of whether a party has an enforceable right . . . . Generally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and typically is determined without regard to the particular claim or defense being asserted."[196] Thus, a child or dissolved corporation that lacks capacity can *never* sue or be sued. It is not as if the child can sue in tort but not in contract. But *Hunter* does not purport to claim that municipalities have no capacity to sue whatsoever. Municipalities can sue in contract and tort. And there is a whole body of law regarding when municipalities can be sued for violations of 42 U.S.C. § 1983.[197] The Supreme Court had no problem adjudicating the case between New Jersey and the city of Trenton.[198] It held that the New Jersey law that made Trenton liable was valid and unaffected by the Constitution, *not* that Trenton could not be sued. Because *Hunter* only applies to constitutional claims, it cannot be a doctrine of capacity to sue. Capacity, like standing, is a doctrine that focuses on the identity of the party, not the nature of the right.

In sum, courts apply the *Hunter* doctrine regardless of the forum, the parties, or the procedural posture of the case. It therefore cannot be a rule of federal courts or civil procedure. It must be a rule of substantive law.

The substantive constitutional law view is also supported by the reasoning of *Gomillion v. Lightfoot*, which treated *Hunter* as a substantive limitation on "particular prohibitions of the Constitution,"[199] and by the subsequent line of cases where the Court allowed constitutional challenges by municipalities against their creating states. Unlike the original *Hunter* line of cases, these cases did not concern municipal boundaries or powers. Rather, they sounded in ei-

193. 6A WRIGHT, MILLER & COOPER, *supra* note 144, § 1559.

194. *Id.* § 1560 n.1.

195. *Id.* § 1563.

196. *Id.* § 1559.

197. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

198. City of Trenton v. New Jersey, 262 U.S. 182 (1923); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (allowing a suit between a city and a neighboring state).

199. 364 U.S. 339, 344 (1960).

ther individual rights[200] or the supremacy of federal law.[201] If the *Hunter* doctrine were a doctrine of standing or capacity to sue, such cases should never have been heard on the merits. But these cases make perfect sense once *Hunter* is understood as a doctrine of substantive constitutional law whose purpose is to preserve state policy flexibility. Avoidance of the one-way ratchet problem does not require that states bar cities from bringing suits alleging injuries to the constitutional rights of their constituents or violations of federal law.

The mere fact that state law constructs municipalities does not mean that state law has plenary power over municipalities to the exclusion of federal law. Property rights are similar. They are constructed in the first instance by states but are also products of federal law. Chief Justice Rehnquist promoted the "bitter with the sweet" argument that the state, as author of a property interest under Due Process Clause (the sweet), had plenary power over all aspects of the right, including the ability to limit the procedural protections that came with it (the bitter).[202] But the Supreme Court rejected that argument, holding that due process is a federal constitutional question, and state law serves merely to establish the existence of the right.[203] Similarly, state law creates the municipality, but that does not mean that state law has plenary power over the municipality's substantive constitutional rights.[204]

Thus, *Hunter* limits the claims that litigants can invoke—but it applies to all litigants challenging state action's effects on municipalities. Municipalities have no special problems with standing. Justice Cardozo's famous language in *Williams v. Mayor of Baltimore*—"[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"—may not be wrong, but its focus on who is doing the invoking is misleading.[205] In order to sensibly communicate the role of municipalities in our constitutional order, we must refocus such language.

200. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

201. *See, e.g.*, Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

202. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); *see also id.* at 559 (Rehnquist, J., dissenting).

203. *Id.* at 541 (majority opinion) (discussing the "bitter with the sweet" theory).

204. Michael Lawrence has made a similar claim to support his view that municipalities should be able to bring procedural due process claims against their creating states. Lawrence, *supra* note 43, at 107.

205. 289 U.S. 36, 40 (1933).

B. How Does the Constitution Protect Municipalities and Their Residents?

I have shown that *Hunter* is a doctrine of substantive constitutional law that limits certain constitutional provisions in order to safeguard the state's flexibility in its municipal policy. This purpose does not argue for a blanket prohibition on constitutional protection for municipalities.

