

City Speech

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Cities speak. A rich array of expressive activities, city speech, surrounds us. Cities topple confederate monuments, fly LGBT pride flags on City Hall, erect monuments commemorating victims of sexual violence, and issue statements that oppose the policies of state and federal governments. They disseminate information concerning climate change, hydraulic fracking, and the impact of minimum wage on poorer populations. They participate in statewide ballot initiatives, and they hire lobbyists to advocate for litigation. But cities have to obtain permission from states to do these things, and increasingly, they are being silenced. In our era of political polarization, states have become hostile to local policymaking, and thus have begun to employ measures to prohibit a variety of expressive activities by cities.

City speech embodies the values of localism, of the First Amendment, and of federalism. It promotes democratic self-government, policy experimentation and innovation, representation of minority views, and economic efficiency and redistribution. It also promotes the ongoing search for truth and the flourishing of an open marketplace of ideas. Cities are structured, legally and politically, to excel at speech. They are separately and democratically elected institutions that function as frontline posts for policymaking, regularly facing economic, social, environmental, and political challenges. As relatively small, nimble, and responsive entities, cities are thus well placed to stir democratic civic engagement in politics. Cities are diverse in their social, economic, religious, ethnic, racial, and political composition, hence their plural expressions reflect the diverse nature of our nation better than other levels of government. These values are threatened by the silencing measures recently adopted by many states.

This Article proposes that city speech should enjoy the constitutional protection of the First Amendment. Such protection is necessary for the values of city speech to withstand state-led threats. In contrast to one traditional view of cities as creatures of the state, this Article argues that there is a doctrinal path for the recognition of city speech as a constitutional and organizational right. Cities are hybrid creatures of government and corporation. Legal doctrine has long viewed them as constitutional property right-bearers but has denied them a variety of government privileges. Simultaneously, corporations have gained a far-reaching recognition of their right to speak. And while the government speech doctrine protects various municipal expressions against private dissenters, it leaves cities unarmed against silencing measures by their own states. Giving our cities free speech rights is not only doctrinally consistent and normatively justified; it has become necessary in order to protect the democratic vitality our cities symbolize.

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INTRODUCTION

Cities speak. They speak by posting signs criticizing lenient gun control policies,¹ or by flying LGBT pride flags and “Black Lives Matter” banners on City Hall.² They speak³ by removing or protecting Confederate monuments,⁴ or by erecting remembrance statues of Korean “comfort women” in municipal parks.⁵ Cities communicate ideas, disseminate information, and announce their policies to their residents using municipal websites,⁶ utility bills,⁷ and television announcements.⁸ Cities speak via lobbyists they send to state capitols and to Washington to advance municipal causes.⁹ Cities speak by disseminating information and expressing their views on various state-

¹ In the aftermath of the Parkland school shooting tragedy, some cities in Florida, fearful of retaliation by their state—which prohibits local gun control measures—posted ironic ‘warning’ signs stating that their jurisdiction is “Protected by 2nd Amendment Security.” See Sarah Holder, *Florida Cities’ New Tactic in the Fight for Gun Reform*, CITYLAB (Apr. 5, 2018), <https://www.citylab.com/equity/2018/04/south-florida-cities-want-to-control-guns-on-their-own-terms/557207/>, archived at <https://perma.cc/H8MX-FT9B>.

² As of August 2017, there was a rainbow flag and a “Black Lives Matter” banner hanging on the Cambridge City Hall. Photo on file with author.

³ The Supreme Court has held that permanent monuments displayed in the public by a local government amount to speech. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–72 (2009).

⁴ See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 67 (2018); see also *State of Alabama v. City of Birmingham*, CV 17-903426-MGG, 2–9 (Cir. Ct. of Jefferson Cty., Ala. Jan. 14, 2019) (striking down Alabama’s Memorial Preservation Act, which prohibited “altering” or “disturbing” Confederate monuments for violating the City’s First Amendment rights).

⁵ See *Gingery v. City of Glendale*, No. CV 14-1291 PA (AJWx), 2014 U.S. Dist. LEXIS 107598, at *3–6 (C.D. Cal. Aug. 4, 2014), *aff’d but criticized*, 831 F.3d 1222, 1232 (9th Cir. 2016) (upholding a decision by a local authority to erect a statue commemorating the suffering of Korean “comfort women”).

⁶ See, e.g., *Kromko v. City of Tucson*, 47 P.3d 1137, 1139 (Ariz. Ct. App. 2002) (discussing Tucson’s dissemination of various communications regarding special referendum through television public announcement and website).

⁷ See, e.g., *Cook v. Baca*, 95 F.Supp.2d 1215, 1217 (D.N.M. 2000) (describing a mayor announcing support for a transportation tax on the municipal water bill).

⁸ See, e.g., *Kromko*, 47 P.3d at 1139 (television announcement and internet site opposing tax reform); *Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311, 316 (Md. 2016) (advertisements opposing a measure in local media, in county libraries, and on county cars); *Burt v. Blumenauer*, 699 P.2d 168, 169–70 (Or. 1985) (en banc) (fluoride advertisement); *Daims v. Town of Brattleboro*, 148 A.3d 185, 186 (Vt. 2016) (advertisements in different media outlets opposing city charter amendment).

⁹ See Matt W. Loftis & Jaclyn J. Kettler, *Lobbying from Inside the System: Why Local Governments Pay for Representation in the U.S. Congress*, 68 POL. RES. Q. 193, 193–97 (2015) (documenting and explaining the significant lobbying efforts that local governments are engaged in); see also Rebecca Goldstein & Hye Young You, *Cities as Lobbyists*, 61 AM. J. POL. SCI. 864, 866–67 (2017).

wide ballot initiatives, such as the rate of property tax¹⁰ or a proposed constitutional ban on same-sex marriage.¹¹ Cities express disagreement or even outrage with their state governments' policies, with the federal government's actions, and sometimes even with foreign governments' policies through statements, declarations, and city council decisions.¹²

Cities are structured, legally and politically, to excel at speech. They are separately and democratically elected institutions that function as frontline posts for policymaking—regularly facing new economic, social, environmental, and political challenges.¹³ They are relatively small, nimble, and responsive and thus well placed to stir democratic civic engagement in politics. Cities are diverse in their social, economic, religious, ethnic, racial, and political composition; hence, because of their plural expressions, cities reflect the diverse nature of our nation better than other levels of government do.¹⁴ When cities speak, they do not speak in one voice; the outcome of their aggregated speech is a polyphony of opinions, views, and normative worlds that emerge and prosper.

But according to a dominant doctrine, cities have to obtain permission from their states to engage in expressive (and other) activities,¹⁵ and increas-

¹⁰ See *Anderson v. City of Boston*, 380 N.E.2d 628, 631 (Mass. 1978) (holding that Boston had no authority to support a referendum proposed to amend the state constitution); discussion *infra* Part IV.A.1.

¹¹ See, e.g., *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012); *San Francisco's Legal Fight for Marriage Equality*, CITY ATT'Y SAN FRANCISCO (June 26, 2014), <https://www.sfcity-attorney.org/2014/06/26/san-franciscos-legal-fight-for-marriage-equality-2/>, archived at <https://perma.cc/G4NA-LNQT>; *SF Mayor Takes Gay Marriage Fight to Court*, NPR (Mar. 5, 2009), <https://www.npr.org/templates/story/story.php?storyId=101452727>, archived at <https://perma.cc/8WZN-Q8CP>.

¹² For example, Chicago, Los Angeles, Boston, Philadelphia, New York, and San Francisco all denounced Trump's travel ban. See Brendan Krisel, *De Blasio Joins Big-City Mayors in Denouncing Trump's Travel Ban*, NEW YORK CITY PATCH (Mar. 30, 2018), <https://patch.com/new-york/new-york-city/de-blasio-joins-big-city-mayors-denouncing-trumps-travel-ban>, archived at <https://perma.cc/K3SH-J78A>; see also CITY COUNCIL OF THE CITY OF SANTA ANA, CALIFORNIA, MINUTES OF THE REGULAR MEETING, 10A-15 (Feb. 21, 2017) (adopting a resolution condemning the January 2017 presidential executive orders regarding immigration); *City Protests Supreme Court Ruling Upholding Trump Travel Ban*, THE EXAMINER (June 26, 2018), <http://www.sfexaminer.com/city-protests-supreme-court-ruling-upholding-trump-travel-ban/>, archived at <https://perma.cc/5VR8-FBVP>.

¹³ See *infra* Part II.A.2.

¹⁴ See *infra* Part II.A.3.

¹⁵ See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2009–10 (2018) (discussing the option that cities might enjoy First Amendment rights, but eventually concluding that, following *Ysursa v. Pocatello Education Ass'n*, 555 U.S. 353, 362–64 (2009), the Court left very little room for such recognition); see also Schragger, *supra* note 4, at 68 (“One important implication of the private/public distinction is that the city cannot immediately assert a First Amendment right to speak on its own behalf . . . Under current doctrine, a city *qua* city cannot readily invoke the First Amendment to protect its decision . . .”); Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST (June 24, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/?noredirect=on&utm_term=.f34842914a69, archived at <https://perma.cc/23GK-9TFB> (“[L]ocal governments . . . likely have no First Amendment rights against state governments, because the state is entitled to control the conduct of its subdivisions[.]”).

ingly, they are being silenced. In our era of political polarization,¹⁶ states have become hostile to local policymaking, and thus have begun to employ silencing measures to prohibit a variety of expressive activities by cities. Alongside the intensification of state preemptive legislation aimed at preventing cities from acting in different areas¹⁷—prohibiting cities and counties from declaring themselves sanctuaries for undocumented immigrants,¹⁸ increasing local minimum wages,¹⁹ prohibiting fracking,²⁰ and regulating the removal of trees from private property²¹—more extreme versions of preemption have recently appeared, targeting speech, including some prohibiting local legislators from even “endorsing” certain policies or positions. For example, in 2017, Texas amended its anti-sanctuary city law to include the possibility of removing from office any local official who

¹⁶ See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954, 974 (2019); see also Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage through Federalism and Localism*, 77 *LA. L. REV.* 1045, 1053–55 (2017) [hereinafter Diller, *Reorienting Home Rule: Part 2*]; Kenneth Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 166–67 (2017); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 *LA. L. REV.* 287, 320–42 (2016) [hereinafter Diller, *Reorienting Home Rule: Part 1*].

¹⁷ Scholarly attention has recently been given to the preemption spree taking place across the nation. See, e.g., Briffault, *supra* note 15, at 1997–2008; Davidson, *supra* note 16; Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 *COLUM. L. REV.* 2225, 2225–28 (2017) (highlighting the negative impact of recent state preemptive measures for progressive local legislation); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship*, 106 *GEO. L.J.* 1469, 1469–74, 1494–1504 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 *TEX. L. REV.* 1163, 1164–70 (2018); Stahl, *supra* note 16, at 136–43, 174–78 (analyzing the current reasons for the rush of preemption and arguing that intrastate federalism might alleviate it); Franklin R. Guenther, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 *MINN. L. REV.* 427, 428–30 (2017); Ira Rubinstein, *Federal and State Preemption of Local Privacy Regulation* (N.Y.U. Sch. L. Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 18-17, 2018), <https://ssrn.com/abstract=3124702>, archived at <https://perma.cc/WB5T-2GMV>.

¹⁸ See, e.g., S. 868, Gen. Assemb., Reg. Sess. (N.C. 2015) (withholding funding from sanctuary cities); S. 2710, 2017 Leg., Reg. Sess. (Miss. 2017); H.B. 1257, § 15.2-1409.1 (Va. 2018) (prohibiting local sanctuary policies); TEX. GOV'T CODE ANN. § 752.053(a)–(b), SB4 (prohibiting local policy that restricts enforcement of federal immigration laws). For further discussion, see Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 *J. FEDERALISM* 403, 413–415 (2017).

¹⁹ See Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (Jul. 18, 2017), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back>, archived at <https://perma.cc/NDY7-WJF5> (describing the ongoing battle between cities that raise the minimum wage within their jurisdiction, and their states that pass laws preempting them from such minimum wage raises); see also Riverstone-Newell, *supra* note 18, at 411–13.

²⁰ In Louisiana, Texas, Colorado, and West Virginia, the state legislatures passed laws that preempted local governments from prohibiting hydraulic fracking within their jurisdiction. These laws were later affirmed by state or federal courts. See, e.g., *LA. REV. STAT. ANN.* § 30:28(F) (Louisiana); *St. Tammany Parish Gov't v. Welsh*, 199 So.3d 3, 3 (La. Ct. App. 2016); H.B. 40, 84th Leg., Reg. Sess. (Tx. 2015-16) (Texas); *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 577 (2016) (Colorado); *EQT Prod. Co. v. Wender*, 191 F.Supp.3d 583 (S.D.W.Va. 2016) (West Virginia); see also Riverstone-Newell, *supra* note 18, at 408–11.

²¹ See e.g., H.B. 70, 85th Leg., Reg. Sess. (Tx. 2017–18); see also *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 5 (Tex. 2016) (holding that Houston's ordinance concerning air-quality standards was preempted by the Texas Clean Air Act).

“adopt[s], enforce[s], or endorse[s] a [local] policy” that “prohibits or materially limits the enforcement of immigration laws.”²² As part of the ongoing battle over Confederate monuments, many southern states have prohibited municipalities from removing their Confederate monuments, thus depriving cities of the ability to express their disdain for the message that those monuments send.²³ And for decades now, states have disallowed local governments from running campaigns in which they express their positions concerning various statewide ballot initiatives—even when those initiatives directly impact the silenced cities.²⁴

In this Article, I argue that, notwithstanding the differences between various modes of local speech, they should all be conceptualized as a distinct type of speech—I call it “city speech”—and silencing measures against this speech should amount to violations of the First Amendment. City speech, unconstrained by state censorship, is needed so that local governments can realize the values of localism, the First Amendment, and federalism. A federal constitutional protection of city speech will allow cities to fulfill their different functions as governments representing their people, which also have valuable things to say about matters that directly affect and concern their residents. City speech promotes democratic self-government, policy experimentation and innovation, representation of minority views, and economic efficiency and redistribution.²⁵ It also promotes the ongoing search for truth and the flourishing of an open marketplace of ideas.²⁶

As state policy-making increasingly reflects national politics and lobbyist groups rather than local interests,²⁷ states serve less and less as structural safeguards against federal domination or as organizations that represent the nation’s true diversity. Cities thus become pivotal bastions in combating Washington’s growing control over America’s political agenda and policymaking. Hence, protecting city speech means, more than ever, protecting

²² TEX. GOV’T CODE ANN. § 752.053 (West 2017) (emphasis added), *invalidated in part by* City of El Cenizo v. Texas, 890 F.3d 164, 173 (5th Cir. 2018); *see also* Briffault, *supra* note 15, at 2004.

²³ *See e.g.*, Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 354, *invalidated* recently in Alabama v. City of Birmingham, *supra* note 4; Ga. Code Ann. § 50-3-1(b)(1) (2018); N.C. GEN. STAT. § 100-2.1(b) (2015); S.C. CODE ANN. § 10-1-165 (2009); *see also* Schragger, *supra* note 4, at 67.

²⁴ *See* Anderson v. City of Boston, 380 N.E.2d 628, 634–641 (Mass. 1978) (holding that the city of Boston could not allocate funds and use its personnel to oppose a statewide ballot initiative that would affect its tax base); *see also* discussion *infra* Part IV.A.1.

²⁵ *See infra* Part II.A.

²⁶ *See infra* Part II.B.1.

²⁷ *See, e.g.*, Michael Greve, *Our Polarized, Presidential Federalism* 11 (George Mason Univ. Legal Studies Research Paper Series, No. LS 16-37, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885932, archived at <https://perma.cc/7EPT-ZRBJ>; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) (arguing that local governments oppose federal policies because of their leaders’ contradictory affiliations). *See generally* DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* (2018).

participatory democracy, self-government, diversity, and pluralism against unfettered encroachment by states and the federal government.²⁸

There are also risks to granting cities First Amendment rights. First, city speech might end up serving and entrenching existing power, especially that of politicians, rather than constituencies. Second, protecting city speech might strengthen the overly broad protection that is currently given to corporations and legitimate the libertarian conception of speech. Third, city speech might be regressive in that mostly rich and powerful cities are poised to reap its benefits, potentially “drowning out” poorer cities’ speech or weaker private voices. Last, city speech could exacerbate inter-local competition and distort local politics by further incentivizing various groups to capture local political institutions. Although these risks should not be taken lightly, this Article argues that the right response is not to deny cities their rightful First Amendment protection, but rather to balance cities’ newly recognized speech rights with other considerations, including the competing constitutional rights of private parties.²⁹

Surprisingly, the Supreme Court has never explicitly ruled on the question of whether cities are entitled to First Amendment protection against their own states, nor has any federal court of appeals authoritatively done so. Rather, federal and state courts around the country have oscillated, mostly in dicta and rarely as a clear ruling, between denying this option and embracing it as plausible or even warranted.³⁰ This ambiguity stands in contrast to the unequivocal and uniform denial of First Amendment protection to the federal government, states, and other state agents by the Supreme Court and by lower courts.³¹ And, although this broad denial of speech rights to government was sometimes construed matter-of-factly to include local govern-

²⁸ In an important sense, I am offering to use the First Amendment as an instrument of promoting localism. In other words, I am offering a rights-based method to protect institutions, that is, local governments. It is a complementary view to Professor Heather Gerken’s. While Gerken sees local governments as potentially providing institutional protection to minorities, complementing rights-based protection with institutional protection, I see rights as protecting the institutions themselves. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

²⁹ Such balancing could be achieved through various legal mechanisms such as severing the different components of corporate speech and recognizing only certain parts as protected speech, while also recognizing some considerations as compelling interests that justify the curtailment of various expressions by cities. See *infra* notes 449, 473, and accompanying text.

³⁰ See *infra* Part IV.

³¹ See *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (1973) (holding that the First Amendment protects individuals from governmental interference, but it “confers no analogous protection on the Government” itself). For a detailed discussion of this decision see *infra* notes 304–312 and accompanying text. For decisions regarding the lack of First Amendment protection to the government see, for example, *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (ruling that state actor speech is not protected by the First Amendment), *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (deciding that governmental expressions are unprotected by the First Amendment), and *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 944–45 (W.D. Va. 2001) (“[T]he First Amendment protects only citizens’ speech rights from government regulation, and does not apply to government speech itself.”).

ments,³² I argue that this construction is flawed and unwarranted. It ignores the hybrid and unique nature of local governments in American law: unlike any other type of government, they are not only governments but also corporations, separately incorporated and democratically elected. Two conclusions arise from this fact: first, cities can and, in fact, do possess certain constitutional rights; and second, they can become subjects of the First Amendment.³³ Additionally, cities can raise a constitutional claim against their own states—based on the First Amendment—despite the long shadow of *Hunter v. Pittsburgh*,³⁴ where the Court ruled that cities are creatures of their states, deprived of any meaningful federal constitutional protection.³⁵ I show that reading *Hunter* too broadly—as if it were a procedural rule of standing or a substantive rule denying cities all constitutional status—is a mistake, and that there are good reasons to construe it as allowing the possibility of granting cities speech rights against their states.³⁶

In contrast to *Hunter*'s "creatures of the state" vision of cities, this Article relies on a competing legal tradition and argues that there is a doctrinal path for the recognition of city speech as a constitutional right. Cities are incorporated as "municipal corporations,"³⁷ a legal form that exemplifies their hybrid nature—combining the traits of government with those of a corporation. This unique kind of government has a distinct and longstanding function within American federalism. As municipal corporations, cities are viewed, legally and politically, as democratically legitimate and partially autonomous entities.³⁸ This dual nature of localities—being both governments and corporations—has meant that courts gave cities the constitutional right

³² See, e.g., *Warner Cable Commc'ns, Inc.*, 911 F.2d at 638; see also *infra* note 305 and accompanying text.