As *Gomillion* shows, the Constitution *can* protect cities from states. When should it?

I argue that there are three kinds of cases where state action regarding municipalities should be subject to challenge: (1) when state action regarding municipalities violates individual rights, as in *Gomillion*; (2) when state action regarding municipalities oversteps the state's authority in relation to federal power, either in terms of the Supremacy Clause or the dormant Commerce Clause; and (3) when recognizing a truly municipal constitutional right would not overly limit state policy flexibility.

1. Individual Rights

Individual rights in the Constitution constrain state power over municipalities.[206] As *Gomillion v. Lightfoot*,[207] *Washington v. Seattle School District No. 1*,[208] and *Romer v. Evans*[209] show, if a state violates the constitutional rights of individuals, the fact that it does so by changing municipal powers or boundaries does not insulate it from suit. As Justice Frankfurter explained in *Gomillion*,

> The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[210]

Seattle School District No. 1 struck down a statewide voter initiative that prohibited local school boards from voluntarily implementing busing programs to alleviate de facto segregation.[211] It held that the state's power over its municipalities is limited by the Fourteenth Amendment, which forbids "plac[ing] special burdens on the ability of minority groups to achieve beneficial legisla-

206. Barron, *supra* note 15, at 564-68.

207. 364 U.S. 339 (1960).

208. 458 U.S. 457 (1982).

209. 517 U.S. 620 (1996).

210. 364 U.S. at 345 (quoting Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 594 (1926)).

211. 458 U.S. 457.

tion."[212] Similarly, *Romer* struck down a statewide constitutional amendment that imposed a "special disability" on gays and lesbians by limiting, among other things, the laws that local governments could pass to protect them from discrimination.[213] Again, rather than saying that the state could hide behind its manipulation of local powers, the Court held that this very manipulation was the problem. These cases stand for the proposition, contrary to *Ysursa*, that there is such a thing as an individual right to the availability of a municipal power, and that a decision to limit such a municipal power is not the same as a decision not to exercise an analogous state power.

There is some conflict between these cases and *Hunter*'s call for state policy flexibility. The demands of individual rights sometimes carve a wedge out of the state's ability to retract what it has given. But this is only appropriate. The Reconstruction Amendments seek to protect individual rights from the state; absent evidence that there was a clear intent to allow states to circumvent that purpose by acting through their powers over municipalities, the Reconstruction Amendments should be held to apply just as much to state power over municipalities as to state power over any other realm of policy.

Furthermore, this principle does not create a specifically *one-way* ratchet problem. It places no special obligation on rights already given. A state could run afoul as much by granting powers as by taking them away.

So individual rights enshrined in the Constitution limit a state's power over its municipalities. As a result, municipalities can bring suit to vindicate these rights. Because *Hunter* is a doctrine of substantive constitutional law, not standing, it no more limits municipalities from bringing suit to vindicate those rights than it limits individuals from doing so. Thus, municipalities should be allowed to participate in such suits where the effect on them makes them proper agents of individual citizens. These cases ultimately sound in representational standing.[214] Municipalities may be better able to protect their residents' interests because they have the ability to aggregate the resources of their constituents.

212. *Id.* at 467 (internal citations and quotation marks omitted).

213. 517 U.S. at 631.

214. *See* Akron Bd. of Educ. v. State Bd. of Educ. of Ohio, 490 F.2d 1285, 1289 (6th Cir. 1974) (allowing a municipal school board to sue state board of education, challenging a student transfer decision as racially discriminatory, under a representational standing theory); Dodd, *supra* note 54, at 983-84 (observing that "for several centuries lawyers had found and practised [*sic*] a way of circumventing" the requirement that "a corporation ow[ed] its existence solely to the grace of the crown," for example by allowing unincorporated groups to bring "representative suits, which enabled a member of an association to sue in equity in behalf of the whole group"); Morris, *supra* note 3, at 7 (discussing "Constituent Cases"). A municipality will usually be able to meet the three-prong test for associational standing. *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual

But because the Supreme Court has not been explicit about allowing these suits, the courts of appeal have not always followed. For example, the Ninth Circuit has held that *Seattle School District No. 1* and its ilk are not binding precedent because, according to the Ninth Circuit's framework, they are *sub silentio* treatments of a jurisdictional matter (standing).[215] In the Ninth Circuit's view, it will not be bound until the Supreme Court discusses the standing issue explicitly. But the Supreme Court may have no occasion to do so, because, as discussed earlier, it correctly behaves as if *Hunter* is a rule of substantive constitutional law. The Supreme Court should squarely hold that *Hunter* is a substantive doctrine, thereby demolishing the Ninth Circuit's entire framework. But *Gomillion* should be close enough to a square holding for the Ninth Circuit to reverse course and allow suits like *Seattle School District No. 1* and *Romer*.

The lower courts are confused in part because, since the constitutional rights revolution, the Court has rarely confronted *Hunter* squarely. The Constitution limits state action much more than it did when the last proper *Hunter* cases were handed down in the 1930s. Nearly all of the Bill of Rights has been incorporated against the states, and both procedural due process and equal protection have more force in noneconomic matters than they once did. The confusion is not helped by the fact that *Gomillion*, one of the few cases to address *Hunter* head-on, was decided based on the Fifteenth Amendment, rather than the Fourteenth. A subsequent case held that *Gomillion* should have been decided on Fourteenth Amendment grounds,[216] but that has affected the world of voting rights more than the world of municipal rights.[217]

2. Federal Supremacy

The Supremacy Clause also constrains state power over municipalities.[218] If state law violates the specific dictates of federal law, the fact that it does so

members in the lawsuit."). The presence of contradictory interests within an association does not create problems under prong (c). *See* Nat'l Mar. Union of Am. v. Commander, Military Sealift Command, 824 F.2d 1228, 1233 (D.C. Cir. 1987) ("If the Supreme Court's *UAW* opinion decided that associational standing is not defeated by conflicting member interests, as we rather think it did, we are, of course, bound by that. But the matter is not entirely clear and we should state why we would reach that conclusion in any event.").

215. Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir. 1998).

216. Shaw v. Reno, 509 U.S. 630, 645 (1993).

217. No reported case cites *Shaw* to modify *Hunter*.

218. Roderick Hills has written a fascinating examination of "the extent to which federal law can delegate federal powers to specific state or local institutions even against the will of the state legislature." Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999).

through its power over municipalities does not make it valid. Thus, if federal law grants powers[219] or funds[220] to cities, state law cannot countermand that grant of power or funds. In other words, the Supremacy Clause empowers Congress to grant municipalities rights and powers against the states that created those municipalities (assuming, of course, that Congress is acting within its enumerated powers).[221]

The saga of the City of Tacoma's efforts to build two dams illustrates this point.[222] Tacoma applied to the Federal Power Commission (FPC) to build a pair of dams. One of the dams would have flooded a salmon hatchery owned by the State of Washington, so the state intervened in the FPC proceedings, arguing that Washington law required the city to obtain permission from the state, in part because of the nature of the dam and in part because cities lack power to condemn state-owned land under Washington law.[223] The FPC granted the city the license to build the dams.[224] The Ninth Circuit upheld the decision[225] and the Supreme Court affirmed.[226] As Roderick Hills explains, the real dispute in the case "rested on whether the Federal Power Commission could bestow the power to condemn state-owned land on the City of Tacoma even though state statutes were silent on the question of whether the City possessed this power."[227] The city's victory affirmed that Congress had validly authorized the FPC to bestow that power. Thus, federal law can give cities judicially enforceable powers against, and contrary to the will of, their creating states.