³³ This is so also because of the quick evolution of the government speech doctrine. Indeed, the "nascent doctrine" of government speech has become increasingly popular, allowing governmental units at all levels of government to advance their positions and policies without being blocked by various First Amendment claims by private parties. This doctrine has also been used widely when municipalities have been sued. See, e.g., *Page v. Lexington Cty. Sch. Dist.*, One, 531 F.3d 275, 278 (4th Cir. 2008); *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006); *Adams v. Maine Mun. Ass'n*, No. 1:10-CV-00258-JAW, 2013 WL 9246553 at *1 (D. Me. 2013); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501, 503 (10th Cir. 1983); *Cook v. Baca*, 95 F.Supp.2d 1215, 1229–30 (D.N.M. 2001); *Alabama Libertarian Party v. City of Birmingham*, 694 F.Supp. 814, 818–21 (N.D. Ala. 1988); *Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311, 323–27 (Md. 2016); *Burt v. Blumenauer*, 699 P.2d 168, 174–77 (Or. 1985); *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 807–09 (Del. Ch. 2015); *Peraica v. Riverside-Brookfield High Sch. Dist.* No. 208, 999 N.E.2d 399, 407–09 (Ill. App. Ct. 2013); *Kromko v. City of Tucson*, 47 P.3d 1137, 1141–42 (Ariz. Ct. App. 2002); *Carter v. City of Las Cruces*, 915 P.2d 336, 338–39 (N.M. Ct. App. 1996).

³⁴ 207 U.S. 161 (1907).

³⁵ *Id.* at 178–79; see also Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL. REV. 389, 390 (2012).

³⁶ See *infra* Part IV.D.

³⁷ See EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* 104–05 (3d ed. 1999).

³⁸ See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 517 (1999).

to property as private owners of land.³⁹ Similarly, cities could also be given the right to free speech from which they could have the ability to sue their own states.

Protecting city speech through the First Amendment is not only normatively desirable and doctrinally possible due to the dual nature of cities; it is also plausible given the lack of binding precedents. No Supreme Court ruling explicitly denies First Amendment city speech rights, and lower courts have been ambivalent about them.⁴⁰ Acknowledging First Amendment city speech rights would be consistent with the increased protection that corporate speech receives in contemporary expansive free speech jurisprudence.⁴¹ Leaving only the speech of *municipal* corporations outside the protection of the First Amendment is both doctrinally inconsistent and undesirable as a public policy matter. After decades of the courts sanctioning corporate involvement in politics,⁴² corporations now exert an immense influence over our political system; they disproportionately set the agenda of what is publicly salient, discussed, and debated.⁴³ City speech could restore some balance back into our political system and public discourse.

Government speech doctrine lends additional support to the prospect of First Amendment city speech rights.⁴⁴ Although this doctrine does not give cities any constitutional protection, it recognizes the importance and necessity of city expression within our governmental scheme, by protecting cities (along with other governments) from claims made by citizens who are unhappy with what their city said.⁴⁵ Yet this doctrine only shields cities from claims made by private parties; it does not give cities the sword they need against their silencing states.⁴⁶

The end of the doctrinal discussion deals with potential “compelled speech” claims from dissenting residents. Such compelled speech claims—where resident taxpayers assert that certain municipal expressions implicate

³⁹ See *infra* Part IV.B.2.

⁴⁰ See *infra* Part IV.A.2.

⁴¹ See, e.g., *Citizens United v. F.E.C.*, 558 U.S. 310, 365 (2010) (striking down Section 203 of the Bipartisan Campaign Reform Act, since it violates the First Amendment rights of corporations, by imposing limitations of their ability to contribute to political campaigns close to election periods); see also *McCutcheon v. F.E.C.*, 572 U.S. 185, 227 (2014) (invalidating Section 441 of the Federal Election Campaign Act (FECA), since it imposes an unconstitutional limit on contributions an individual can make over a two-year period to national party and federal candidate committees).

⁴² See *Citizens United*, 558 U.S. at 346–47.

⁴³ See generally ADAM WINKLER, *WE THE CORPORATIONS* (2018) (describing the successful battle that American businesses led over the past century to obtain a host of civil rights).

⁴⁴ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 481–83 (2009). For an elaborate discussion of the government speech doctrine see *infra* Part IV.C.

⁴⁵ See *infra* Part IV.C.

⁴⁶ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 44–45 (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 605–09 (1980). For cases involving residents’ claims against cities, see, for example, *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270 (9th Cir. 1995) and *Hewett v. City of King*, 29 F.Supp.3d 584, 632–33 (M.D.N.C. 2014).

them and thus infringe on their First Amendment right not to speak—should force us to think about mechanisms that would ensure that city speech is indeed democratically legitimate. And although this Article argues that compelled speech claims should not prevent us from granting cities First Amendment rights, it also suggests that dissenting citizens, in some extreme situations, might be given the right to exit from the speech with which they disagree.

This Article stands at the intersection of local government law and First Amendment scholarship, and, at least on a basic level, can be understood as advocating a “maximalist” position in both fields.⁴⁷ I am defending the expansion of local power, authority, and immunity as well as the expansion of the First Amendment. While maximalist visions of local power and the First Amendment might have some negative and regressive consequences, I argue in this Article that defending an expansionist vision of localism and free speech has an egalitarian and progressive potential in the context of city speech.⁴⁸ In doing so, this Article joins in the quest—as articulated by Jeremy Kessler and David Pozen—for an “egalitarian First Amendment,” using free speech as a vehicle, broadly speaking, to advance equality.⁴⁹ It also joins recent scholarly attempts to envision cities as important constitutional actors,⁵⁰ who should be authorized to protect individual rights and raise various constitutional claims—even First Amendment ones⁵¹—against their

⁴⁷ See generally Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1986–94 (2018).

⁴⁸ This does not mean that I am a complete First Amendment maximalist in Kessler and Pozen’s terms. Although I support some free speech rights even to business corporations, I do not condone the current expansion of the First Amendment to many corporate activities and expressions.

⁴⁹ Kessler & Pozen, *supra* note 47, at 1953.

⁵⁰ See, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2218 (2006); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147–48 (2005).

⁵¹ See, e.g., Matthew A. De Stasio, Comment, *A Municipal Speech Claim Against Body Camera Video Restrictions*, 166 U. PA. L. REV. 961, 1012–21 (2018) (arguing that local governments could raise First Amendment claims against state laws that restrict the ability of municipalities to release the data gathered by policy-worn body cameras); Bendor, *supra* note 35, at 411–29 (arguing that local governments should be entitled to the protection of federal constitutional rights such as the Fourteenth Amendment, but paying only brief attention to the First Amendment); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1676–78 (2006) (advancing the position that state and local governments should be entitled to First Amendment protection, without paying attention to the differences between these two types of governments); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1, 35–38 (1999) (claiming that the First Amendment should protect state and local foreign policy initiatives); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 826–29 (1989) (raising the possibility that the First Amendment protects expressive activities of states and localities in the area of foreign relations); Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMPLE L. REV. 813, 832–44 (1989) (claiming state and local government speech intended to communicate foreign policy positions to the national government should be protected under the First Amendment).

states.⁵² Some of these academic endeavors lump cities together with states as if they share the same skin, thus ignoring the uniqueness of local governments;⁵³ however, this Article insists on the theoretical and doctrinal uniqueness of local governments.⁵⁴

This Article proceeds in four parts. In Part I, I ask what city speech is, and what its traits are. I explain why the free speech right I seek to extend to cities is legal, rather than structural-political; federal constitutional, rather than state level; organizational, rather than personal; and independent, rather than derivative. In Part II, I explore in depth the values promoted by granting speech rights to cities, based on city speech's contribution to the values that stand at the core of localism, the First Amendment, and federalism. Part III calls our attention to why we might need to worry about granting constitutional protection to city speech, as it might serve to entrench existing power and legitimate the overly broad speech rights of corporations—thus becoming a regressive rather than progressive tool. In Part IV, I draw the doctrinal path to recognizing cities as protected by the First Amendment. I conclude by highlighting the challenges that adopting a First Amendment protection for city speech entails.

I. WHAT IS CITY SPEECH AND HOW SHOULD IT BE PROTECTED?

Cities speak for a variety of reasons, and the ways in which they speak are wildly distinct. Some of their expressions are pure “speech” since they involve merely talking or communicating ideas and knowledge—for example, when they distribute information to their citizens through leaflets or on their websites. Other city actions, while clearly in the realm of expression, should be classified as political speech. When cities lobby in state capitols or

⁵² See, e.g., Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 1 (2012) (claiming that cities can raise various constitutional claims against their states); 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, 94 (2002) (arguing that local governments should be allowed to raise procedural due process claims against their states).

⁵³ See, e.g., Bilder, *supra* note 51; Fagundes, *supra* note 51; McArdle, *supra* note 51; Porterfield, *supra* note 51.

⁵⁴ Only recently have scholars begun to articulate the possibility that cities might deserve unique First Amendment protection, but these attempts have been brief, suggestive, or narrow. See, e.g., Briffault, *supra* note 15, at 2010 (claiming that if First Amendment rights were extended to local governments, it could help them combat some of the new preemptive measures, but without much consideration of how it would work); Bendor, *supra* note 35, at 425–26 (arguing that “free speech is an excellent candidate for municipal right” but discussing it for just a few paragraphs); David J. Barron, *The Promise of Tribe’s City: Self-Government, The Constitution and a New Urban Age*, 42 TULSA L. REV. 811, 829–32 (2007) (analyzing the brief submitted by Professor Tribe in *City of Boston v. Anderson*, 439 U.S. 951 (1978) and discussing the option to grant First Amendment rights to cities, without expressly stating his views on the issue). The only serious undertaking is Matthew A. De Stasio’s recent comment, dealing specifically with the possibility of developing municipal First Amendment speech claims against body camera video restrictions. He almost entirely neglects, however, the theory and rationales of local government law. De Stasio, *supra* note 51.

try to influence the outcome of statewide ballot initiatives by funding a campaign, they are not merely expressing themselves but rather trying to impact the results of the political process. Other actions that cities engage in, however, involve a mix of speech and action. Such is the case when a city erects a monument or decides to topple one. On one hand, it is an act of physical construction (or destruction), which could be viewed as part of the town's planning and building activity; on the other hand, it might also have a clear expressive function, as in the case of Confederate monuments.⁵⁵ Other instances of city speech are only incidentally speech in that they convey or express ideas but serve a different primary function, such as regulating smoking or economic activity. While such regulation probably stems from and expresses the views of the locality on the regulated behavior, policy concerns drive it.

Indeed, like many First Amendment dilemmas, it will often be a difficult task to discern whether a particular city action is "speech" or "act."⁵⁶ One of the outcomes of the expansionist First Amendment jurisprudence that the Court has developed in recent decades—whereby more and more speakers are recognized as First Amendment speakers, and more and more activities as speech protected by the First Amendment—is that such questions arise more frequently.⁵⁷ Therefore let me be clear from the outset that I will refrain from providing a comprehensive definition of what counts as city *speech*, as opposed to city action. Free speech scholars have demonstrated over and over again that the line between speech and action is often blurry and no clear criteria for distinguishing the two exists.⁵⁸ In this sense, I am not suggesting any new criteria for city speech; I am instead arguing that if any other entity were found to be "speaking"—rather than "acting"—then when cities do the same thing, their behavior should also be classified as speech. Whichever test is adopted to determine what speech is, it should apply to municipal expression as well.

⁵⁵ The recent case dealing with Birmingham's decision to cover a Confederate monument in a municipal park with plywood exemplifies this point. The state of Alabama sued Birmingham based on Alabama's Memorial Preservation Act, which prohibits altering or otherwise disturbing Confederate monuments. The court decided to invalidate Alabama's Memorial Preservation Act, since it found it to be infringing on Birmingham's First Amendment rights. *See State of Alabama v. City of Birmingham*, CV 17-903426-MGG, 2-9 (Cir. Ct. of Jefferson Cty., Ala. Jan. 14, 2019). For further discussion of this case, see *infra* notes 160-166 and accompanying text.

⁵⁶ See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617-18 (2015).

⁵⁷ See generally Frederick Schauer, *On the Distinction between Speech and Action*, 65 EMORY L.J. 427 (2015) (criticizing the soundness of the speech/action distinction); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016) (arguing that a social movement of libertarian-leaning understanding of the First Amendment and changes in the modes of regulation have led to an increase in commercial interest claims for First Amendment protection).

⁵⁸ See, e.g., STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO (1994); Schauer, *supra* note 56, at 1617-21; see generally Aviva O. Wertheimer, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793 (1994).

A. A Legal Right

Why do we need to give cities a legal right at all? Would it not be more appropriate if we gave cities political *powers* and structural *authorities*—like the ones we give the states—rather than legal rights which usually belong to private parties? Indeed, it would have been better if the Constitution had explicitly recognized localities, and defined their powers, privileges, and immunities, as well as their relationship with other tiers of government. After all, cities have been with us since before our republic was born,⁵⁹ and in many liberal democratic countries around the world, cities are an integral part of constitutional structure.⁶⁰ Scholars and localists have long lamented this lack of federal constitutional recognition of cities, which profoundly structures American local government law, giving states the ultimate control over their cities.⁶¹

Yet, despite the explicit omission of cities from the Constitution, cities used to have de facto structural protections that made them more powerful, without needing any federal individual rights. For example, cities enjoyed, for decades in many states, what can be called “political safeguards,” which empowered them and gave them some degree of protection against state and federal encroachment. They were represented, as cities, in state legislatures.⁶² And through petitions and instructions they could impact state and federal policy-making.⁶³ Gradually, however, cities lost these protections, and in 1964, following *Reynolds v. Sims*,⁶⁴ cities lost direct representation in state legislatures. In this case, the Court ruled that a voting scheme, which gave local governments, qua local governments, representation in state senates, violated the “one person, one vote” principle, thus leading the Court to prohibit states from adopting such schemes. Although rightly decided—considering the harsh racial injustice that states’ unequal electoral districts represented—the political loss for cities was not accompanied by any balancing shield for city power, apart from the unsatisfactory protection provided to localities by Home Rule constitutional provisions.⁶⁵ Thus, cities have be-

⁵⁹ See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1083–90 (1980); see also MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS 10–12 (1970).

⁶⁰ See generally, e.g., GIOVANNI BOGGERO, CONSTITUTIONAL PRINCIPLES OF LOCAL SELF-GOVERNMENT IN EUROPE (2017).

⁶¹ See, e.g., Frug, *supra* note 59, at 1105–16.

⁶² See ZUCKERMAN, *supra* note 59, at 24–25.

⁶³ See Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142–56 (2016).

⁶⁴ 377 U.S. 533 (1964).

⁶⁵ Home Rule provisions in state constitutions attempt to provide some constitutional recognition and protection to local governments within the governmental structure of the state. Typically, Home Rule provisions empower and authorize localities to act on “local matters”; in some cases, these provisions even prohibit the state from legislating in areas that are within the authority of local governments. Despite their potential to meaningfully restrict the ability of the state to intervene in spheres of local action, scholars have ardently criticized the weak protections Home Rule provisions actually provide to local governments vis-à-vis their states. See, e.g., GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN

come increasingly dependent on other means, such as advertising campaigns and lobbying, to push forward their interests.⁶⁶ One of the consequences of this political disempowerment is the current “attack” on our cities, as Professor Richard Schragger labeled it.⁶⁷ Indeed, the gradual demise of the “political safeguards” of localism has made the protection of city speech through a legal right within the federal Constitution imperative.⁶⁸

Furthermore, unlike corporations and individuals who can threaten to leave (“exit”) their state if it does not provide a favorable regulatory or legal framework, cities have no exit option. Some might wonder why this is even worth mentioning, since cities are physically and inescapably located within their state. I will explain. As is well known, corporations can register—and thus impact parts of the legal and regulatory scheme that influences them—wherever they wish, without the need to travel in reality; they can, and most do, register in Delaware, without moving their headquarters and without shifting their production.⁶⁹ Theoretically, our cities—being corporations—could also decide that they are unhappy with their state’s municipal legislation and “register” in another, more friendly state. However, our legal sys-

INNOVATION 60–61 (2008); Schragger, *supra* note 17, at 1192–95; David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2329–34 (2003); Diller, *Reorienting Home Rule: Part 2*, *supra* note 16, at 1086–93; Diller, *Reorienting Home Rule: Part 1*, *supra* note 16, at 345–49. Interestingly, the third and last wave of Home Rule amendments took place during the 1960s, almost parallel to *Reynolds v. Sims*, 377 U.S. 533 (1964), although no direct support exists that the latter was a response to the abolition of this political safeguard of localism.

⁶⁶ See, e.g., Goldstein & You, *supra* note 9, at 864 (describing the involvement of local governments in lobbying activities); Loftis & Kettler, *supra* note 9, at 193–206 (documenting and explaining the intense lobbying that local governments are engaged in); Shoshana Weissmann, *Governor Cracks Down on Government Paying Lobbyists to Lobby Itself*, THE WEEKLY STANDARD (July 11, 2016), <https://www.weeklystandard.com/shoshana-weissmann/governor-cracks-down-on-government-paying-lobbyists-to-lobby-itself>, archived at <https://perma.cc/D5F7-XU5R> (describing measures taken by the Arizona governor to “crack down” on local government lobbying); *Special Interests Paid Lobbyists Up to \$328 Million in 2013 Session*, TEXANS FOR PUBLIC JUSTICE (2014), <http://info.tpj.org/reports/Top%20Lobbyists%202013.pdf>, archived at <https://perma.cc/875R-GDSE>; Zachary Newkirk, *Tiny Towns Spend Big Bucks on Lobbyists to Reap Federal Government Riches*, OPENSECRETS.ORG (May 4, 2011), <https://www.opensecrets.org/news/2011/05/tiny-towns-spend-big-on-lobbyists-to-reap-federal-government-riches/>, archived at <https://perma.cc/D2WZ-SD3V> (describing lobbying efforts made by small Alaskan localities to “reap” federal benefits); Tristan Hallman, *Handout City*, THE TEXAS TRIBUNE (Nov. 11, 2010), <https://www.texastribune.org/2010/11/11/cities-counties-spend-millions-to-lobby-in-dc/>, archived at <https://perma.cc/LQV4-UY4P> (describing lobby efforts in Washington D.C. made by Texan local governments).