Lawrence County v. Lead-Deadwood School District No. 40-1 is another interesting illustration of this point. It concerned the Payment in Lieu of Taxes Act, which compensates local governments that have federal lands in their jurisdiction for the inability to tax those lands even though the localities need to provide services related to them.[228] The Act states that each unit of local government receiving funds "may use the payment for any governmental purpose."[229] The litigation arose after South Dakota passed a law requiring counties

219. *See* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

220. *See* Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985).

221. *See id.*; Hills, *supra* note 218, at 1232-40.

222. *See* Wash. Dep't of Game v. Fed. Power Comm'n, 207 F.2d 391, 393 (9th Cir. 1953). For a clear and more detailed exposition of this convoluted litigation, see Hills, *supra* note 218, at 1272-74.

223. *Wash. Dep't of Game*, 207 F.2d at 395.

224. *Id.* at 398.

225. *Id.*

226. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

227. Hills, *supra* note 218, at 1273-74.

228. Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 258 (1985).

229. *Id.* (quoting 31 U.S.C. § 6902(a) (2012)).

to distribute the funds in the same proportions that they distributed general tax revenues—for example, if a county normally distributed sixty percent of its general tax revenues to its school districts, it would have to distribute sixty percent of its Payment in Lieu of Taxes funds to school districts.[230] The Supreme Court held that the state statute was invalid under the Supremacy Clause because it "obstruct[ed] th[e] congressional purpose" to give localities free reign in using the funds.[231] In effect, this meant that the federal statute preempted any state attempt to regulate the use of funds. The county had a right to use the funds as it saw fit, and it could enforce this right against a state statute in federal court.

These cases show that federal statutes should be able to limit state power over municipalities. This principle is generally consistent with *Hunter*'s purpose of state policy flexibility. It does not set into stone the powers or boundaries that states grant their municipalities; it just layers on top of those grants an additional set of federal funds or powers. This does not create a one-way ratchet problem. Moreover, any flexibility that is lost is transferred to another sovereign, which can reverse its decisions with a mere legislative majority.

Roderick Hills has criticized *Lawrence County* as insufficiently precise. In his view, the opinion erroneously suggests that the counties can use Payment-in-Lieu-of-Taxes funds to engage in activities that state law does not authorize them to conduct. In order to avoid this conclusion and preserve the state's traditional regulatory authority, Hills distinguishes between general state regulatory laws, which can limit what activities counties can pursue, and state laws that specifically redirect Payment-in-Lieu-of-Taxes funds, which per *Lawrence County* are invalid.[232]

I agree with Hills, but would apply his argument more broadly. States should be able to pass general regulatory laws, even when federal funds flow to localities, but they should not be able to directly countermand the specific dictates of federal law. In the Payment-in-Lieu-of-Taxes context, that would bar laws redirecting revenue; if federal law gave a municipality federal eminent domain power,[233] it would bar state efforts to take away that specific power. But neither federal law would prevent the state from abolishing the municipality, changing its education or environmental policy, or passing other laws that indirectly affect the federal power or grant of funds.

States create localities, and the federal government must take them as it finds them. But once it finds them and seeks to act with them—by funding them, granting them powers, or taking powers away—states cannot pass any laws specifically countermanding the directive of federal law. A state could redraw all its school districts, but it could not direct them to use federal funds for educating disabled children in a manner that contradicts federal law. The anal-

230. *Id.* at 259.

231. *Id.* at 270.

232. Hills, *supra* note 218, at 1235.

233. *See* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 323 (1958).

ogy to property rights is instructive. While the state can legislatively abolish a property right, it cannot specifically countermand the dictates of due process, nor seek to craft its own due process regime that overrides the federal regime.

While this Section is focused on the Supremacy Clause, that is not the only constitutional doctrine limiting state power for structural reasons. The dormant Commerce Clause should be treated similarly to the Supremacy Clause. That is, a state should be no more able to violate the dormant Commerce Clause through its actions regarding municipalities than through any other actions. This is the view of the California Supreme Court.[234]

3. Municipal Rights

So far, I have established that state power over municipalities is constrained by constitutional law regarding the rights of individuals and by the supremacy of federal statutes that grant funds or powers to municipalities. I now turn to whether state power over municipalities is constrained by constitutional rights held by the municipalities themselves.