⁶⁷ Schragger, *supra* note 17, at 1164–68.

⁶⁸ The term “political safeguards” is taken from the famous expression “political safeguards of federalism.” See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Contrary to legal safeguards (such as rights), political safeguards relate to the existence of political institutions that, through their daily operation, can protect and safeguard the role and rights of the various components of the federal structure.

⁶⁹ See Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2500–02 (2005); see also Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 590 (2003). But see Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, N.Y.U. L. REV. (forthcoming 2019) (documenting and analyzing the decline in the importance of Delaware as a hub for corporate law).

tem does not afford cities this kind of forum shopping, although it enables companies to do just that. By prohibiting cities from pressuring their states to improve their regulatory framework or grant them any other benefit by threatening to exit, our legal system further disempowers cities as municipal corporations, relative to private corporations.

Hence, cities do not currently possess a formal or informal *voice* in state and national politics, nor do they have at their disposal the threatening power of *exit*.⁷⁰ It is therefore not surprising that cities and towns all over our nation have seen their real power and influence in federal and in state politics decrease in recent decades.⁷¹ Apart from a rather short list of successful and powerful cities, the rest of our cities and towns are struggling against formidable forces⁷²: state governments, the federal government, and business corporations—all of which enjoy significant political safeguards or legal protections.⁷³ States are represented in the U.S. Senate and the Electoral College system, and the “winner takes all” rule that the majority of states have adopted, rather than the pure popular vote, gives states an important role in deciding presidential elections. States have enjoyed greater protection for their “state’s rights” vis-à-vis federal entities, especially over the past few decades.⁷⁴ And private corporations are increasingly vested with various constitutional rights previously given only to private individuals.⁷⁵

The lack of political safeguards for cities suggests that local governments, unlike other types of governments, should be protected by *rights* vis-à-vis other governmental tiers. That states and the federal government are not guarded by the First Amendment is not an indication that cities should be

⁷⁰ For a presentation of the theoretical scheme of “exit” and “voice” as crucial factors in political power, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

⁷¹ See FRUG & BARRON, *supra* note 65, at 232–34 (describing changes in Home Rule legal regimes that have disempowered local governments); Schragger, *supra* note 17, at 1169–94 (describing the recent demise of local power). See generally Diller, *Reorienting Home Rule: Part 1*, *supra* note 16 (pointing to the weakness of urban areas in national politics). But see Richard Briffault, *Our Localism – Part One: The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (arguing that American local governments are sometimes too powerful).

⁷² See FRUG & BARRON, *supra* note 65, at 53–74.

⁷³ The main discussion concerning political safeguards has been around states, not cities. See generally Wechsler, *supra* note 68; see also Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 57–58 (2014) (discussing the political safeguards that control and stabilize relations among states); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221 (2000) (reflecting on the importance of Wechsler’s formulation of political safeguards, and pointing to other political facts, such as the rise and dominance of political parties, to explain the “continued success” of American federalism).

⁷⁴ See Richard H. Fallon, Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 971–73 (2017) (describing states’ rights federalism, arguing that it is a form of “partial or incomplete” federalism); see also John O. McGinnis & Ilya Somin, *Federalism v. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U.L. REV. 89, 90–91 (2004) (defending the legitimacy and importance of judicial review in order to protect states’ rights in a federal system).

⁷⁵ See *infra* Part II.B.1.

likewise deprived of such protection. States and the federal government enjoy a host of structural protections—primarily states’ rights and federal supremacy, respectively. Conversely, cities are more like individuals and private corporations; lacking structural constitutional protection, they are exposed to federal and state governmental power, which, left unchecked, might become abusive, arbitrary, and discriminatory. Thus, First Amendment protection for cities could protect cities’ power against unfettered encroachment by states and the federal government.

B. A Constitutional Right

But why does city speech need constitutional protection? After all, the fast evolving “government speech” doctrine already provides a rather expansive protection for the expressive conduct of cities.⁷⁶ Courts have recognized a host of municipal activities, ranging from erecting monuments in front of city hall⁷⁷ to posting policies and links on municipal websites,⁷⁸ as “government speech.”⁷⁹ Such municipal expressions were thus immunized from heightened judicial scrutiny where private parties argued that their First Amendment right was infringed by the non-neutral expression of the government.⁸⁰ This Article argues that the government speech doctrine is valuable, but limited, with respect to city speech. Although it correctly views cities as speakers whose speech is valuable,⁸¹ the doctrine is framed as protecting the

⁷⁶ See YUDOF, *supra* note 46, at 43–44.

⁷⁷ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009); see also Mary Jean Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U.L. REV. 7, 13–17 (2008); cf. *Hewett v. City of King*, 29 F. Supp. 3d 584, 621–22 (M.D.N.C. 2014) (holding that a Christian flag in a city monument has “elements of government speech but is best categorized as private speech”).

⁷⁸ See *Page v. Lexington Cty. Sch. Dist., One*, 531 F.3d 275, 278 (4th Cir. 2008).

⁷⁹ Other city activities, such as city council meetings, have mostly not been considered government speech. Rather, they have been repeatedly recognized as a designated public forum, requiring municipal neutrality. See *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011) (ruling that city council meetings constituted a designated public forum); *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011) (deciding that the government may enact “reasonable time, place, and manner restrictions on speech,” but any restrictions on the content of speech must be tailored narrowly to serve a compelling government interest); *Steinburg v. Chesterfield Cty. Planning Comm’n*, 527 F.3d 377, 385–86 (4th Cir. 2008) (finding that a local government entity can limit its meeting to specific agenda items but such restriction must not discriminate on the basis of a viewpoint). Other parts of council meetings, however, cannot be considered an open public forum for the expression of private speech, as they are intended to manage the city’s doings; *infra* note 80.

⁸⁰ See Fagundes, *supra* note 51, at 1638; Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380–81 (2001); see also *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) (“A city council meeting is . . . a governmental process with a governmental purpose. The council has an agenda to be addressed and dealt with . . . the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact.”).

⁸¹ See *Pleasant Grove City*, 555 U.S. at 472 (“City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world.”).

government against private parties who object to certain governmental actions,⁸² and thus cannot guard cities against state censorship. The government speech doctrine creates a distinction between the government as providing a public forum on the one hand, and the government as speaker on the other hand. In the first case, private parties can raise First Amendment claims, demanding content neutrality in the public forum; when the government speaks, however, private parties cannot raise such a constitutional claim, and the government can express its own views. The doctrine is framed and designed to protect the government, including cities, against First Amendment claims made by individuals by excluding “government speech” from the First Amendment. Thus, government speech doctrine can assist cities, when they “speak,” against private parties who try to prevent their city from saying something, or when they try to force their city to say something. But when states try to silence their cities, they do so through legislation; they do not claim that they have a First Amendment right to censor their cities, or force them to express a certain view. Therefore, the doctrine leaves cities defenseless against their censoring states.

Thus, protecting city speech from state preemption requires going beyond the government speech doctrine to provide cities with constitutional protection. As explained in Part II.B, such constitutional protection is justified since city speech authentically fulfills the values embedded in the First Amendment—self-government and democracy, the search for truth, and the perfection of a marketplace of ideas. It also fulfills the federalist and localist values that our Constitution cherishes: democratic experimentation, jurisdictional competition, and the separation of powers.⁸³ City speech is too valuable to leave at the mercy of the states. This interpretation of city speech as included in the Free Speech Clause also takes its cue from the Supreme Court’s expansionist First Amendment jurisprudence⁸⁴—recognizing corporations as bearers of free speech rights, including political speech;⁸⁵ emphasizing the importance of the listener and not only the speaker;⁸⁶ and expanding the meaning of “speech” so that it includes political contributions,⁸⁷ erecting monuments,⁸⁸ and even gerrymandering.⁸⁹

⁸² See Ursula Ramsey, *Constitutional Law - First Amendment - Government Speech and the Display of Permanent Monuments in Public Parks*, 77 *Tenn. L. Rev.* 685, 687–92 (2010) (surveying key points in the development of the doctrine that were all challenges by private parties).

⁸³ See *infra* Parts II.A, II.C.

⁸⁴ See Leslie Kendrick, *First Amendment Expansionism*, 56 *WM. & MARY L. REV.* 1199, 1210–12 (2015).

⁸⁵ See Kessler & Pozen, *supra* note 47, at 1982.

⁸⁶ See *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 540–43 (1980); see also *Lamont v. Postmaster General*, 381 U.S. 301, 305–07 (1965); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 *B.U. L. REV.* 939, 972–83 (2009).

⁸⁷ *Buckley v. Valeo*, 424 U.S. 1, 242–44 (1976).

⁸⁸ See generally Dolan, *supra* note 77.

The importance of a constitutional protection for city speech has become only more urgent as states take increasingly aggressive measures against their cities and against their ability to speak. More than ever, cities stand at the epicenter of conflicts ranging from police brutality to gun control, from immigration to minimum wage, from fracking to gender equality.⁹⁰ For decades, such conflicts pitted states against the federal government or against other states; over the past decade, a new wave of conflicts have emerged between cities and their states.⁹¹ This shift can be attributed to demographic, economic, social, technological, and political transformations that have deepened the political chasm between states and their cities: between blue cities and red states,⁹² between conservative municipalities and liberal states,⁹³ and between majority-minority cities and majority-controlled states.⁹⁴ Although city-state conflicts existed throughout history,⁹⁵ the growing nationalization of American politics in the past decade⁹⁶ has made them even more salient.

⁸⁹ This is based on the comment made by Justice Kennedy in *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (opining that there might be a “First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views”). See also Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2190–91 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 376–82 (2017).

⁹⁰ See *supra* notes 12–21.

⁹¹ See Schragger, *supra* note 17, at 1169–83 (thoroughly surveying state preemption in the early-twentieth-century); see also Scharff, *supra* note 17, at 1495–1504.

⁹² See Mark Pulliam, *Blue Texas?*, CITY JOURNAL (Mar. 28, 2017), <https://www.city-journal.org/html/blue-texas-15081.html>, archived at <https://perma.cc/KN3G-HRFF>; Aaron Blake, *People Move to Places that Fit Their Politics. And it's Helping Republicans.*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/13/people-move-to-places-that-fit-their-politics-and-its-helping-republicans/?utm_term=.2f9f07891e5f, archived at <https://perma.cc/8W8U-MRZ7>; Josh Kron, *Red State, Blue City: How the Urban-Rural Divide is Splitting America*, THE ATLANTIC (Nov. 30, 2012), <https://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/>, archived at <https://perma.cc/24Y8-PGW9>; Emily Badger, *The Real Reason Cities Lean Democratic*, CITYLAB (Nov. 15, 2012), <https://www.citylab.com/equity/2012/11/political-map-weve-been-waiting/3908>, archived at <https://perma.cc/7MSH-JTQH>.

⁹³ See Davidson, *supra* note 16, at 973–74.

⁹⁴ *Id.* at 1000 n.33.

⁹⁵ Indeed, state restrictions on city speech are not new. For example, the “public purpose” doctrine, prohibiting localities from appropriating funds to pursue activities—even if they were authorized by state law—unless those activities serve a “public purpose,” was interpreted as possibly limiting cities’ ability to fund ballot campaigns. See Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 536–37, 545–46 (1980).

⁹⁶ See generally DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* (2018). The political dominance of the Republican Party in all tiers of government—both federally and in many states—further enables states to strip their cities of their traditional powers, and to subjugate them to their will in more virulent manners. See Davidson, *supra* note 16, at 963–74; Briffault, *supra* note 15, at 1997–98; Schragger, *supra* note 17, at 1190–91.

Scholars have tried to tackle this old-new problem by suggesting that we reform the doctrine of preemption;⁹⁷ amend, expand, and reorient states' home rule provisions;⁹⁸ allow cities to sue their states for violating individual constitutional rights and to enforce the Constitution;⁹⁹ try to rely more heavily on states' constitutions;¹⁰⁰ or generally weaken the conception that cities are creatures of their state.¹⁰¹ While agreeing with these mostly state-centered proposals, this Article suggests augmenting them with a federal constitutional solution: interpreting the First Amendment as protecting city speech, and by doing so, providing a federal constitutional defense to the core of local power.

C. *An Organizational Right*

But what kind of right would a municipal constitutional right to free speech be? Do cities speak "for" their individual residents, such that their speech rights are derived from the individual speech rights of each of their residents? Perhaps cities possess independent speech rights of their own, based on their corporate entity, fully equivalent to an individual speech right? Or, maybe, city speech rights are a unique form of rights, organizational rights that are based on the specificities of the city as an organization that is created to achieve certain goals and purposes? In this section I argue that the city speech right does not derive from the individual speech rights of city residents; nor does it protect the expressive interests of an amorphous collective that inhabits the local jurisdiction. Rather, the First Amendment right this Article advocates is the right of cities *as organizations*. As organizations, cities exist to advance various goals of their residents and to promote the values associated with federalism and localism. Cities' organizational and institutional character is thus designed to uphold democratic self-government, policy experimentation, representation of minority views, and efficiency-enhancing jurisdictional competition. Hence the speech right that this Article contemplates should protect these institutional ends.

⁹⁷ See, e.g., Guenther, *supra* note 17; Phillips, *supra* note 17; Rubinstein, *supra* note 17; Scharff, *supra* note 17.

⁹⁸ See, e.g., Barron, *supra* note 65, at 2334–45 (proposing to reclaim state home rule provisions in order to empower cities); Diller, *Reorienting Home Rule: Part 2*, *supra* note 16, at 1080–83 (calling for strengthening "imperio" home rule provisions that would protect cities from their states).

⁹⁹ See, e.g., Barron, *supra* note 50, at 2246–52 (arguing that cities should have a role in enforcing the Constitution); Schragger, *supra* note 50, at 171–74 (claiming that local governments have a role in protecting federal constitutional individual rights).

¹⁰⁰ See, e.g., Davidson, *supra* note 16, at 986–90 (offering to rely more heavily on states' constitutional individual rights provisions in order to better counter the problems associated with localism, without giving up on the advantages of vibrant and empowered local governments).

¹⁰¹ See, e.g., Morris, *supra* note 52, at 44–45.

In his study of collective speech, Meir Dan-Cohen makes several distinctions concerning non-individual speech rights, which could help us define the nature and scope of city speech rights.¹⁰² First, Dan-Cohen differentiates between active speech rights, which are the rights of the speaker in the speech, and passive speech rights, which represent the interests of the listener. Dan-Cohen makes a second important distinction between the original expressive right, which is based on the speaker's or listener's autonomy and is thus non-utilitarian, and the derivative speech right, which is utilitarian and springs not from the speaker's or listener's own concern, but rather from their concern for someone else.¹⁰³ This classification has practical implications in the frequent cases where conflict emerges between the rights of different individuals and collectives.¹⁰⁴ The strongest type of speech rights are original and active, and they should win when they conflict with other rights, while the weakest are derivative and passive speech rights, and they more easily lose when they conflict with other rights.

To better decide the degree of protection that should be given to organizations, Dan-Cohen develops a typology of organizations. He divides them into four types—utilitarian organizations, expressive organizations, protective organizations, and communities—and deduces from their organizational traits what type of speech rights they deserve. While all four types have passive derivative rights, only communities possess an original-expressive right since only speakers on behalf of communities can have an autonomy interest in their communal expression.¹⁰⁵ In contrast, utilitarian organizations—primarily business corporations—only obtain a weak, passive derivative right.¹⁰⁶ Dan-Cohen's typology, although initial and somewhat vague,

¹⁰² Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991).

¹⁰³ The original expressive right of an individual is non-utilitarian in that it "embodi[es] or protect[s] some fundamental aspect of personhood vital to one's dignity and exercise of autonomy." *Id.* at 1232–32. Artistic expressions, and expressions of political or religious belief are of this type of original expressive rights. Derivative rights, on the other hand, are expressive rights that, rather than embodying fundamental aspects of one's personhood, protect or promote someone else's rights. An example of a derivative right is the right of a publisher of a book. The publisher's rights are derived from his contribution to the author's self-expression. *Id.* at 1234.

¹⁰⁴ I will return to this issue later in discussing the compelled speech doctrine and how it might affect the First Amendment rights of cities. See *infra* Part IV.E.

¹⁰⁵ This distinction exists because, more so than with other organizations, communities have an extremely tight identification between the speaker and the organization, and a very minimal role-distance between the representatives and the organization. For Dan-Cohen, the paradigmatic example of a community is a family, where the degree of identification between the members and the community is high, and where the role-distance between the mother and her family is almost non-existent. This means, that the expressive right that members of a family have in communal expression of the family are original. Dan-Cohen, *supra* note 102, at 1254–58. Dan-Cohen refrains from providing the criteria "for classifying the relevant entity as a community as well as standards for ascertaining whether the communication in question was produced in such a way or by such a person that it can truly constitute the community's self-expression." *Id.* at 1261.

¹⁰⁶ *Id.* at 1244–48.

brings to the surface some of the dilemmas that this Article wishes to raise without providing a final answer. Do we think of our cities as representing “communities” or as utilitarian organizations that are there only to supply various services?¹⁰⁷ Are they mostly “protective” of their residents’ rights and interests, or have we constructed our cities as legal entities so that they express their own ideas, values, and beliefs? The answers that are given to these difficult questions could determine the nature and force of the speech rights granted to our cities.

For the purposes of this Article, the greatest importance of Dan-Cohen’s analysis is his support for the idea that organizations have rights that are *organizational*, meaning that they reflect the different modes of decision-making and distinct roles that organizations have.¹⁰⁸ Dan-Cohen critiques the idea that organizations operate the same way that a single representative does; a corporation or city is distinct from an individual agent in the type of derivative speech rights that it has. Organizations are structured differently, operate differently, and are understood—both by their own members and by external viewers—to be different than the individuals that they supposedly represent, and this fact should mean that their speech rights are not identical to rights of individuals, even if they are derived from them. The organizational nature of cities has two crucial consequences for the purposes of this argument: first, that the disagreement of an individual member of the organization—a local resident or taxpayer—does not destroy the city’s right to speak; second, that the scope of the speech right might depend on the type of speech and on the characteristics of the particular city, as explained below.

Indeed, if we view the city as an *individual* representing other individuals (that is, the city residents),¹⁰⁹ then the city must cease expressing its views once any resident voices an objection to it. But such understanding ignores the reality that organizations are created to do something more than simply represent their individual members, and that organizational speech is mandated to obtain the goals for which its members created the organization. Hence, argues Dan-Cohen,¹¹⁰ although the corporation’s right is *derivative*, it

¹⁰⁷ See FRUG & BARRON, *supra* note 65, at 87–88 (discussing the rise of the “fee-for-service mentality” in local government theory and practice).

¹⁰⁸ Dan-Cohen, *supra* note 102, at 1235–41.

¹⁰⁹ A possible, if not necessary, reading of Judge Posner’s “amplifier” metaphor in *Creek v. Vill. of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996).

¹¹⁰ Because Dan-Cohen published his article in 1991, he was dealing with a set of important cases that were published in the 1980s and early 1990s, in which corporate rights were first articulated and shaped. The main decisions he analyzed were: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976); and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Since then, corporations have been given more and more speech rights. In addition, however, the Court has made it clearer that the First Amendment also protects individuals from being “compelled” into speech with which they disagree. The prohibition on compelling speech—the “compelled speech” doctrine—has thus been used in various cases, most recently in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), to counter union speech. See *infra* note 453 and accompanying text.

is necessarily distinct from its members' individual rights. The nature and roles of organizations—aiming to advance the shared goals of many individual members who necessarily disagree with one another—require their derivative rights not to be trampled by every individual member's dissent. Crucially, he argues, people understand the distinction between the organization and its members and therefore do not necessarily attribute the positions of the institution to the individual members.¹¹¹ This is an important observation, since municipal expressions trigger, almost by definition, disagreement among residents; and if city speech were understood as derivative from each and every one of the city's residents, and thus legitimate only inasmuch as it conformed to each resident's viewpoint, then city speech would never be possible.¹¹²

Dan-Cohen's conceptualization and recognition of "the reality of organizations" thus enable us to define the scope of the city's speech rights, based on a nuanced analysis of the characteristics of the city: its purposes and roles, its decision-making processes, and the expectations and understandings of its residents and outsiders as to whether and how much the members are identified with the organization. These parameters might vary quite significantly between small, medium, and large cities; between urban and rural areas; between different types of expressions (political, cultural, or other); and between more and less democratically representative cities. Furthermore, these various distinctions could drastically change over time.¹¹³ The parameters set by Dan-Cohen's analysis help us not only in determining the scope of protection to a particular municipal expression; they could also serve as guidelines for cities who wish to immunize their speech from state preemption. For example, given the importance of a participatory decision-making process for the organizational protection, if a city wishes a particular speech to be protected by the First Amendment, it would be well advised to decide on it through a robust democratic process, perhaps even galvanizing it by a super majority.

D. *An Independent Right*

The city speaks on behalf of its people as an *independent* organization—rather than as an organ of its state—and so its right to speak should be independent of its state's will. This idea is far from being widely accepted. In

¹¹¹ Dan-Cohen, *supra* note 102, at 1242–43.

¹¹² See *infra* Part IV.E.

¹¹³ David Fagundes was critical towards the idea of derivative free speech rights, since it might give too much power to dissenting taxpayers. He therefore suggested that we view rights as "public rights" aimed at serving not just the individuals who hold them, but the entire public. Fagundes, *supra* note 51, at 1671–76. Although I fully agree with him that rights should be seen as serving our political system in general rather than merely their individual holders, I think the idea of derivative rights does not preclude this view. As Dan-Cohen explains, nothing in the derivative notion itself suggests a veto for each rights' holder, as this would entirely miss the idea of organizational rights. Dan-Cohen, *supra* note 102, at 1242–44.

fact, the dominant view seems to be that city speech is no different than any other city activity. When cities speak, they say—or at least *should* say—only what their states wish them to; that since cities are the long arms of their states,¹¹⁴ city speech, like city action, is nothing more than what the state wants to say, and city speech can thus never contradict the state’s will. According to this view, cities are authorized to speak under the condition that their expression is required to perform their state-mandated tasks; but their speech, like all municipal activities, should be strictly governed and regulated by the state.¹¹⁵

This Article follows an alternative doctrinal and theoretical tradition, seeking to promote a positive vision of city power and city speech. This Article celebrates local power, following the localist tradition, which dates back to the earlier days of the republic,¹¹⁶ continued throughout the nineteenth century,¹¹⁷ and is still supported today.¹¹⁸ Thus this Article argues that the city is not the vessel through which the state speaks rather, city speech is an expression made by a municipal corporation—a democratically and separately elected institution, representing the local people. Unlike the federal and state governments that are fully governmental, cities combine the traits of governments with those of the corporation—a unique hybridity reflected in the name given to localities, *municipal corporations*, as well as in various doctrines.¹¹⁹ Thus, even if states exercise full and ultimate control over what their cities *do*, cities deserve to be protected from such strict control over what they *say*. City speech is unlike other city functions and should be freer from state control, both due to the singular status granted to speech in our Constitution and the hybrid status of cities as unique, independently and separately incorporated governments.

¹¹⁴ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

¹¹⁵ See Note, *supra* note 95, at 536 (arguing that courts dealing with municipal advocacy “have traditionally attempted to determine first whether such spending is within the municipality’s powers under state law. Their analysis has proceeded from the central tenet of local government law: municipalities are creatures of the state. That principle limits a municipality’s powers to those either expressly granted by the state constitution or a state statute or those necessarily implied in any expressly conferred powers.” (footnotes omitted))

¹¹⁶ See ZUCKERMAN, *supra* note 59, at 10–12, 15–18.

¹¹⁷ Barron, *supra* note 38, at 491–92.

¹¹⁸ The list of contemporary “localists,” people who wish to recover and revive the tradition that sees local governments as important actors within our federation, is expanding. See, e.g., RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* (2016); GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999); Davidson, *supra* note 16; Nadav Shoked, *Debt Limits’ End*, 102 IOWA L. REV. 1239 (2017); Stahl, *supra* note 16; Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014); Morris, *supra* note 52; Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271 (2009); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (book review).

¹¹⁹ See *infra* Part IV.B.1.

The danger in viewing city speech as being derived from state authority—either through specific authorization or through general home rule provisions¹²⁰—is revealed by the new wave of “super preemption” laws, some of which aim to strip localities of many of their traditional authorities.¹²¹ Once we tie city speech to city policymaking, meaning that a city can speak only on matters that it is already authorized to deal with, then when states strip their local governments of their authorities, they also shrink what their cities can discuss, debate, and say. This might result in a profound reconfiguration not only of the relationship between our cities and our states, but, more importantly, a remaking of what our local governments are, and whether they will be able to fulfill not just some of their concrete functions, but also the higher ideals that we entrust in our cities as political entities that promote democracy, liberty, efficiency, and other fundamental values. If, on the other hand, we understand city speech to be independent and distinct from state speech, our cities will be able to uphold some of these fundamental values, since they will be given at least some protection from their state’s preemptive powers.

Until now, however, the Supreme Court has not recognized such a constitutional speech right for cities, and lower and state courts have remained extremely ambivalent about it.¹²² Scholars, too, have only recently begun to examine this option, and have done so in a sporadic and incidental manner.¹²³ Before examining the doctrinal path to such constitutional recognition, I now turn to the rationales of why city speech merits the protection of the First Amendment.

II. THE VALUES PROMOTED BY CONSTITUTIONALLY PROTECTING CITY SPEECH

City speech deserves the constitutional protection of the First Amendment because it promotes three important sets of values: the values of localism, the values protected by the First Amendment, and the values of federalism. Additionally, contemporary predicaments make the need to pro-

¹²⁰ These are the two modes of authorization for local power. In many instances, local governments are authorized through specific legislation; at other times, they are given powers in constitutional or legislative home rule provisions, authorizing local governments to act on “local matters.” See generally Diller, *Reorienting Home Rule: Part 2*, *supra* note 16.

¹²¹ See Davidson, *supra* note 16, at 957–59; see also SB168/HB527 (Fla. 2019) (compelling local governments to cooperate with federal immigration enforcement. The Bill also mandates local agencies to use their “best efforts to support federal immigration law,” and allows the state to fine entities that violate it. The bill passed the House, and is currently pending before the state’s Senate); ARIZ. REV. STAT. ANN. § 41-194.01 (2016) (authorizing the state to withhold and redistribute its shared monies with local government, if an official action made by the local government violates state law or the Constitution of Arizona); H.B. 4052, 98th Leg., Reg. Sess. (Mich. 2015) (barring local regulation of minimum wage and benefit policies); Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J. L. & POL. 67, 67–70 (2018); *supra* text accompanying notes 18–21.

¹²² See *infra* Part IV.A.

¹²³ See *supra* note 54.

tect city speech through the First Amendment ever more urgent. The polarization and nationalization of our politics,¹²⁴ combined with the reemergence of corporations as immensely influential in our political, legal, economic, and social realms,¹²⁵ oblige us to think anew about the potential institutional avenues to counteract corporate and national influences, avenues that are already built into our political system, though their potential is not fully utilized. Cities are such possible counterweights; thus, their protection becomes even more pressing. Arming our cities with the power to speak with immunity from state preemption and federal censorship could serve as a meaningful check on and powerful counterweight to our partisan, nationalized, and corporatized politics. Cities can fulfill their oppositional role by expressing ideas and disseminating information that might not conform with or please their states. They can influence statewide ballot initiatives even if they contradict the position of the state. Cities could lobby in state capitols and in Washington to advance their interests, and generally become involved in state and national politics. To express themselves this way without fear of state preemption, First Amendment protection of city speech is needed.

A. *City Speech Promotes the Values of Localism*

When cities express themselves, they mostly do so in the regular course of their activity, thereby fulfilling their varied functions, as set forth by their states.¹²⁶ But city speech does more than merely assist cities in the mundane performance of their state-sanctioned authorities. Taking into account the unique values that empowered localities can achieve—participatory democracy, minority protection, policy experimentation, economic efficiency, and redistribution—illuminates how municipal speech can be an important, indeed necessary, part of the realization of these values. Achieving these ideals requires a departure from the notion that cities should always and by necessity act and speak as “creatures” or “long arms” of their states. Giving cities First Amendment rights is an important step in this direction.

1. *Democratic Self-Government*

One of the hallmarks of local governments is their ability to enhance democratic self-government. Local governments generally enable people to

¹²⁴ See Michael Greve, *Our Polarized, Presidential Federalism* 11 (George Mason Univ. Legal Studies Research Paper Series, No. LS 16-37, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885932, archived at <https://perma.cc/7QQ4-8JTK>; see also HOPKINS, *supra* note 96, at 1–19.

¹²⁵ See K. Sabeel RAHMAN, *DEMOCRACY AGAINST DOMINATION* 2–3 (2016); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1329–30 (2016).

¹²⁶ For example, local governments organize festivities and advertise them to their residents, they recommend taking precautions in case of an impending storm, and they disseminate information regarding planned infrastructural projects.

collectively engage in political matters in order to become masters of their own fate as a community.¹²⁷ The relative homogeneity of local populations and the relatively lower number of issues that concern many local communities—though not true in many large or even medium size cities—makes consensus easier to reach and allows people to deliberate controversial matters. Popular participation in the political process is often more equitable, more accessible, and less expensive in local settings.¹²⁸ And lay participation in local government and politics—much more prevalent than in state or federal institutions¹²⁹—creates the opportunity for people to participate in decision-making, and breeds good democratic citizenship.¹³⁰

Freedom of expression is a fundamental condition for self-government.¹³¹ Without the ability to access and share information, to listen and talk, and to debate and reflect, no real self-government can happen. Thus, city speech is not only an effective way for a local community to debate, reflect on, decide, and express its values; it is also a necessary condition for local democracy to exist and thrive. In order for local debate to be a tool for genuine self-government, it must be truly open and free, and thus it must be protected from state intervention. It is not enough that residents can freely assemble as private individuals and discuss the issues that concern them; if local governments are to be tools for democratic self-government, they need to be able to freely debate, discuss, and express themselves as representative institutions. States that prevent cities from disseminating certain information to their own residents because they express their own views on state policies (such as hydraulic fracking, immigration, or affordable housing),¹³² severely curtail the community's ability to engage in an informed and genuine deliberation, perhaps the most basic element of self-government.

Recognizing the importance of free speech to the realization of the democratic potential of cities means that cities' expressions require constitutional protection; this protection should be dependent on the democratic nature of the city's institutions and on the democratic and participatory nature

¹²⁷ See FRUG, *supra* note 118, at 10–12, 21; ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94 (Phillips Bradley ed., Francis Bowen trans., Vintage Classics 1990 (1835)).

¹²⁸ See ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* 24–29 (2003); Frug, *supra* note 59, at 1070–73.

¹²⁹ See Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 *THEORETICAL INQUIRIES L.* 113, 120 (2005).

¹³⁰ See *id.* at 115, 120–22; Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 *HARV. L. REV.* 2009, 2009–12 (2000); Frug, *supra* note 59, at 1070–73.

¹³¹ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 28 (1995).

¹³² See TEX. GOV'T CODE ANN. § 752.053 (West 2017) (Texas's ban on municipal endorsement of sanctuary cities policies); N.C. GEN. STAT. §§ 160A-499.3 (West 2010) (North Carolina's ban on cities' endorsing or opposing a referendum); N.C. GEN. STAT. §§ 153A-456 (West 2010) (North Carolina's ban on counties' endorsing or opposing a referendum); *Anderson v. City of Boston*, 380 N.E.2d 628, 632 (Mass. 1978).

of the processes by which the speech was formed. Although they are poised to enable local self-government, there is nothing inherently democratic about local governments. They can be appointed by state organs rather than elected by their residents, and they can be used by string-pulling state organs to manipulate policy even if the local governments' initial appointments were free of impropriety.¹³³ For popular participation and democracy to prosper, several conditions should be met: local governments must include elected officials; residents must participate in decision-making processes rather than simply vote once every few years;¹³⁴ and local values and local knowledge must be able to influence the decisions of local governments.¹³⁵ Thus in order for city speech to deserve constitutional protection, it needs to be formed by democratic institutions, and through democratic and participatory mechanisms.¹³⁶

¹³³ See, e.g., *Our Views: State Takes Over Record Number of Local Governments Because of 'Plain Mismanagement'*, THE ADVOCATE (Feb. 25, 2019), https://www.theadvocate.com/baton_rouge/opinion/our_views/article_d1e441ee-3481-11e9-ae32-5b61d79927e5.html, archived at <https://perma.cc/3CH2-LQA5> (reporting that “no less than seven towns and cities in Louisiana [were] taken over by state administrators”); Jesse McKinley, *Why Can't New York City Govern Its Own Affairs?*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/nyregion/nyc-home-rule-state-laws.html>, archived at <https://perma.cc/LPX3-VNWT> (highlighting how even major cities, such as New York City, remain dependent on the state legislature to shape some of its policies); see also Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1403 (2012) (describing Rhode Island's and Michigan's new laws designed to permit those states to impose receivership on struggling localities, thus suspending local democracy); see generally Omer Kimhi, *A Tale of Four Cities - Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881 (2012) (analyzing state interventions in local democracy following financial distress).

¹³⁴ Such participation mechanisms may include ballots, written or oral opportunities to comment on “city speech” proposals, extensive social media usage, and utilization of apps programed for this specific purpose.

¹³⁵ A recent example of a successful—however controversial—struggle of local preferences against corporate and state interests can be found in Amazon's decision not to site one of its headquarters in New York. See Samuel Stein, *New York's Dance with Amazon Shows Us How to Fight for a City's Future*, THE GUARDIAN (Feb. 23, 2019), <https://www.theguardian.com/commentisfree/2019/feb/23/amazon-new-york-headquarters-corporate-power-balance>, archived at <https://perma.cc/3BUF-6HPE> (“Ultimately, however, Bezos, Cuomo and de Blasio failed—they could not secure the consent of the people, who conducted a forceful and multi-fronted battle on the issues of housing costs, labor and immigrant rights, corporate subsidies, infrastructure demands, small business survival, and more”).

¹³⁶ This Article advances the position that for an institution—unlike an individual—to receive First Amendment protection, it is required to possess democratic legitimation. This stands in contrast to current doctrine that gave corporations First Amendment protection without requiring them to be democratically legitimate. Although such requirements were not put in place in order to grant business corporations speech rights, I believe this was an error—an error that should not be repeated if we are to grant cities speech rights. See Dan-Cohen, *supra* note 102, at 1241–48 (explaining why corporate speech serves different ends than individual speech and should thus be considered differently under the constitution); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 89–93 (2010) (criticizing current corporate free speech mechanisms because they enable the management to articulate the corporation's expression with very little regard for the shareholders' interests, thus producing corporate speech that is slanted in favor of the management's interests); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 851–58 (2012) (assessing the desirability of the legal

2. Policy Experimentation and Innovation

Cities are abundant¹³⁷ and they serve as frontline posts that regularly encounter cutting edge problems. This makes them the perfect laboratories for policy experimentation.¹³⁸ Confronted with new social, economic, and technological changes on a regular basis, localities are required to innovate and experiment with novel regulatory schemes, new services, and original policies. Predatory lending,¹³⁹ the opioid crisis,¹⁴⁰ the insufficiency of federal minimum wage,¹⁴¹ changes in gender perceptions¹⁴²—these arduous challenges have presented themselves first at the local level and received different treatment by different localities. The benefits of having such a large number of experimental laboratories are clear: bad policies will be weeded out before damaging too many people, while effective and efficient ones will survive and be copied by more local governments.¹⁴³ Decentralizing policy-making powers to local governments also allows for more nuanced and locally tailored policymaking, since each locality will adjust the policies to its specific conditions. Empowered localities thus breed not one view or one

asymmetry between the rules governing campaign finance of unions and those governing corporations).

¹³⁷ The number of local governments in the U.S. is estimated as 90,056, according to the Census Bureau Reports. See Carma Hogue, *Government Organization Summary Report: 2012*, UNITED STATES CENSUS BUREAU (Sept. 26, 2013), <https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf>, archived at <https://perma.cc/4NV5-RAHG>.

¹³⁸ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 320–23 (1998).

¹³⁹ See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303–05 (2017) (holding that cities may sue banks over predatory mortgage lending; Cleveland, Cincinnati, and Toledo all filed briefs on Miami’s behalf); see also Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 771–80 (2007) (describing cities’ practices of trying to deal with predatory lending and the legal challenges they are facing).

¹⁴⁰ See Dennis Wagner, *Opioid Epidemic: Arizona Cities, Counties Join Huge Federal Suit Against Pain-med Makers*, AZCENTRAL (June 30, 2018), <https://www.azcentral.com/story/news/local/arizona/2018/06/30/opioid-epidemic-cities-and-counties-join-suit-against-manufacturers/746770002/>, archived at <https://perma.cc/WF83-75C4>; Linda Poon, *The Race to Learn What’s Really Happening in the Opioid Crisis*, CITYLAB (Apr. 30, 2018), <https://www.citylab.com/life/2018/04/the-race-to-learn-whats-really-happening-in-the-opioid-crisis/555191/>, archived at <https://perma.cc/4BX7-FN65> (describing cities’ experimental solutions).

¹⁴¹ Richard Florida, *The Case for a Local Minimum Wage*, CITYLAB (Dec. 11, 2013), <https://www.citylab.com/life/2013/12/why-every-city-needs-its-own-minimum-wage/7801/>, archived at <https://perma.cc/NV2J-YAAL> (making the case for local minimum wages); Kirk Johnson, *Voters in SeaTac, Wash., Back \$15 Minimum Wage*, N.Y. TIMES (Nov. 26, 2013), https://www.nytimes.com/2013/11/27/us/voters-in-seatac-wash-back-15-minimum-wage.html?_r=0, archived at <https://perma.cc/X4R3-3RDM> (describing local battles to increase the minimum wage).

¹⁴² See Jason Axelrod, *Cities Enact Rules Requiring Gender-Neutral Restrooms in Municipal Buildings*, AM. CITY & COUNTY (May 16, 2017), <https://americancityandcounty.com/facilities/cities-enact-rules-requiring-gender-neutral-restrooms-municipal-buildings>, archived at <https://perma.cc/PPT4-KZA7>.