Current law recognizes that municipalities themselves can have constitutional rights. For example, *United States v. 50 Acres of Land* noted that the Takings Clause of the Fifth Amendment requires compensation when the United States exercises the power of eminent domain over public entities, including municipalities.[235] Compensation is due not only because of the rights of municipal constituents, but also because the municipality itself is a bearer of rights:

> When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.[236]

Not only does *50 Acres* show that municipalities themselves can bear rights—it also suggests that there is no presumption against municipalities bearing rights. *50 Acres* finds that municipalities are protected by the Takings Clause in spite of the fact that the Clause speaks explicitly of "*private* property."[237] *50 Acres* uses purpose to override the plain meaning of the text—and it is therefore the opposite of a rule requiring a clear statement to show that municipalities have rights. In fact, municipal rights against the United States may extend beyond the Takings Clause. For example, the Third Circuit Court of Ap-

234. Star-Kist Foods, Inc. v. Cnty. of Los Angeles, 719 P.2d 987 (Cal. 1986).

235. 469 U.S. 24, 31 (1984).

236. *Id.*

237. *Id.* (emphasis added).

peals has held that political subdivisions have due process property rights against the federal government, even though states do not have such rights.[238]

Given that municipalities can have constitutional rights, that constitutional rights can limit state power over municipalities, and that federal statutory law can give municipalities rights against their states, municipalities can have constitutional rights against their creating states.

So, what constitutional rights *do* municipalities have? *Hunter* stands for a presumption against municipal rights that would burden the state's authority to grant powers to its municipalities by setting such grants in stone. But where municipal rights would not substantially limit state policymaking flexibility, general principles of constitutional interpretation come into the foreground and may demand the recognition of municipal rights. Thus, where *Hunter*'s demands are weak, constitutional values that municipalities can further should be allowed to win the day, even when, as in *50 Acres*, the literal application of constitutional text does not argue for the extension of rights to municipalities.

Free speech is an excellent candidate for a municipal right.[239] *Hunter*'s demands are weak, municipalities have a meaningful role to play in furthering the constitutional value of free speech, and the text does nothing to argue against the extension of the right.

First, municipal free speech will generally not raise serious problems with state policy flexibility. For example, municipal speech might involve activities such as passing expressive city council resolutions,[240] posting expressive signs,[241] or hosting talks at libraries. Shielding these activities from state censorship will not mean that states cannot shape municipal institutions, but merely that they cannot take targeted actions against speech-related functions of those institutions. Speech activities will usually bear little connection to the flexibility purpose of *Hunter*; where there is a clash of constitutional values, the matter can be adjudicated in that specific context.

Second, municipal free speech furthers the purposes of the First Amendment.[242] Local institutions are a vital part of public debate. One way that activ-

238. *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 765 n.3 (3d Cir. 1989).

239. *See generally* Fagundes, *supra* note 52 (proposing a framework for analyzing the free-speech-in-government context).

240. *See* Creek v. Vill. of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) ("Thus if federal law imposed a fine on municipalities that passed resolutions condemning abortion, one might suppose that a genuine First Amendment issue would be presented.").

241. *See* Fagundes, *supra* note 52, at 1637 ("Imagine that the Vermont Agency of Transportation uses state funds to erect a series of highway billboards critical of the Iraq War, and that the United States Congress—in an attempt to end the practice in Vermont and deter it elsewhere—responds by passing a law that levies substantial fines on any state that engages in such expression.")

242. *See* Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229

ists organize on national issues is through the expressive organs of local government. It would be a sad day in America if Texas could stop the residents of Austin from expressing their views on matters of state and national policy through their city council. Nor is it clear why state legislatures should be able to regulate the content of book talks held in local libraries any more than they could regulate such talks if they were held in local bookstores. Furthermore, *Citizens United* "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[243] Speech in association is protected like individual speech.[244] Municipalities are sites of association, often more so than corporations.

Third, the constitutional text does nothing to argue against municipal free speech. As David Fagundes has pointed out, the Speech Clause is unusual in that it "does not identify any limitations on the identities of the speakers on whom that safeguard is bestowed."[245] This makes it different from many "other substantive constitutional protections, which do specify the entities on which they confer rights."[246]

This argument for municipal free speech challenges *Ysursa*'s holding that state laws limiting municipal expression are the equivalent of the state declining to speak.[247] This presumes that municipalities have no existence separate from the state. But *Seattle School District No. 1* and *Romer* treated laws taking away municipal powers as distinct from laws declining to exercise analogous powers at the state level. Thus, the Constitution *does* see municipalities as having an existence separate from the state. But *Ysursa* does not cite either case, much less grapple with them. Furthermore, as Justice Stevens noted in dissent, decisions of the Court regarding liability and immunity have attached "constitutional significance [to] the relationship a State chooses to establish with its political subdivisions."[248]

(1991); Fagundes, *supra* note 52, at 1637; *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1310 (2009) (discussing the merits of vigorous debate between government entities).

243. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010) (describing a holding of a prior case). One interesting question is whether *Citizens United* argues for allowing municipalities to make campaign contributions in federal elections.

244. *Id.* at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

245. Fagundes, *supra* note 52, at 1648.

246. *Id.*

247. 555 U.S. 353, 362-64 (2009).

248. *Id.* at 374 (Stevens, J., dissenting). Kathleen Morris echoes this point, arguing that state constitutions often limit the power that state legislatures have over local governments. Morris, *supra* note 3, at 6.

Justice Stevens indicated that he was open to considering municipalities as separate entities, such that speech restrictions placed on them are more akin to speech restrictions placed on private bodies than to speech restrictions placed by the state on itself.[249] Since the First Amendment speaks in the language of limited government power, not individual rights—"Congress shall make no law . . . abridging the freedom of speech"[250]—recognizing a municipality as a separate entity would mean that municipalities have free speech rights against the state.

Of course, as Fagundes acknowledges, recognizing a free speech right for governments raises complicated questions of intergovernmental relations. Note that this problem is not unique to the state-local relationship; it would be raised within the federal-state and federal-local relationships as well. *Environmental Defense Center, Inc. v. EPA* both illustrates this problem and shows the beginnings of a way out.[251] The EPA issued regulations requiring municipal stormwater drainage systems to educate their citizens about the hazards of improper waste disposal. A number of municipalities sued, alleging compelled speech. The Ninth Circuit came to a sensible accommodation, holding that the required information was not ideological speech and was therefore unobjectionable under compelled speech doctrine.[252] The court therefore avoided interjecting free speech into a factual regulatory matter.[253]

C. *How Does the Constitution Protect Municipalities from Other State Actors?*

1. Challenges to Municipal Action

A further question is whether *Hunter* should apply in suits where a political subdivision challenges the actions of another political subdivision, rather than the state.[254] Neighboring cities can deprive each other of property, implicating due process. But, unlike the state legislature, one city does not have plenary power over another. One city cannot revoke or modify another municipality's powers at will. Thus, while we may say that, against the state legislature, a city

249. *Ysursa*, 555 U.S. at 373-75 (Stevens, J., dissenting). Justice Stevens did not ultimately decide this issue. "Because my conclusion that § 44-2004(2) discriminates against labor organizations is sufficient to decide this case, I find it unnecessary to fully consider the implications of Idaho's relationship with its political subdivisions. Rather, I note the significance of this relationship to urge its careful consideration in future cases." *Id.* at 375.

250. U.S. CONST. amend. I.

251. 344 F.3d 832 (9th Cir. 2003).

252. *Id.* at 849-50.

253. *Id.* at 849 n.23.