¹⁴³ See, e.g., Olatunde C. A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 118–130 (2016); Dorf & Sabel, *supra* note 138, at 321. But see Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 639–43 (2017).

solution, but rather a diverse plurality of policies, ideas, and expressions. And this is why localities in particular—even more so than the states—can be such excellent First Amendment speakers.

Such policy and regulatory experimentations require the free gathering and exchange of information and ideas.¹⁴⁴ Municipalities need to be able to gather and disseminate data—through their websites, reports, and lobbying—both internally, from and to their own residents, and externally, from and to other local governments and citizens throughout the nation. If the state, for political or ideological reasons, not only blocks local *policies* in certain areas, but also prevents its localities from gathering or disseminating data and information through various preemption mechanisms, the unique potential of local governments as data gathering frontline posts and experimental laboratories is wasted.¹⁴⁵ Protecting such data gathering and dissemination through the First Amendment would not necessarily prohibit the state from ever regulating city behavior. Reasonable state regulation through monitoring city budgets or “time, place, and manner” restrictions might still be allowed;¹⁴⁶ yet the state would be barred, without proving that it sought to protect a compelling interest through a narrowly tailored restriction,¹⁴⁷ from a content-based prohibition on cities’ information gathering and disseminating activities. Such measures would be prohibited as they would infringe on the cities’ free speech rights as both listener and speaker.¹⁴⁸

3. *Representing and Expressing Minority Views*

City speech has the potential to bring to light marginalized ideas and worldviews and express the values and beliefs of minority groups that are all too often excluded from public discourse. This contention might seem questionable given the dubious historical record that local and state governments have on issues of race and immigration, among others.¹⁴⁹ Indeed, many believe that local power means parochialism, racial bias, and discrimination,

¹⁴⁴ See De Stasio, *supra* note 51, at 992–97.

¹⁴⁵ See, for example, De Stasio’s discussion of states prohibiting local governments and police departments from allowing public access to data collected by police-worn body cameras. De Stasio, *supra* note 51, at 962–65, 1025–28.

¹⁴⁶ See *infra* note 264 and accompanying text.

¹⁴⁷ See *infra* note 265 and accompanying text.

¹⁴⁸ First Amendment litigation that relates to information gathering and dissemination has intensified with changing technologies. See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (ruling that anti-indecency provisions of the 1996 Communication Decency Act violate the First Amendment); see generally Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115 (2012).

¹⁴⁹ See, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 552–58 (2001) (arguing against devolution of immigration policymaking authority to the states in part because of their poor record of protecting the rights of immigrants).

and that protection for minorities must come from the federal government.¹⁵⁰ This suspicion about the local tendency to discriminate against minorities and the correlative admiration for the federal egalitarian potential is also based on the famous Madisonian risk of the faction. According to James Madison, local and state governments are prone to domination by extremist local majorities who will use their power to oppress minorities by advancing radical programs.¹⁵¹

Despite this fear, throughout the years, local governments have been a significant progressive force on many issues, including protection of racial, religious, and sexual minorities.¹⁵² As Professor Heather Gerken convincingly argues, we need not ignore this reality by remaining suspicious towards local power only because it can be and has been used in parochial and discriminatory ways.¹⁵³ Once national minorities become local majorities and take over City Hall, they can exert power of their own; rather than merely protesting and marching in the streets, they can express themselves through decisions, declarations, statements, raising flags, toppling monuments, and other modes of city speech.¹⁵⁴ Such formal expressions amplify the voices of marginalized communities and may engender statewide or even national conversations. Justice Brennan hinted at this point when he ex-

¹⁵⁰ As an example, the Equal Employment Opportunity Commission (EEOC) was established in light of ongoing discrimination against Black people in southern states. *See Pre 1965: Events Leading to the Creation of EEOC*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html>, archived at <https://perma.cc/3ZY7-CT7X> (last checked May 18, 2018).

¹⁵¹ THE FEDERALIST No. 10 (Madison) (“The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.”).

¹⁵² *See, e.g.*, Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 1018–19 (2012); *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>, archived at <https://perma.cc/2GZT-KLCL> (last checked Mar. 15, 2019); *Local Non-discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances, archived at <https://perma.cc/6MMH-8BYC> (last checked Mar. 15, 2019).

¹⁵³ Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 46–48 (2010); Gerken, *supra* note 28, at 1748.

¹⁵⁴ Gerken gives the example of the San Francisco Mayor’s decision to issue marriage licenses to same-sex couples against the will of California in the early 2000s. Although California courts were quick to declare the marriage licenses void, these local actions stirred conversation throughout the nation. *See Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004); *see also* Gerken, *supra* note 28, at 1748, 1754–58, 1764–69 (discussing the example of San Francisco); *cf.* Schragger, *supra* note 50 (analyzing the case of same-sex marriage licenses in the context of the role of cities as interpreting and enforcing the Constitution).

plained in *Boston v. Anderson*¹⁵⁵ that it was the city and probably no one else that could represent “the interests of *all* taxpayers, including residential property owners,” and not just those of the business lobby.¹⁵⁶ And in *Creek v. Village of Westhaven*, Judge Posner explained, “a municipality is the voice of its residents—is, indeed, a megaphone *amplifying voices that might not otherwise be audible*.”¹⁵⁷ And given that minorities often have the least voice in state and national politics and public debate, they have the greatest need for the city to serve as their amplifier.

The recent wave of localities covering or attempting to remove Confederate monuments from public spaces further exemplifies this point.¹⁵⁸ In states controlled by conservative white majorities, majority-minority localities are able to express the minority’s disgust with symbols of white supremacy through the removal of these symbols. African-Americans are voicing their strong opposition—against their states, against the federal government, and against society—not through regular dissent, but by taking action at the local level. Yet they are being silenced through state preemptive statutes, such as the Alabama Memorial Preservation Act.¹⁵⁹ In *Alabama v. City of Birmingham*,¹⁶⁰ Judge Graffeo stressed the importance of Birmingham being a majority-minority city, emphasizing that “the city has had for many years an overwhelmingly African-American population and a majority African-American elected Mayor and City Councilors . . . [And i]t is undisputed that an overwhelming majority of the body politic of the city is repulsed by the Monument.”¹⁶¹

In this case, Alabama sued Birmingham for its decision to place a twelve-foot high wooden screen around a Confederate monument in a municipal park, since it violated Alabama’s Memorial Preservation Act.¹⁶² The court struck down the Act for various reasons, most importantly for violating Birmingham’s First Amendment right.¹⁶³ If the city had no First Amendment right against its state, ruled the court, then “the Act [would] render[] pro-Confederate speech immune from a local political process that rejects a mes-

¹⁵⁵ 439 U.S. 1389 (1978). For further discussion of the decision, see *infra* notes 289–299 and accompanying text.

¹⁵⁶ *Id.* at 1390 (emphasis added).

¹⁵⁷ *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (emphasis added). As Judge Posner wrote: “[T]o the extent, moreover, that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.” *Id.*

¹⁵⁸ See *supra* note 4.

¹⁵⁹ Alabama Memorial Preservation Act of 2017, Limitations on Relocation, Removal, Alteration, Etc., of Certain Architecturally Significant Buildings, Memorials, Monuments, Etc., ALA. CODE 1975 § 41-9-232 (2017) (prohibiting altering or otherwise disturbing Confederate monuments).

¹⁶⁰ CV 17-903426-MGG, *3 (Cir. Ct. of Jefferson Cty., Ala. Jan. 14, 2019).

¹⁶¹ *Id.*

¹⁶² *Id.* at *3–7.

¹⁶³ *Id.* at *6.

sage of white supremacy.”¹⁶⁴ This was especially egregious given the context in which the municipal expression was formed: “the democratic process [of Birmingham’s decision] flew into motion after the people of Birmingham witnessed race-based violence across the South and decided, through their elected officials, to reject a message of African-American inferiority.”¹⁶⁵ Indeed, structurally, minorities who are able to take control of local governments and express themselves through them, will always be exposed to the majority’s preemptive power. And this, the court ruled, was unacceptable. Thus, this case demonstrates, granting cities First Amendment rights against their state would adequately protect minorities, who are often able to express their opposition most effectively through their democratically elected local officials.

4. *Economic Efficiency and Redistribution*

Many theories advocating delegation of authority from central to local governments have emphasized the economic advantages accompanying the shift. According to Charles Tiebout’s famous model, viewing localities as complex commodities organized in a market—a political and legal system that gives local governments significant discretion over local taxation and the provision of public services—is desirable because it fosters competition among governments.¹⁶⁶ This competition, importantly, induces efficiency and makes government more responsive to residents’ preferences for the provision of public goods and services.¹⁶⁷ The model hypothesizes that citizens, called “consumer-voters,” choose where to live according to their individual preferences, and that localities respond to these demands by competing among themselves, thus creating a variety of service-packages available to consumers. The Tieboutian model presumes that this inter-jurisdictional competition not only induces localities to improve the public services they provide, but also encourages economic growth.¹⁶⁸

Leaving aside the flaws in the application of the model to real life as well as the critiques against the consequences of intra-local jurisdictional

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

¹⁶⁷ See William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 216 (1997). *But see* SCHRAGGER, *supra* note 120, at 31–32 (critiquing Tiebout’s model for its view of localities as passive providers of goods and services, among other reasons); FRUG, *supra* note 118, at 168–73 (criticizing the unrealistic assumptions of the Tieboutian model and describing its undesirable consequences).

¹⁶⁸ See Tiebout, *supra* note 166; see also WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001); James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 1–2 (1971).

competition,¹⁶⁹ the value of city speech according to this model requires two main conditions. First, as is true for policy experimentation, the city must be able to disseminate information freely concerning its activities, policies, and values since the model's efficiency depends on the fully rational and informed decisions of the "consumer-voters."¹⁷⁰ City residents, who shop for the jurisdiction that most suits them, can only make the rational choice if they have full information concerning the exact costs, benefits, services, and values that the various localities offer. Second, for the city to be efficient, it must be able to compete freely in the market of localities. Given that "private" localities—such as homeowners' associations and common interest communities¹⁷¹—compete against "public" local government through lobbying and ballot campaigning, prohibiting only public local governments from engaging in such expressive and political speech creates an unequal playing field that hinders efficiency. For these reasons, it is important to prevent the state—which can be captured by interest groups trying to impede competition¹⁷²—from interfering with cities' ability to distribute information and publicize their ideals and beliefs. No less important, protecting city political speech will enable cities to compete, on a fairer playing field, against other players such as homeowners' associations.¹⁷³

¹⁶⁹ Notwithstanding its advantages, delegation of powers to lower levels of government creates an array of collective action problems that could cause undesirable outcomes: deterioration of public goods and inefficiency in public services. For both public goods (such as the environment and other natural resources) and public services (such as education and security), cooperation and peer-participation are crucial. However, jurisdictional competition has led to a so-called "race to the bottom," as well as to other collective action failures enabled by uneven exit options and a growing ability of some to externalize costs. See, e.g., Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN ECONOMICS IN HONOR OF WALLACE OATES* 163–98 (William A. Fischel ed., 2006). In addition, well-organized interest groups exert disproportionate power within their states and obtain an equally disproportionate percentage of political and tangible goods, such as lower tax rates, more subsidies, and more favorable legislation. Well-organized or well-financed local governments can also obtain disproportionate influence using similar means. In both cases, suboptimal resource allocation is the unfortunate, albeit logical, result. See Bratton & McCahery, *supra* note 167, at 261.

¹⁷⁰ See Tiebout, *supra* note 166, at 419.

¹⁷¹ See generally Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

¹⁷² See, e.g., Schragger, *supra* note 17, at 1226–28 (providing several examples of interest groups attempts—and successes—at circumventing local regulation via state preemption).

¹⁷³ An extremely appealing yet radically different view of city power and its relationship to the economy and to growth has been advanced recently by Professor Richard Schragger. According to him, the power of cities is indeed primarily economic, but not in the Tieboutian sense; in fact, argues Schragger, cities are pretty bad at catalyzing economic development, prosperity, or efficient competition. He found no historical evidence to support such claims, and he argues that the idea that inter-city competition would produce growth or efficiency is wholly unsupported by facts. What cities are good for, however, is in cabining economic crises and in managing periods of economic decline. Cities can use their power to regulate economic activity, and to redistribute resources in ways that would protect their middle classes—through minimum wage ordinances, protection of local businesses, and more. See SCHRAGGER, *supra* note 118, at 135–90.

B. City Speech Promotes First Amendment Values

Parallel to its importance for localist values, city speech is also extremely conducive to values of the First Amendment. While autonomy—one of the central ideals that free expression embodies¹⁷⁴—is not advanced by protecting city speech, other values are: the search for truth and the marketplace of ideas, self-government, and democracy.

1. The Search for the Truth and the Marketplace of Ideas

The search for truth is one of the most well-known and well-established values of free speech, despite various critiques.¹⁷⁵ In “the marketplace of ideas,” truth is sought by allowing in almost all ideas and beliefs and letting the best rise to the top and emerge as truth. The entire society benefits from this marketplace.¹⁷⁶ Government speech is not always presumed to be truthful, objective, and neutral, especially when governments are acting as censors of private speech. Nevertheless, governments can contribute significantly to the fundamental value of truth-seeking when they speak on matters that are within their unique expertise and knowledge. Indeed, local governments often have exclusive access to the accurate data and relevant information necessary to decide on the best policies.¹⁷⁷ It is often the municipality that is the first to realize that there is a problem, even if state and federal governments might not be interested in reviewing the data.¹⁷⁸ Localities as a whole, in contrast to state and federal governments, are uniquely situated to expose and express uncomfortable truths; because they have such varying political, ideological, and economic commitments and interests, cities are less committed to partisan party politics¹⁷⁹ or big businesses, and they serve a wide-range of communities. For example, during the Flint water crisis,¹⁸⁰

¹⁷⁴ See, e.g., Susan Easton, *Autonomy and the Free Speech Principle*, 12 J. APPLIED PHIL. 27, 28–33 (1995).

¹⁷⁵ JOHN STEWART MILL, ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 18–55 (2015).

¹⁷⁶ See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“Many persons . . . will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas”).

¹⁷⁷ See De Stasio, *supra* note 51, at 993–94.

¹⁷⁸ See, e.g., *supra* notes 139–142; see also Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT’L MIGRATION REV. 1308, 1326–31 (2004) (describing how local minority coalitions managed to influence INS policies in California).

¹⁷⁹ See CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY 18 (2011).

¹⁸⁰ See K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America’s Water Crisis*, 53 HARV. C.R.-C.L. L. REV. 533, 536–38 (2018) (analyzing the case of Flint, Michigan’s local water crisis).

or in response to Hurricane Katrina,¹⁸¹ localities suffered from state and federal inaction, and eventually took action themselves.¹⁸²

The value of truth-seeking does not end with scientific data and other objective facts about the natural or social world. As I have already argued, local communities can express their values, beliefs, and normative visions through independently and democratically elected local institutions.¹⁸³ These “social facts”—what other people and communities think and feel—are relevant to many statewide and national conversations about socially and politically contested issues such as race, gender, the environment, trade, and abortions. Given the vast variety of local governments and their radically divergent views regarding a host of political, economic, and social issues, city speech benefits the entire nation by amplifying marginalized views and enriching the famous “marketplace of ideas.”¹⁸⁴ Judge Posner echoed this idea in *Creek*: “There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern. . . .”¹⁸⁵ Indeed, cities and towns must be able to express themselves to achieve a truly vibrant marketplace of ideas that is not censored or dominated by national politics and business interests.

Crucially, constitutionally protected city speech can complement and counter corporate speech, potentially correcting the market failures of our current marketplace of ideas. Given the increased protection that corporate speech receives in contemporary First Amendment jurisprudence, beginning with *Buckley v. Valeo*¹⁸⁶ and *First National Bank of Boston v. Bellotti*¹⁸⁷ and especially after *Citizens United v. Federal Election Commission*¹⁸⁸ and *McCullen v. Coakley*,¹⁸⁹ it is not only theoretically and legally inconsistent, but

¹⁸¹ See Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1942 (2018) (discussing the failure of federal and state entities surrounding Hurricane Katrina); DEP’T OF HOMELAND SEC., OFFICE OF INSPECTIONS & SPECIAL REVIEWS, OIG-06-32, A PERFORMANCE REVIEW OF FEMA’S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA (2006).

¹⁸² Combating climate change is one of the areas where local governments have been extremely proactive, following inaction at the federal level. See, e.g., Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 591–95 (2009).

¹⁸³ See *supra* Part II.A.1.

¹⁸⁴ See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). However, the idea that free speech is geared towards enriching the marketplace of ideas has been subject to criticism. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16–48 (1984); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 237–38 (2017); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 831–33 (2008); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U.L. REV. 951, 953–57 (1997).

¹⁸⁵ According to Judge Posner, such matters of public concern include, for example, “the subsidization of housing and the demographic makeup of the community.” *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996).

¹⁸⁶ 424 U.S. 1 (1976).

¹⁸⁷ 435 U.S. 765 (1978).

¹⁸⁸ 558 U.S. 310 (2010).

¹⁸⁹ 573 U.S. 464 (2014).

also undesirable as a policy matter to deprive *municipal* corporations of the same constitutional protection private corporations enjoy.¹⁹⁰ After decades of the courts sanctioning corporate involvement in politics,¹⁹¹ corporations (including the media, new and old) exert an immense influence over our political system. As a result, they are able to disproportionately set the agenda for what is publicly salient, discussed, and debated. There are many good reasons to criticize the decades-long shift in Free Speech doctrine from its traditional focus on the speaker's interests and protecting individuals to the listener's interest in an almost-unregulated marketplace of ideas and protecting corporations. This Article, however, takes this shift as a given (for the time being) and argues that as long as democratically-deficient and barely-transparent institutions such as business corporations receive full First Amendment protection, democratically-accountable and far more transparent entities, such as municipal corporations, ought to receive Speech Clause protection as well.¹⁹² Granting only business corporations the ability to speak, and even to "speak" by donating money to political candidates, distorts both the marketplace of ideas and the electoral process.

The huge amounts of money corporations currently spend on political contributions and ballot initiatives aimed at advancing pro-business interests¹⁹³ leave unorganized or disempowered individuals and communities at an immense disadvantage. Richard Briffault and David Fontana recently showed how *Citizens United*, and even more so *McCutcheon*, are already

¹⁹⁰ Justice Brennan already noted this danger in his opinion in *Boston v. Anderson*, 439 U.S. 1389, 1390 (1978), when he ruled that denying the city the right to fund a ballot campaign considering a tax reform that would hurt residential—rather than business—property owners would mean that ordinary residents' voices would not be heard. It seems plausible that Justice Brennan correctly assumed that it was the city of Boston, and only the city, that could represent and express the concerns of "all taxpayers, including residential property owners" that were impacted by the ballot initiative—as opposed to the corporate lobby that supported the tax reform and opposed Boston's involvement. Brennan's position also demonstrates the understanding that cities could somewhat balance the results of the political speech right of business corporations that was declared by the Court only two years earlier in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

¹⁹¹ Such involvement includes permitting corporations to finance campaigns concerning various ballot initiatives, *First National Bank of Boston*, 435 U.S. at 794–95, and making political donations, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 372 (2010).