254. *See generally* Hollway, *supra* note 45 (arguing that municipalities should have a cause of action under 42 U.S.C. § 1983 to sue other municipalities).

has no property for which it can claim due process, against another city, it seems that it does have property interests—especially since it has property interests against the federal government under *50 Acres*.[255]

Obviously, municipalities should be able to challenge municipal action on any grounds they can challenge state action, such as where the action violates individual constitutional rights or federal law asserting national interests. The question is whether political subdivisions should be able to challenge the actions of other political subdivisions in the same state as violations of their property rights under the Due Process or Equal Protection Clauses.

All the circuits that have considered the question have said no. Wright and Miller agree.[256] Accordingly, courts have cited this rule to block a town from challenging another town's ordinance under the Due Process and Equal Protection Clauses;[257] a municipally owned waste disposal corporation from challenging a town's ordinance under the Due Process and Equal Protection Clauses;[258] and a state-created Indian Housing Authority from challenging a city's action under the Equal Protection Clause.[259]

But according to the policy-flexibility view of *Hunter*, these limitations on the Due Process and Equal Protection Clauses are unnecessary. The need to avoid the one-way ratchet problem does not require that municipalities lack the Fourteenth Amendment rights against other municipalities that private persons have. When one city zones land next to another city,[260] a due process challenge by the neighboring municipality does not take away the state's ability to change the arrangement of municipal powers and boundaries—certainly no more than the equivalent due process challenge by a neighboring private landowner. There is no reason to hold that municipalities must act according to due process when their actions affect private property owners but not when their actions affect public property owners.

Granting municipalities constitutional rights against each other may serve the cause of good governance. Municipalities can impose costs on other municipalities that the acting municipality does not take into account. In many cases the issue will not be sufficiently important to merit the attention of other con-

255. *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

256. 13B WRIGHT, MILLER & COOPER, *supra* note 144, § 3531.11.1.

257. City of New Rochelle v. Town of Mamaroneck, 111 F. Supp. 2d 353, 357-58 (S.D.N.Y. 2000) (barring due process and equal protection challenges but allowing a dormant Commerce Clause challenge).

258. S. Macomb Disposal Auth. v. Twp. of Washington, 790 F.2d 500, 503-04 (6th Cir. 1986).

259. Hous. Auth. of Kaw Tribe v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991).

260. *See* River Vale Twp. v. Town of Orangetown, 403 F.2d 684, 686 (2d Cir. 1968) (allowing a due process challenge by a municipality to a zoning ordinance of a different municipality in a neighboring state).

flict-resolution bodies, such as the state legislature.[261] Moreover, the requirement that government act according to the demands of due process is a constitutional value that transcends instrumental reasons. Finally, courts already adjudicate common law disputes between governmental entities,[262] so the bare fact of court adjudication is not problematic. While one could argue that the problem is federal court involvement, this would be an entirely different rule, and would be in tension with the holding in *Virginia Office for Protection & Advocacy v. Stewart* that there was no sovereign immunity problem with a state agency suing state officials in federal court.[263]

2. Challenges to Agency Action

A more complicated question is whether *Hunter* means that municipalities have no constitutional rights against state agencies. I suggest that the answer depends on whether the agency active is adjudicatory or legislative in nature.

Where the legislature has delegated its legislative authority to an executive agency, *Hunter* should retain its force, such that a state regulation is immune from claims that it violates the Contracts, Just Compensation, or Due Process Clauses by infringing on municipal powers or property. When the legislature delegates its legislative authority, it should be able to delegate that full authority. The legislature may well decide that the interests of the state are best served by delegating legislative authority to an expert agency. If it does so, it should be able to delegate its flexibility to give and freely take away under *Hunter*. Otherwise, the state would be forced to choose between delegation and flexibility.