¹⁹² The government speech doctrine shields cities from various challenges made by dissenting taxpayers and disgruntled citizens, but it gives them no defense whatsoever against preemptive and legislative efforts by states, by the federal government, and by Congress, all of which can deprive cities of their ability to compete against corporations. Cities' inability to compete results from courts giving their speech inadequate protection while giving corporations' speech expansive protection. See discussion *infra* Part IV.C.

¹⁹³ See, e.g., Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. POL. 367, 368 (2016); John C. Coates IV, *Corporate Politics, Governance, and Value before and after Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 662–63, 667 (2012); Bob Biersack, *8 Years Later: How Citizens United Changed Campaign Finance*, OPENSECRETS (Feb. 7, 2018), <https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/>, archived at <https://perma.cc/PF7C-3VS3>.

causing money to flow from individuals and corporations outside election jurisdictions to influence the outcomes of electoral races.¹⁹⁴ Municipal funding for ballot initiatives and lobbying—democratically authorized, transparent, and accountable—is one of the best ways to counter these worrisome developments.

Yet cities, who are able to speak on behalf of these individuals as their democratically elected representatives, are handicapped by legislatures and courts alike; their right to political speech is not recognized, while corporations' rights are.¹⁹⁵ Hence, cities—and the communities they represent—are often limited or altogether blocked when they try to promote a position that conflicts with business or private interests that have managed to capture state politics.¹⁹⁶ The ability of homeowners' associations to influence politics exemplifies the harmful impact of this asymmetry between cities and private corporations. Since homeowners' associations are private corporations, they are allowed to donate money to political candidates and finance ballot initiatives designed to benefit them;¹⁹⁷ any attempt by their state or Congress to limit this ability would be predictably perceived as violating the associations' First Amendment rights.¹⁹⁸ Cities, on the other hand, can be easily prevented from doing these same activities by their state since no equivalent right has been granted to them. This would be the case even when cities merely wished to counter measures that clearly target cities—and even if such efforts were initiated and promoted by homeowners' associations or other businesses.

Furthermore, recognizing corporate, but not city, speech often rests on the assumption that it is natural for individuals to collaborate and agree on economic interests—they all want to make more money—but doubtful that

¹⁹⁴ See David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247, 1268–71 (2017); Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29, 32–33 (2015); see also Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 437–43 (2015).

¹⁹⁵ Various state statutes and constitutions place prohibitions on municipalities' "donations" and involvement in ballot campaigns. See, e.g., ALASKA STAT. § 15.13.074(f) (2014); COLO. REV. STAT. ANN. § 1-45-117 (West 2018); DEL. CODE ANN. tit. 15, § 8012(d) (2015); GA. CODE ANN. § 21-5-30.2 (2012); MICH. COMP. LAWS § 169.257 (1976); N.J. STAT. ANN. § 19:34-33; UTAH CODE ANN. § 20A-11-1203 (West 2015).

¹⁹⁶ A vivid example of such conflict is over local taxation. See, e.g., Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 944–51 (2018).

¹⁹⁷ See, e.g., *Finley v. Superior Court*, 80 Cal. App. 4th 1152, 1156–58 (Cal. Ct. App. 2000) (ruling that contributions made by homeowner association to support a ballot measure "were neither ultra vires nor illegal").

¹⁹⁸ See, e.g., *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 4:08cv445-SPM/WCS, 2009 WL 1457972, at *5–*7 (N.D. Fla. May 22, 2009) (striking down aspects of Florida's electioneering communications laws—particularly those requiring registration and disclosure of expenditures and contributions—as facially unconstitutional and unconstitutional as applied to homeowners' associations and community organizations because they violate their First Amendment rights).

they can cohesively unite around a multitude of non-economic goals.¹⁹⁹ This Article argues against this notion, relying on cities' democratic legitimacy and tradition as institutions created to advance a host of goals upon which residents generally agree.²⁰⁰ Recognizing city speech as a protected form of speech therefore resists the notion that only profit-oriented corporate speech is reliable and non-suspicious. Such recognition expands our imagination of and faith in other modes of collective debates and goal-formation.

Importantly, unlike some of the unchecked and unverified "alternative" information spread over the internet and social media,²⁰¹ which until very recently was hailed by various commentators as countering corporate and nationally dominant speech,²⁰² the validity of city speech can be more easily verified and regulated since local governments, though hybrid, are governments nonetheless. As such, they are bound by formal and justiciable internal procedural and substantive rules,²⁰³ political opponents monitor their actions, and those actions are substantively reviewable by courts. These facts render city speech the type of expression that the current marketplace of ideas needs, and one that merits First Amendment protection.

2. *Self-Government and Democracy*

The ideal of self-government depends on the free exchange of information and ideas. Since in a democracy the people have the power to decide their own fate and keep their government in check, they must be able to

¹⁹⁹ See Claus Offe & Helmut Wessenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67, 97–99, 101 (1980) (discussing the assumption that economic interests are easier to align than other, non-economic interests).

²⁰⁰ Cf. Dan-Cohen, *supra* note 102.

²⁰¹ See, e.g., Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 212 (2017); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 180–187 (2003); *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y (Aug. 17, 2017), <https://today.law.harvard.edu/berkman-klein-releases-report-media-coverage-2016-presidential-campaign/>, archived at <https://perma.cc/6LZS-5UJP> (analyzing "fake news" and its ramifications on democracy).

²⁰² See, e.g., ZEYNEP TUFECKI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* 6–7 (2017) (reviewing the radical potential of social media and the ways in which authoritarian governments try to fight it); Habibur Haque Khondker, *Role of the New Media in the Arab Spring*, 8 GLOBALIZATIONS 675, 675–78 (2011) (illustrating the crucial role of new-media in recent social revolutions across the Middle East and North Africa). *But see* Jack. M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U.L. REV. 1053, 1059 (2016) (discussing the disillusionment regarding new-media's potential); Henry Timms & Jeremy Heimans, *Commentary: #DeleteFacebook Is Just the Beginning. Here's the Movement We Could See Next*, FORTUNE (Apr. 16, 2018), <http://fortune.com/2018/04/16/delete-facebook-data-privacy-movement/>, archived at <https://perma.cc/LV4B-52GX>.

²⁰³ Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 572–74 (2017) (noting that although local administration tends to operate more informally than federal and state agencies, it is nonetheless bound by various procedural rules, which radically vary between different states and different localities).

know what their government does, what it believes in, what values it holds, and what policies it advances. The First Amendment, according to this “republican defense,” protects the right of the people to make informed decisions concerning public life, know what their government does, and voice their views in hopes of influencing government and their fellow citizens.²⁰⁴ This republican rationale seems to suggest a right *against* all governments, including local ones, which try to silence citizens or keep them uninformed. Indeed, nothing in what I write suggests that First Amendment city speech rights would strip private individuals of their First Amendment rights against local governments. Similar to the government speech doctrine, I suggest that cities enjoy First Amendment rights when they speak, not when they silence. But the republican defense of free speech explains why we need to give local governments the powerful tool of the First Amendment against their states given municipalities’ function as venues for self-government and open deliberation over public life.

City speech thus fulfills the civic republican, rather than the libertarian-individualistic, ideal of free speech. When cities express their views about immigration, gun control, sexuality, and race, they contribute significant content to local, statewide, and national dialogues concerning these issues. When municipalities participate in debates surrounding statewide ballot initiatives—on the aforementioned controversial topics and also on seemingly more mundane issues such as tax rates or the construction of airports—they express their commitment to the ideal of public deliberation, dialogue, and collective decision-making. When cities issue public statements concerning federal policies,²⁰⁵ they are talking with their fellow citizens—within their jurisdiction, but also outside of it—and are realizing the ideal of public, rather than individual, freedom.²⁰⁶ The more our public opinion and individual views are formed in “echo chambers”—through social and other media that cater more and more to what we consume, to corporate interests, to

²⁰⁴ See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996); MEIKLEJOHN, *supra* note 131; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 5–10 (1995) (suggesting that rather than defending people from the government as the libertarian ideal demands, the First Amendment should oblige the government to aid people who cannot be heard); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–89 (2011).

²⁰⁵ See, e.g., RESOLUTION CALLING ON CONGRESS TO REDIRECT MILITARY SPENDING TO DOMESTIC PRIORITIES, CITY OF CHARLOTTESVILLE CITY COUNCIL (Jan. 17, 2012) (regarding military spending generally); RES 1121-2003, N.Y.C. COUNCIL (Dec. 31, 2003) (regarding Iraq war); Michael Cooper, *Mayors Call for a Quicker End to Wars So Money Can Be Used for Needs at Home*, N.Y. TIMES (June 20, 2011), <https://www.nytimes.com/2011/06/21/us/21mayors.html>, archived at <https://perma.cc/T5JL-M4C3>; Mythili Sampathkumar, *US Cities and Companies Declare ‘We Are Still in’ Paris Agreement Despite Trump*, THE INDEPENDENT (Nov. 10, 2017), <https://www.independent.co.uk/news/paris-agreement-trump-us-cities-still-in-defiance-coalition-a8047086.html>, archived at <https://perma.cc/CT5T-SEAB>; see also *supra* note 12.

²⁰⁶ In his seminal piece, Professor Frug, following Hannah Arendt, defines “public freedom” as “the ability to participate actively in the basic societal decisions that affect one’s life.” Frug, *supra* note 59, at 1068.

national political powers, or to unknown entities²⁰⁷—the further removed we become from the ideals of public and collective politics. City speech is thus direly needed to counter these tendencies.

The unique potential of city speech in this regard stems from the fact that in order to be heard publicly, especially in our current media and political climate, it is not enough to have a good and well-articulated idea. Time, money, organizational skills, and long-lasting institutions are required to sustain an expressive campaign. Without local institutions, we risk not only missing tremendously important viewpoints from our public dialogue, but also withdrawing from public dialogue altogether into the private and unregulated realms of social media.²⁰⁸ City speech is thus a lucid manifestation of the republican, rather than the libertarian, tradition of free speech; when cities speak, they articulate, communicate, and enable debate about defining the public good in a particular polity.²⁰⁹ City speech indeed serves as an “amplif[ier]” of the views of communities,²¹⁰ groups, and individuals who would otherwise have difficulty organizing and lack the resources and connections to be heard beyond their small and often peripheral jurisdictions.

The potential for city speech to enable self-governance is also attributable to the relatively democratic, participatory, and transparent manner in which city speech is, ideally, formed.²¹¹ City speech is not a byproduct of

²⁰⁷ See, e.g., Iyengar, Shanto, & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. OF COMM. 19 (2009); Kelly R. Garrett, *Echo Chambers Online? Politically Motivated Selective Exposure among Internet News Users*, 14 J. OF COMPUTER-MEDIATED COMM. 265 (2009); *But cf.* Seth Flaxman, Sharad Goel & Justin M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 PUB. OPINION Q. 298, 313–18 (2016) (demonstrating that “while social networks and search engines are associated with an increase in the mean ideological distance between individuals. . . these same channels also are associated with an increase in an individual’s exposure to material from his or her less preferred side of the political spectrum”).

²⁰⁸ See JAMES CURRAN, NATALIE FENTON & DES FREEDMAN, *MISUNDERSTANDING THE INTERNET*, 95–120 (2012) (summarizing the position that unique technological and cultural aspects of the internet make it harder to regulate it, at least in traditional ways); Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 533–36, 543–44 (2018) (examining Congress’s limited ability to enact legislation regulating social media platforms due to First Amendment challenges and arguing that the government should not regulate this area).

²⁰⁹ This tradition stands in stark contrast to what Professor Weiland describes as the libertarian tradition of free speech, which the Court has advanced in recent decades. Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017). Other scholars have also identified the tension between a more robust and positive notion of the First Amendment as against the libertarian, Lochnerian (invented) tradition of free speech. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375–81 (1990); Benkler, *supra* note 200, at 201–05; Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1976–2002 (2016); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–21 (2015).

²¹⁰ See *supra* note 157 for relevant quote from Judge Posner in *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996).

²¹¹ See Dan-Cohen, *supra* note 102, at 1248–50 (emphasizing the importance of the “internal structure and the decisionmaking process” by which organizational speech is formed).

some “spooky . . . ‘group mind’,”²¹² but rather an agreement between people—even if ad-hoc, partial, and temporary, and obviously not in full consensus—on matters pertaining to their collective wellbeing.²¹³ It facilitates public debate, engagement of ideas and beliefs, discussions of the public good rather than merely private interests, and compromises between competing ideals, values, and visions of the good life. All these traits advance the civic republican, rather than libertarian, goals of the freedom of speech. Indeed, ideally, city speech should be a product of a democratic and open process, though this is not always the case. But following the analysis of Dan-Cohen, the degree of democratic accountability, as well as the nature of the process that formed the particular act of city speech, could influence the scope of the First Amendment protection that it should receive.²¹⁴ And once such guiding principles are established, they could encourage cities to form their expression in ways worthy of enhanced protection.²¹⁵

My analysis might therefore suggest that mundane, non-controversial speech could receive First Amendment protection even if it were formed in a regular city council meeting.²¹⁶ However, if the city wishes to contradict its state’s position or fund a ballot campaign, it might be required that the city council passed the resolution by a super majority or perhaps even had a mandatory notice period and solicited comments from the public. In other words, I argue, once we acknowledge the civic republican virtues embedded in city speech, and the connection between these virtues and the ways in which municipal expressions are formed, we could also condition the degree and scope of the constitutional protection on the quality of the democratic processes that form city speech.

C. City Speech Promotes Federalist Values

Cities can be an instrument of federalism. Given their democratic legitimation, their centrality in implementation and enforcement of national policy, and their state-bound legal regulation, cities have an important role in

²¹² *Id.* at 1234.

²¹³ This Article does not purport to offer the exact ways in which cities should decide on their expressions. However, public council meetings, town meetings, and participatory events are examples of how municipalities could increase the democratic legitimacy of their expressions, and hence improve the likelihood that their speech would receive First Amendment protection.

²¹⁴ Dan-Cohen, *supra* note 102, at 1233, 1249–50.

²¹⁵ Although without granting First Amendment rights to cities, the Supreme Court recognized this unique local potential for democratic deliberation and accountability in the context of speech in *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 518 U.S. 727, 763 (1996) (“Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: *There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children . . .*”) (emphasis added).

²¹⁶ See *infra* Part IV.E.

our complex system of formal—and informal—federal checks and balances. This is especially true today. One of the unique traits of our current political era is that it is increasingly nationalized²¹⁷—controlled by national politics and policymaking—and polarized along party lines.²¹⁸ Consequently, states are performing less and less of their traditional roles within our federal system. They present less diversity in their politics and ideology; they are less effective political checks on the federal government; they are less experimental in their policymaking; and they seem to be not as responsive to their voters as before.²¹⁹ Indeed, contemporary anti-local state measures seem to reflect, at least in part, the subordination of state politics to nationwide politics.²²⁰ State politics are becoming staunchly ideological and aligned with Washington partisan politics, moving away from their traditionally nimble, problem-solving orientation.²²¹ Although states who disagree with federal policies can indeed try to resist them and thus perform their traditional role within the federalist system, in an extremely partisan environment, such opposition could be easily read as ideologically and politically motivated rather than being based on substantive disagreement.

A worrying outcome of this nationalization is that states serve less and less as structural safeguards against federal domination.²²² In such politically charged settings, cities become pivotal forces in combating Washington's absolute control of American politics, and city speech is critical to this fight. Cities and towns, many of which are not submerged in party politics—at least not to the same degree as the states are—can pass dissenting resolutions, disperse alternative information, and express non-conforming ideas.²²³ Through such measures, cities can provide reliable, informed, and forceful checks on the information distributed by the states and the federal government.

This conflictual and confrontational relationship between cities and their states, especially in polarized times, is somewhat analogous to the relationship Gerken and Bulman-Pozen envisioned for the states in our federal structure.²²⁴ There is a connection, they argue, between the function of states as “servants” when they perform on behalf of the federal government, and their supposedly “sovereign” status when they resist and obstruct federal

²¹⁷ See HOPKINS, *supra* note 96, at 1–19.

²¹⁸ See James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 49 (2013); Michael Greve, *Federalism in a Polarized Age*, in PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER 119, 119–20 (Zachary Courser et al. eds., 2018).

²¹⁹ See Gardner, *supra* note 218, at 36–52.

²²⁰ See HOPKINS, *supra* note 96, at 36–58.

²²¹ See, e.g., Greve, *supra* note 218, at 125–32; David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 767, 782 (2017).

²²² For a more optimistic view of the role states play in federalism, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

²²³ See *supra* Part II.A.

²²⁴ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–60 (2009).

policies. The connection between these two modes of state/federal relations is captured by the term “uncooperative federalism,” which emphasizes “how the state’s status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger.”²²⁵ Similarly, the function of cities as dissenters, this Article argues, does not mean that they suddenly become fully “sovereign” and refrain from cooperating with their states. In fact, what allows cities to dissent (or “uncooperate”) from their states is that their dissent is the exception rather than the rule; cities’ uncooperative role depends, to a large extent, on their regular cooperation with their states. Thus, there is no reason to be alarmed that letting cities speak will unravel state sovereignty or that it will upend city-state cooperation. On the other hand, the mode of friction, confrontation, and un-cooperation between levels of government, which is encouraged by city speech, benefits our system of government no less—perhaps even more, especially in times of nationalization of politics—than frictionless coordination and collaboration between all governmental tiers.²²⁶ Viewed this way, city speech thus becomes an important instrument of federalism, and its protection through constitutional measures is warranted.

III. WHY WE MIGHT WORRY ABOUT GIVING SPEECH RIGHTS TO CITIES

Granting First Amendment protection to city speech comes with potential risks and costs. Although on balance, the reasons for protecting city speech through the First Amendment outweigh the dangers, these counterbalancing considerations would impact the contours, scope, and concrete meaning of the speech right. I consider here four main normative concerns that arise from protecting city speech through the First Amendment.

A. *City Speech Risks Serving and Entrenching Existing Power*

Granting First Amendment protection to city speech might be used to entrench existing power structures, primarily those benefitting acting politicians, but also other powerful groups who will perpetuate their hold over the municipal apparatus to promote their interests. Put differently, the danger is that city speech will be used to serve politicians rather than their constituents—used not for the public good but for that of self-serving politicians who wish to remain in City Hall. Thus, city speech suffers from the classic agency problem: the concern that political institutions are captured by elites and corrupt politicians who serve those elites—a problem Clayton Gillette argues is one of the most vexing and challenging for local government law.²²⁷ But besides the fact that it is unclear whether this problem is more

²²⁵ *Id.* at 1258.

²²⁶ *Id.* at 1284–94.

²²⁷ See GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY, *supra* note 179, at 15–28.

severe in municipalities than at upper levels of government,²²⁸ or even in business corporations,²²⁹ there is no reason to think that this problem is more worrying when cities speak than when they act. If this is the case, then there is no particular problem with protecting city speech.

Yet, if we expand the meaning of speech beyond monuments, declarations, and purely expressive measures—as the Court has previously done²³⁰ and as this Article advocates—while also protecting cities' rights to engage in political speech, such as lobbying, participating in, and funding statewide ballot campaigns, a new set of problems arises. The fear is that the efforts of city officials will be directed at pressuring legislators to benefit them personally or create a regulatory framework that will increase their personal gains at the expense of their constituents. Indeed, this is the claim that corporate scholars such as Victor Brudney, Lucian Bebchuk, Robert Jackson, and John Coates have been making ever since corporations were given political speech rights in *Bellotti*²³¹: corporate political speech, that is, corporate political contributions, advance mostly the interests of managers and directors—not shareholders.²³² The fact that courts have refused to protect dissenting shareholders by giving them veto rights over contested speech has exacerbated this problem because diffused, minority shareholders can do very little to stop corporate expressions;²³³ the only thing they can do is to sell their shares and exit the corporation. Often this option is only hypothetical and cannot truly and systematically change corporate decisions.²³⁴

²²⁸ The risk that agents will use their power to serve themselves and their interests rather than those of their voters is gnawing at the legitimacy of representative governments, local ones included. *See id.* at 23–30.

²²⁹ *See, e.g.,* Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 60–61 (1995); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 258 (1981).

²³⁰ Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 275–81.

²³¹ 435 U.S. 765, 776–77 (1978).

²³² *See generally* Lucian A. Bebchuk & Robert J. Jackson Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942–43 (2013) (arguing for the need to require public corporations to disclose their political spending); Bebchuk & Jackson, *supra* note 136, at 90–92 (2010); Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, *supra* note 229, at 289–91; John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 244 (2015); Coates, *supra* note 193, at 665.

²³³ *See* Peter J. Horne, *Suppressing Minority Shareholder Oppression*, 16 DUQ. BUS. L.J. 199, 204–10, 218 (2013) (describing various legal barriers that prevent minority shareholders from succeeding in claims regarding oppression); Russell Mangas, *Citizens United against Dissenting Shareholders*, 46 TULSA L. REV. 409, 412–16 (2011) (describing the lack of protection for dissenting shareholders after *Citizens United* and calling on Congress to act).

²³⁴ This is due to the fact that many shareholders own shares through institutional investors such as pension funds. *See, e.g.,* Alex Gorman, *Exit vs. Voice: A Comparison of Divestment and Shareholder Engagement*, 72 N.Y.U. ANN. SURV. AM. L. 113, 185 (2017) (“Engagement generally is superior to divestment as a tactic to change corporate behavior. Both tactics have limited ability to inflict direct costs on the corporation. Theoretically, divestment may be able to drive share prices down, but the chance of achieving the necessary critical

Similarly, if we allow cities to speak politically, the danger is that city officials will abuse their power and pressure their state and the federal government to increase their personal benefits and create a friendlier regulatory environment that will only serve to improve the officials' own chances for reelection. In this sense, a danger arises that political speech will serve only political elites and corrupt the electoral process. These are grave concerns, and dealing with them fairly would require a detailed and lengthy examination beyond the scope of this Article. However, I do wish to outline some preliminary thoughts concerning these important challenges.

The first response is that cities are already lobbying rather aggressively in state capitals and in Washington, even without constitutional protection—and they are not being punished by their voters for it.²³⁵ Cities and towns invest heavily in lobbying, often to secure federal funding, and especially when their states fail to meet their needs.²³⁶ Although it might be the case that cities occasionally lobby to obtain higher wages or better conditions for their officials,²³⁷ there is no evidence in the literature that municipal lobbying is directed at these self-serving purposes in any significant way. Indeed, unlike business corporations who suffer from a severe democratic deficit and whose decisions are rarely transparent, cities are, by and large, democratic institutions with a vibrant and vigilant opposition. Therefore, city officials who would spend public funds for such self-serving purposes would be punished in elections. It is worth noting that the legality of using city funds for legislative lobbying is uncertain in various states, especially given state constitutional requirements that public funds be used only for “public purposes.”²³⁸ Although in the nineteenth century several cases challenged the practice of using public funds to finance legislative lobbying, they died out for the most part, and cities' use of public funds for lobbying is now a generally accepted practice.²³⁹

mass is unlikely due to the sheer size of the market for corporate equity and the countervailing pressures which would frustrate the effort.”)

²³⁵ See Goldstein & You, *supra* note 9, at 864 (describing the involvement of local governments in lobbying activities); Hallman, *supra* note 66 (describing lobby efforts in Washington D.C. made by Texan local governments); Loftis & Kettler, *supra* note 9, at 193–206 (documenting and explaining the intense lobbying that local governments are engaged in); Newkirk, *supra* note 66 (describing lobbying efforts made by small Alaskan localities to “reap” federal benefits.); Weissmann, *supra* note 66 (describing measures taken by the Arizona governor to crack down on local government lobbying).

²³⁶ See Goldstein & You, *supra* note 9, at 864; Loftis & Kettler, *supra* note 9, at 193–206.

²³⁷ See, e.g., Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 902 (2018).

²³⁸ See Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 41, 43 (1997); David Morgan, *Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 VAN. L. REV. 433, 434, 444 (1984); see also, e.g., *Elisenau v. City of Chicago*, 165 N.E. 129, 130–31 (Ill. 1929); *Shannon v. City of Huron*, 69 N.W. 598, 599 (S.D. 1896). It is less readily clear, however, that funding ballot campaigns will be considered a “public purpose,” as I earlier discussed. See *supra* note 117.

²³⁹ See David Morgan, *Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 VAN. L. REV. 433, 438–43 (1984).

Secondly, the risk of entrenchment and corruption of the political electoral process is not a reason to deny cities First Amendment protection, because states will be able to assert a “compelling state interest” in situations when this danger becomes real.²⁴⁰ Where there is substantial risk that city speech would corrupt the electoral process—for instance, if cities started donating money to politicians, or if city officials started funding their own campaigns or the campaigns of their allies—it would be possible to convincingly articulate a “compelling state interest” in preventing the possible corruption of the election process.²⁴¹ Even if ballot campaigning or funding of election campaigns would be considered speech, the state or Congress could legitimately ban them, or at least restrict and regulate them.²⁴² In other words, I am not denying that city speech might be used to entrench existing power and that in these cases, it would be desirable and legitimate for the state to intervene and prohibit its cities from engaging in such speech. But this possibility does not mean that every expression—for example, a municipal council declaration that it supports or opposes a certain ballot initiative, or a municipal decision to fund political lobbying—is by definition an entrenchment of existing power or serving only city officials and not their voters. The California Supreme Court explained the important distinction between corrupting the integrity of the political process through meddling with the elections themselves and participating in legitimate legislative hearings through lobbying:

Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, *public agency lobbying, within the limits authorized by statute . . . in no way undermines or dis-*

²⁴⁰ Under First Amendment jurisprudence, the court will apply a two-prong test in determining the constitutionality of a rule curtailing speech: whether the interest of the government in the rule is sufficient and whether the rule is properly tailored to achieve the government’s goal. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997) (describing the two-prong test). *See also infra* note 265 and accompanying text.

²⁴¹ The Court has been relatively deferential to assertions made by states concerning their interest in the integrity of the states’ electoral processes, often finding that state interest to be compelling. *See Joshua A. Douglas, (Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 554 (2015) (“[T]he Court has accepted almost any assertion of a state interest to protect the integrity of the election, failing to dig deeper into the actual rationale for the state’s regulation of the voting process. This differs from the Court’s approach to federal election statutes and is contrary to historical practice.”). For recent Court cases that demonstrate the trend of deferring to states concerning election administration, *see, for example, Crawford v. Marion County Election Board*, 553 U.S. 181, 181 (2008), upholding Indiana’s voter ID law, given the state’s compelling interest in the integrity of the election process, and *Doe v. Reed*, 561 U.S. 186, 187 (2010), upholding Washington’s law requiring disclosure of petition signatures.

²⁴² As I have already indicated, I am personally unconvinced that corporate funding of political campaigns should be protected through the First Amendment, but given that this is the existing doctrine, it should be applied to municipal corporations. Even when the Court considered the expansion of free speech over political donations, it recognized a legitimate interest in regulating direct donations, affirming the need to donate through political action committees rather than directly to candidates.

torts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leaves to the ‘free election’ of the people (*see* Cal. Const., art. II, § 2) does present a serious threat to the integrity of the electoral process.²⁴³

Indeed, a distinction should be made between funding ballot campaigns and involvement in the elections of officials. While the former seems to be within the core of the First Amendment right of cities, the latter is far more peripheral and controversial, and I leave it for future inquiry.²⁴⁴ The reason for this distinction is that ballot campaigns often touch upon the most fundamental functions of local governments, affecting their well-being and sometimes even their very existence. They can involve the construction of airports or stadiums in the vicinity of localities, the rates of local taxation, the ability of residents to marry in a town hall, and more. It lies squarely within the civic republican rationale of the First Amendment that cities be able to express their own position on such matters and engage in a statewide dialogue to try to convince their fellow citizens of their position. Furthermore, the marketplace of ideas would be diminished if city speech were excluded from these statewide conversations, as these are precisely the types of issues on which cities have distinct information, unique local knowledge, and inimitable perspective. However, clear statements like those of the California Supreme Court are rare.²⁴⁵ And without constitutional protection for municipal political speech, cities would have no legal ammunition if states decide to deny or preempt cities from lobbying. Thus, constitutional protection for city political speech is needed. Interestingly, the few states that have expressed concern over municipal lobbying did not frame their concern around the need to protect dissenting local minorities, nor the fear that city lobbying was abused by local officials interested in entrenching themselves; rather, as demonstrated in Texas and Arizona, the anger is that cities are lobbying “against” their own state and using tax money to promote their own affairs, “crowding out citizen participation.”²⁴⁶

As this Article suggests, it is not merely possible but often desirable for cities to disagree with their states²⁴⁷ and spend money convincing their own

²⁴³ *Stanson v. Mott*, 17 Cal.3d 206, 218 (Cal. 1976) (emphasis added).

²⁴⁴ In this, I agree with critics of *Citizens United* who think such speech is either not speech at all for the purposes of the First Amendment or lies in its periphery, thus deserving only minimal protection. *See, e.g.*, Laurence Tribe, *Dividing ‘Citizens United’: The Case v. The Controversy*, 30 CONST. COMMENT. 463, 471, 492 (2015); ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 59–76 (2014); Weiland, *supra* note 209, at 1439–41.

²⁴⁵ Different states take different positions concerning local funding of ballot measures. *See* Briffault, *supra* note 238. *See also* Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 Nw. U. L. REV. 655, 655, 662 (2017).

²⁴⁶ *See* Weissmann, *supra* note 66. For a discussion of the “crowding out” argument *see infra*, Part III.C.2.

²⁴⁷ *See supra* Part II.C.

residents and other citizens who live outside the city²⁴⁸ that the state should design different policies or take different legislative measures. Ballot campaigning and lobbying aimed at such goals should not be immediately read as corrupting the electoral process or entrenching existing power, but rather as cities' attempt to participate in and influence the political sphere on behalf of the local community. Indeed, that cities disagree with their states or have independent policy positions is proof of the importance of city speech and protecting it.

Lastly, I would like to emphasize the need to think creatively about other methods for ensuring—or restoring—trust in our electoral system aside from silencing cities. We could devise heightened transparency requirements on municipal funding measures, require supermajorities to pass resolutions to fund election campaigns, and develop other means to buttress the democratic process rather than prohibiting cities' lobbying and ballot campaigning efforts altogether.

B. Legitimizing and Strengthening the Overbroad Protection Given to Corporations

Critics of the long line of cases giving business corporations individual rights and, more particularly, granting corporations protection from governmental regulation of their participation in the electoral process, might also be hostile towards this Article's argument to import this protection to cities, rather than weakening or even debunking that protection. For those who view *Bellotti*²⁴⁹ and *Citizens United*²⁵⁰ as destructive for both the ideal of free speech and the integrity of our political and electoral processes, the thought of jumping on this train instead of derailing it might sound like a dangerous idea.²⁵¹ Furthermore, because this Article also highlights the "private" side of local governments and emphasizes their corporate self, some might worry that I am envisioning a private and privatized city.

I deeply share the disagreement with the current libertarian jurisprudence of free speech and think it is dangerous for business corporations to be left with fewer and fewer regulations in place to curb their immense power over our politics.²⁵² However, as I have already explained, as long as corporations are so deeply involved in politics,²⁵³ it is necessary to counter their

²⁴⁸ See *supra* Part II.B.2.

²⁴⁹ 435 U.S. 765 (1978).

²⁵⁰ 558 U.S. 310 (2010).

²⁵¹ J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, COLUM. L. REV. 609, 614, 625 (1982); Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS (May 13, 2010), <https://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy/>, archived at <https://perma.cc/GM5L-JBPK>.

²⁵² Cf., Rahman, DEMOCRACY AGAINST DOMINATION, *supra* note 125, at 44; Purdy, *supra* note 125, at 2165.

²⁵³ See generally WINKLER, *supra* note 43; *supra* Part II.B.1.

influence by giving our cities—our most democratic institutions—a fair chance in the game.²⁵⁴ Additionally, even if businesses do not deserve the extended speech rights they currently receive, I have made the case for *municipal* First Amendment rights. Constitutional protection for city speech is not only needed as a matter of the republican defense for free speech; it is also necessitated by the important role local governments have in our federal system, the erosion of cities' power by states and the federal government, and the disempowered position that local governments currently suffer vis-à-vis business corporations.²⁵⁵

C. *City Speech Is Regressive*

If city speech were constitutionally protected, and cities began to use their money for ballot and electoral campaigning, would rich cities gain an unfair advantage over poorer cities with fewer resources? Would it not make matters worse for those poorer local governments and trigger more conflicts between localities? Furthermore, since local governments can raise and spend a lot of money, would they not end up further weakening and diluting the voices of ordinary people who are already struggling to be heard in a world where big money controls the public discourse? And finally, is it not possible that city speech would be used to advance discriminatory, even racist, expressions? The following section explores these risks.

1. *Assisting Rich Cities Against Poorer Cities*

One potential critique of protecting city speech as a First Amendment right is that free speech privileges the rich and affluent and can never be progressive.²⁵⁶ Although this line of Marxist critique of free speech sometimes has merit to it, it is less convincing as applied to city speech. First, cities already speak, and in this sense, rich local governments already have an advantage over less affluent ones. This does not mean, however, that allowing cities to use money to influence politics will not worsen the situation of poorer cities. The second point is therefore more important. Currently, through informal ties, political clout, and economic leverage, some cities exert more influence over public opinion and state and federal policies. Allowing for less politically connected cities to recruit money in order to make their plight known might at least give them access to some fora from which they are now almost entirely excluded due to their marginal status. Put differently, powerful cities do not need constitutional protection as their interests and concerns are often protected through other means; politicians

²⁵⁴ See *supra* Part II.A.

²⁵⁵ See generally FRUG & BARRON, *supra* note 65 (explaining constraints on municipal power in Boston); Schragger, *supra* note 17, at 1216.

²⁵⁶ See Louis M. Seidman, *Can Free Speech Be Progressive?* 118 COLUM. L. REV. 2219, 2245 (2018).

and the media bring attention to their needs. Less privileged municipalities, however, might overcome their lack of political power and inability to affect public discourse by spending money on political campaigning and lobbying.

However, the more fundamental reason for protecting city speech relates to my previous discussion concerning the constitutional protection and the resulting advantage currently given to business corporations, non-governmental organizations, and homeowners' associations. All these entities are able to participate in politics through funding, while cities—poor and rich, marginalized and powerful—are restrained from doing so, kept under the control of their states. Thus, although protecting city speech might benefit some rich cities over poorer ones, I argue that it is generally preferable to give all cities the right to free speech given their shared disadvantage in relation to other corporations. Furthermore, instead of giving up on constitutional protection altogether due to economic disparities, an attempt to mitigate the financial inequality between localities is warranted. For example, imposing caps on municipal expenditures on political activities or providing state subsidies for municipal campaigning in statewide ballots could decrease the harmful effects of economic disparities between rich and poor cities.²⁵⁷

2. *City Speech Might Drown Out Weaker Voices*

Because city governments can sometimes be abundantly resourceful, if they speak too loudly, they might drown out other voices that are not as loud, well-funded, or effective, thus distorting public debate.²⁵⁸ This problem has already been raised in the context of the opposition to the government speech doctrine, and it is indeed troublesome.²⁵⁹ Yet, this problem exists anyway—the government constantly speaks—and there is little reason to think that it will be significantly worsened by protecting city speech through the First Amendment. The reason is that First Amendment protection for city speech does not affect the relationship between *individuals* and cities. As I have already explained, when the government speaks, individuals cannot raise First Amendment claims anyway; thus, protecting city speech through the First Amendment will not make the situation of individuals worse. The only thing such protection will do is protect cities against silencing measures taken by their *states*, and one should not worry about drowning out the voice

²⁵⁷ See Briffault, *supra* note 241, at 440; Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL 63, 64 (E. Joshua Rosenkranz ed., 1999).

²⁵⁸ YUDOF, *supra* note 46, at 51–52.

²⁵⁹ See, e.g., Steven Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1295 (2010) (arguing that government speech doctrine enables the government to silence opposition); Mary-Rose Papan-drea, *The Government Brand*, 110 Nw. U. L. REV. 1195, 1226 (2016) (arguing that the broad interpretation of government speech offered in *Walker* imposes significant limitations on free speech as it enables the government to silence dissenting citizens by classifying its expressions as government speech rather than as restrictions on a public forum).

of states, who are far more vocal and dominant than their cities. Indeed, protecting city speech restores the balance between relatively powerless cities and their powerful states; it prevents the drowning out of city voice by states, rather than the reverse.

Where protected city speech might nevertheless compete with the speech of individuals and thus potentially drown out their voices, the risk posed to weak and marginalized voices is minimal, given that those participating in such campaigns are often well-organized and well-funded groups or corporations. Indeed, the focus on a potential conflict between city speech and individual speech—specifically, city speech threatening individual speech—is misplaced and possibly misleading. City speech, this Article posits, is worthy of protection since it amplifies individual and communal voices that are currently being drowned out by corporate and national voices.²⁶⁰

I do not claim, however, that since city speech merits First Amendment protection, it should never be regulated. Indeed, the imminent risk of crowding out citizens' voices, and clear proof that certain municipal expressions drown out disempowered communities' and individuals' voices, might be considered a compelling state interest that justifies regulation or curtailment of city speech. The Eleventh Circuit made an analogous argument in the context of government speech.²⁶¹ In *Warner Cable Communications, Inc. v. City of Niceville*,²⁶² the court held that if government speech was so loud as "to make it impossible for other speakers to be heard by their audience,"²⁶³ that was sufficient reason to limit it. By analogy, then, First Amendment protection for cities does not necessarily mean that cities could speak in each and every way they wish without federal or state government regulation; cities' speech could still be contained. First, like any protected speech, content-neutral "time, place, and manner" restrictions can be legitimately placed by the state on city speech.²⁶⁴ Second, since cities are also governmental bodies with significant powers, various considerations—ranging from maintaining the integrity of the electoral process to avoiding state-sanctioned racist speech—could substantiate a "compelling state interest" that could justify regulating and limiting city speech, as long as these limitations are "narrowly tailored."²⁶⁵

²⁶⁰ See *supra* Part II.B.1.