For example, Part I discussed how *Hunter* protected the Connecticut legislature's ability to change its policy for transportation over the Connecticut River, moving from a municipally run ferry to a private toll bridge and then to a publicly operated bridge free of tolls. But we can also imagine a world in which, instead of determining the specific modes of transportation itself, the legislature might have found it preferable to delegate the decision to an agency staffed with experts. If it did so, it should have been able to grant the same ability to change course to that agency.

261. *See, e.g.*, *River Vale Twp.*, 403 F.2d at 685 (involving the rezoning of a wooded area into an office park district); *City of New Rochelle*, 111 F. Supp. 2d at 357 (involving a dispute over whether to build an Ikea store).

262. *See* 1 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 3A:21 (3rd ed. 2012) ("Intergovernmental cooperation has become a necessity, and therefore it is not uncommon for municipalities and states to contract with each other. The inevitable result has been that contractual disputes have arisen between cities and states."); 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 63:27 (4th ed. 2012) ("Where a municipality is the owner of land within a neighboring municipality, it is in the same position as any other property owner. It is entitled to protect its property right and its standing is determined by the same factors relating to 'aggrievement' that apply to any other property owner.").

263. 131 S. Ct. 1632 (2011).

City of Pawhuska v. Pawhuska Oil & Gas Co. further illustrates the point.[264] The Oklahoma legislature had created the Oklahoma Corporation Commission and delegated to it "general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services."[265] The Commission issued an order regulating natural gas rates and services, which had the effect of overriding a contract that the city had with a gas company. The city challenged the order as a violation of the Contracts Clause. The Court treated this as a classic *Hunter* case, with the city having no more ability to challenge a legislative action by the Commission than the equivalent action by the legislature. The legislature could have adopted the order itself; it should not matter that it delegated that authority to the Commission. A contrary ruling would have burdened delegations of authority to agencies by making them necessarily incomplete. Thus, *Hunter* should apply the same to legislative actions by state administrative bodies as it does to legislative actions by state legislatures.[266]

Conclusion

The *Hunter* doctrine limiting municipal constitutional rights originates in a concern with controlling potentially powerful corporate actors. Today, of course, we are not worried that San Francisco will raise an army and overrun Sacramento. The doctrine also comes from a time of skepticism about anti-egalitarian and monopolistic corporations, both public and private. But cities have changed. Today, the animating purpose behind *Hunter* is flexibility in state policymaking—the notion that a sovereign state should not have to worry about making grants of powers, boundaries, or privileges to a subordinate municipal corporation, because the sovereign state can change its mind should circumstances warrant.

Recognition of this purpose limits *Hunter*'s reach. First, when added to case law analysis, it shows that *Hunter* is a substantive rule about what the Constitution means, not a doctrine of standing or capacity to sue that depends on the party asserting the claim. Second, it shows that federal law can limit state power over municipalities, so long as there is no substantial one-way ratchet problem. Thus, individual rights and federal supremacy limit state power over municipalities. Third, it opens the door to claims that municipalities themselves can have rights as long as they do not interfere substantially with state policy-making flexibility. Free speech is a promising candidate. Fourth, it shows why municipalities should be able to sue other municipalities for constitutional violations. Finally, it shows why municipalities should not be able to sue administrative

264. 250 U.S. 394 (1919).

265. *Id.* at 395-96 (internal citation omitted).

266. However, when an agency adjudicates rather than legislates, the question becomes more difficult. The question is beyond the scope of this Note.

agencies for legislative actions taken in a legislative capacity, but perhaps should be able to sue agencies for adjudicatory actions.

This analysis corrects the maximalist views of *Hunter* embraced recently by the Supreme Court in *Ysursa* and long embraced by the Ninth Circuit. It also corrects other problems: the failure of courts to consider *Hunter*'s purpose, often leading to an overly broad reading of the doctrine; the more narrow errors made by the Tenth Circuit construing *Hunter* as a doctrine of standing (albeit one that does not bar all constitutional claims); the error of the New York Court of Appeals construing *Hunter* as a doctrine of capacity to sue; and the errors of many courts blocking suits between municipalities on *Hunter* grounds.