²⁶¹ *Warner Cable Commc'n v. Niceville*, 911 F.2d 634, 637 (11th Cir. 1990).

²⁶² *Id.*

²⁶³ *Id.* at 638.

²⁶⁴ See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a ban on placing signs on public utility poles). *But see McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (striking down a 35-foot buffer zone around the entrances of reproductive health centers adopted by the Massachusetts legislature since the "time, place, and manner" restrictions were not sufficiently narrowly tailored).

²⁶⁵ See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry*

This Article does not offer a new test for deciding what counts as “compelling state interest.”²⁶⁶ A case-by-case examination would be required—one in which courts should not be satisfied with generic recitations of state goals;²⁶⁷ rather, the state should explain why it suppresses certain municipal expression by demonstrating a factually-based rationale that passes meaningful scrutiny. Importantly, since cities are also bound by federal and state constitutional duties, and since they carry many obligations—as public governments—various compelling interests would be easier to find than in private expressions.²⁶⁸

Imagine, for example, that a state passes a law that compels all cities to take down existing confederate monuments erected in city parks, or prohibits new confederate monuments from being erected on municipal grounds. In such a case, despite the city’s First Amendment right to express itself, including its prima facie right to do so through erecting confederate monuments, the state could rightly argue that it has a “compelling interest” in preventing its cities from conveying messages that express white supremacy. Professors Schwartzman and Tebbe contend that the government—state and local—is “prohibited from conveying messages that denigrate or demean racial and ethnic minorities.”²⁶⁹ Thus, the state could argue that because local governments are also state organs, and not private corporations, it has a substantial, compelling interest—perhaps even duty—to eradicate such “messages of African-American inferiority.”²⁷⁰ Indeed, Judge Posner reminds us in *Creek v. Westhaven*, “[s]peech by government, even when not cast in the form of a command . . . cannot be equated for all purposes to speech by an individual. It remains an official act, and when its purpose and tendency are . . . to promote discrimination that violates the Fourteenth Amendment, so too does the act.”²⁷¹

Another example arises in the context of municipal spending on ballot campaigns. Although I think that prohibiting cities from spending funds on ballot campaigns would be unjustified since it is too overbroad, I tend to agree with the Massachusetts high court that the state could argue a compelling interest in “assuring the fairness of elections and the appearance of fairness in the electoral process.”²⁷² The state, however, would need to factually

Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). See also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1997).

²⁶⁶ Nor does this Article offer new ways of determining whether the governmental means were “narrowly tailored.”

²⁶⁷ See Douglas, *supra* note 241, at 563–64.

²⁶⁸ One such compelling state interest might be, e.g., maintaining the integrity of the electoral process, as I have already explained. See *infra* notes 243–46 and accompanying text.

²⁶⁹ Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017), <https://slate.com/news-and-politics/2017/08/charlottesvilles-monuments-are-unconstitutional.html>, archived at <https://perma.cc/R83Y-TLJV>.

²⁷⁰ *Alabama v. City of Birmingham*, No. CV 17-903426-MGG, at *3, *6 (Cir. Ct. of Jefferson Cty., Ala. Jan. 14, 2019).

²⁷¹ *Creek v. Village of Westhaven*, 80 F.3d 186, 193–94 (7th Cir. 1996).

²⁷² *Anderson v. City of Boston*, 380 N.E.2d 628, 638 (Mass. 1978).

prove that there is a real risk to the fairness of the ballot measure, and devise a narrowly tailored means less extreme than prohibiting municipal spending altogether. It could, for example, limit the amount of municipal spending, require spending to be authorized by a large majority in the city council, or impose equalizing measures to prevent undue political influence by some localities.

3. *City Speech Might Be Used to Advance Discriminatory Expressions*

One last concern which this Article addresses is that, once First Amendment protection is given to city speech, it will also protect discriminatory positions and expressions made by cities. Providing cities with First Amendment immunity for racist, homophobic, or misogynistic expressions that they make contradicts one of the most fundamental expectations we have for our government. Indeed, we expect our government to disavow racist and discriminatory positions, even when made by private entities,²⁷³ rather than to make them behind the shield of the First Amendment.

The case of *Creek v. Village of Westhaven*²⁷⁴ demonstrates the danger that city speech might pose to minorities and the protection it might give to racist expressions. Westhaven Village was an all-white suburb that was sued for damages by a real estate developer, Fred Creek, after the suburb delayed and obstructed a plan approved by HUD to build a 216-unit apartment complex in the Village.²⁷⁵ Mr. Creek's argument, which the Seventh Circuit affirmed, was that the motive for the Village's refusal to give the building permit was racial, since forty percent of the units in the complex were to be supported by federal rental aid.²⁷⁶ The Village tried to establish First Amendment immunity for its campaign—made through letter-writing and suing HUD in an attempt to forestall and cancel the project—in order to reject the developer's claim that he was entitled to damages. This demonstrates precisely the risk that local governments might use their free speech rights to promote exclusionary, sometimes racist, positions, and then escape responsibility. Although Judge Posner was open—or at least not hostile—towards the idea that cities could enjoy First Amendment rights,²⁷⁷ he rejected its concrete application to this case, refusing to grant the village immunity, explaining that this would be an abuse of the idea of city speech:

²⁷³ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 378–80 (1967); *Sherman v. Community Consolidated School District 21*, 8 F.3d 1160, 1168 (7th Cir. 1993).

²⁷⁴ 80 F.3d 186 (7th Cir. 1996).

²⁷⁵ *Id.* at 188.

²⁷⁶ *Id.* at 188–89.

²⁷⁷ “Nor is it out of the question that a municipality could have First Amendment rights. . . . The question is an open one in this circuit, and we do not consider the answer completely free from doubt.” *Id.* at 192–93.

Even if municipalities do have First Amendment rights, . . . we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on grounds of race. . . . Speech by government, even when not cast in the form of a command, . . . cannot be equated for all purposes to speech by an individual. It remains an official act, and when its purpose and tendency are, as alleged here, to promote discrimination that violates the Fourteenth Amendment, so too does the act. A contrary conclusion would permit government to undermine the duties that the Constitution imposes upon it and would thus be infected by the same vice that has persuaded judges not to allow a municipality to use the Fourteenth Amendment as a shield against the state that has created and under state law controls it.²⁷⁸

Through this elaborate rejection of the application of the First Amendment to the case, Judge Posner rebutted the concern expressed in this section: it is crucial to realize that granting speech rights to cities will not release them from other constitutional restraints, including the Equal Protection, Due Process and Establishment Clauses. A particular city expression might be substantively good or bad, palatable or provocative; but it may not be seen as an individual speech right, as it still remains a governmental expression. Thus, while having the unique potential to give voice to excluded minorities and opinions, city speech is also limited by constitutional provisions that prohibit cities—like other governments—from expressing or endorsing discriminatory positions.

* * *

The considerations against granting cities free speech rights are important, and I do not wish to downplay them. But they should not prevent cities from having the general and principled constitutional protection to speak freely. Indeed, despite the costs that might accompany a constitutional protection for city speech, interpreting the First Amendment to provide such protection is most aligned with the Amendment's fundamental purposes and to the crucial roles that local governments play within our constitutional structure. It is also an attractive solution to many of the problems plaguing our state-local relationships.

²⁷⁸ *Id.* at 193–94. Despite his sympathetic position concerning the right-bearing capacity of municipalities, Posner casts doubt on the ability of municipalities to raise constitutional claims against their own states, based on a line of cases that reads *Hunter v. Pittsburgh* to lay down a standing rule. But as I argue below, *Hunter* makes very little sense as a rule about standing, since in many cases, including *Romer v. Evans* and *Seattle School District No. 1*, cities have brought claims against their own states, and the Court has ruled on the merits. *Infra* Part IV.D.

IV. THE DOCTRINAL PATH FOR FIRST AMENDMENT PROTECTION FOR CITY SPEECH

I now turn to the doctrinal plausibility of granting local governments First Amendment rights. Can the First Amendment be construed to include city speech within its reach, and can cities use this right against their own states? In this Part, I pave the way for granting such free speech rights to cities by establishing three main arguments. First, there is no compelling Supreme Court precedent that specifically denies cities free speech rights, and federal and state caselaw is ambivalent about this issue. Second, I show that local governments enjoy a unique status in American law, and they are unlike any other type of government: they are simultaneously governments as well as corporations, democratically elected and separately incorporated.²⁷⁹ From this dual status arise two conclusions: first, cities can and in fact do possess certain constitutional rights; and second, and more specifically, they can possess a free speech constitutional right.²⁸⁰ The third argument is that cities can raise a constitutional claim, including a First Amendment claim, against their own states. This is true, despite the long shadow of *Hunter v. Pittsburgh*,²⁸¹ where the Court ruled that cities are creatures of their states, and thus supposedly deprived of any substantive or procedural constitutional standing against their states.²⁸² I show that reading *Hunter* too broadly—as if it set a procedural rule of standing or a substantive rule denying cities all constitutional status—is a mistake, and the case should instead be construed as allowing courts to grant cities speech rights *against their states*. After establishing the plausibility of recognizing a First Amendment claim of cities against their states, I deal with the apparent problem of “compelled speech” that might arise from the fact that many local taxpayers might disagree with certain municipal expressions.

²⁷⁹ See *supra* Part II.A.

²⁸⁰ This is also the case because of the quick evolution of the government speech doctrine. Indeed, the “nascent doctrine” of government speech has become increasingly popular, allowing governmental units at all levels of government to advance their positions and policies without being blocked by various First Amendment claims by private parties. This doctrine also has been used widely when municipalities have been sued. See, e.g., *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 287 (4th Cir. 2008); *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006); *Cook v. Baca*, 12 F. App’x *640, *641 (10th Cir. 2001); *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501, 504 (10th Cir. 1983); *Adams v. Maine Mun. Ass’n*, No. 1:10-CV-00258-JAW, 2013 WL 9246553, 18–19 (D. Me. Feb. 14, 2013); *Ala. Libertarian Party v. City of Birmingham*, 694 F. Supp. 814, 818–21 (N.D. Ala. 1988); *Kromko v. City of Tucson*, 47 P.3d 1137, 1141 (Ct. App. Ariz. 2002); *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 805 (Del. Ch. 2015); *Peraica v. Riverside-Brookfield High Sch. Dist. No. 208*, 999 N.E.2d 399, 407–09 (App. Ct. Ill. 2013); *Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311, 323–27 (Md. 2016); *Carter v. City of Las Cruces*, 915 P.2d 336, 338–40 (Ct. App. N.M. 1996); *Burt v. Blumenauer*, 699 P.2d 168, 175 (Or. 1985).

²⁸¹ 207 U.S. 161 (1907).

²⁸² *Id.* at 178–79.

A. *No Clear and Authoritative Rule Denying Free Speech Rights to Cities*

Surprisingly, the Supreme Court has never explicitly ruled on whether cities are entitled to First Amendment protection against their own states. Rather, both federal and state courts have oscillated, mostly in dicta and rarely in holding, between denying this option and embracing it as plausible or even warranted.²⁸³ This ambiguity stands in contrast to the unequivocal and uniform denial of First Amendment protection to the federal government by the Supreme Court and other courts.²⁸⁴ This broad denial of speech rights to governments was sometimes construed—matter-of-factly and without much discussion—to include local governments. These interpretations reflect a dominant view—but surely not the only or the correct view—that cities are mere creatures of the state, and thus if the state and its agents cannot bear free speech rights, neither can cities.²⁸⁵

1. *No Clear Supreme Court Precedent*

Although no Supreme Court decision has recognized cities as protected by the First Amendment, the Court has specifically refrained from denying them First Amendment rights. Indeed, in the two cases where this question was presented, the Court left open the possibility that cities could be entitled to First Amendment rights. In the first case, *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employ't Relations Comm'n*,²⁸⁶ a teachers' union filed a complaint with the Wisconsin Employment Relations Commission, claiming that a school board—a local government for our purposes—had committed a prohibited labor practice by permitting a teacher to speak in opposition to an agency shop proposition at a public school board meeting.²⁸⁷ The school board claimed that it had a First Amendment right to hear the nonunion teacher.²⁸⁸ Although the case was decided on other grounds²⁸⁹ the Court addressed the First Amendment claim.²⁹⁰ Rather than flatly denying that such a speech right could exist for a local government, the Court explicitly reasoned, “[w]e need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees.”²⁹¹ Thus, although *City of Madison* deals with a First Amend-

²⁸³ See *infra* Part IV.A.

²⁸⁴ See *Colum. Broad. Sys. v. Dem. Nat'l Comm.*, 412 U.S. 94, 156 (1973) [hereinafter CBS]. For a detailed account of the sway of CBS, see Fagundes, *supra* note 51, at 1641–43.

²⁸⁵ See *supra* note 15.

²⁸⁶ 429 U.S. 167 (1976).

²⁸⁷ *Id.* at 169–70.

²⁸⁸ *Id.* at 172.

²⁸⁹ The primary ground for the Court's ruling was that the Board's decision to let the teacher speak was during a public hearing, and the board was obliged to hear all speakers. *Id.* at 174–76.

²⁹⁰ *Id.* at 175 n.7.

²⁹¹ *Id.*

ment right of the city as a listener—rather than as a speaker—the fact remains that the Court did not deny any First Amendment claim by a local government and left the issue explicitly undecided.²⁹²

The second case in which the Court had to address the question directly—yet eventually refrained from ruling one way or the other—was decided only a month later. In *City of Boston v. Anderson*,²⁹³ the Court was asked to grant a writ of certiorari and a stay order on the Massachusetts Supreme Judicial Court’s decision to prohibit Boston from funding a ballot campaign on property tax reform.²⁹⁴ In *Anderson v. Boston*,²⁹⁵ the Massachusetts court enjoined Boston from spending any city funds, allowing any city employee to devote any time or service, or allowing any person to use any city resources in its attempt to convince Massachusetts voters to reject a ballot proposition that would change the classification of real property for taxation purposes.²⁹⁶ The vote was extremely important since it threatened to shift the taxation burden from business owners to regular residents, and Boston opposed it vehemently.²⁹⁷ The Supreme Judicial Court prohibited Boston from spending any money on the campaign, but it did so without specifically ruling out that cities could ever have First Amendment rights.²⁹⁸ Instead, it deferred the federal constitutional question to another time, ruling that Boston was simply not authorized to spend money on such a campaign opposing the proposed tax reform, especially given the importance of the integrity of the electoral process.²⁹⁹

Although the Supreme Court ultimately refused to grant certiorari, the various decisions it handed down along the way revealed strong disagreement among the justices about whether cities had First Amendment rights. In his opinion denying a motion to vacate the stay order, Justice Brennan demonstrated a favorable attitude towards Boston’s claim that funding the campaign was part of its First Amendment-protected political speech. Indeed, the tone of his decision and the remarks he made reveal that his attitude was based on the unique position of the locality as representing residential rather than business interests:

In my view the balance of the equities favors the grant of the application. In light of *Bellotti*, corporate industrial and commercial opponents of the referendum are free to finance their opposition.

²⁹² *Id.*

²⁹³ 439 U.S. 1389 (1978).

²⁹⁴ *Id.* at 1389.

²⁹⁵ 380 N.E.2d 628 (Mass. 1978).

²⁹⁶ *Id.* at 641.

²⁹⁷ See Bowie, *supra* note 196, at 974.

²⁹⁸ See *Anderson v. Boston*, 380 N.E.2d at 636 (“We abstain from expressing the issue before us in terms of whether a municipality ‘has’ First Amendment rights and what the scope of those rights may be.”). The Massachusetts Supreme Judicial Court ruled that Boston could not base its appropriation of funds for ballot campaigns on its free speech rights, since the city is a political subdivision of the state, and the state can decide not to talk. *Id.* at 637.

²⁹⁹ *Id.* at 638.

On the other hand, unless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required *in the interests of all taxpayers, including residential property owners*. . . . I am also of the view that at least four Members of this Court will vote to grant plenary review of this important constitutional question.³⁰⁰

In an exceptional move, however, three Justices—Stevens, Stewart, and Rehnquist—made public their dissent from Brennan’s decision to uphold the stay order. In a brief opinion, the justices expressed their disdain for the “frivolous” suggestion that “the First Amendment, or any other provision of the United States Constitution,” empowers the Court, to “interfere with [the state’s] determination . . . to bar its various subdivisions from expending funds in contravention of [the state’s decision].”³⁰¹ The split within the Court around this issue became apparent as the writ was finally denied, with only three Justices—Brennan, Blackmun, and Powell—noting “probable jurisdiction” and that they would have granted right to appeal.³⁰² Nikolas Bowie explains that the grounds cited for the denial of certiorari—want of a “substantial federal question”³⁰³—was based on mootness, rather than on the merits.³⁰⁴ Except for these two cases, the possibility that cities could have First Amendment protection has never been discussed directly by the Court, thus leaving the door open for other courts throughout the country to recognize First Amendment rights for cities.³⁰⁵

³⁰⁰ Anderson, 439 U.S. at 1390-91 (emphasis added).

³⁰¹ City of Boston v. Anderson, 439 U.S. 951, 952 (1978).

³⁰² City of Boston v. Anderson, 439 U.S. 1060 (1978).

³⁰³ *Id.* at 1060.

³⁰⁴ See Bowie, *supra* note 196, at n.313 and accompanying text (citing an email from Professor Laurence Tribe, who represented Boston in the appeal). Bowie explains, “In the early 1990s, after Justice Brennan retired from the Supreme Court, he and Tribe co-taught a seminar at the University of Miami Law School. Tribe recalls ‘that he confirmed my hunch that the Court’s final ruling was based on mootness.’” *Id.*

³⁰⁵ The closest that the Court has come to such discussion in recent years is in *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009), where Chief Justice Roberts opined: “Such a decision [i.e., prohibiting local governments as employers from allowing their workers deductions from their payrolls for political activities] is reasonable in light of the State’s interest in avoiding the appearance that carrying out the public’s business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities.” *Id.* at 355. But note that the Court does not discuss the right of the city itself. Indeed, there was no claim that the city’s First Amendment right was infringed; rather, it was the union’s right, as applied to the city’s payroll, that was infringed. That, the Court rejected, since “[t]he First Amendment prohibits government from ‘abridging the freedom of speech;’ it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.” *Id.* For a detailed discussion of *Ysursa*’s meaning, see Bendor, *supra* note 35, at 391, 410 and De Stasio, *supra* note 51, at 1008–12.

2. *Ambivalent Lower Federal and State Caselaw*

The silence of the Supreme Court has allowed lower courts to rule differently on the question of First Amendment protection for municipalities. Even so, only a few cases explicitly raise the question whether local governments deserve the protection of the First Amendment. This sparsity can be attributed to the long shadow of *Hunter*'s "creature of the state" idea, and to the closely related notion that local governments are governments pure and simple—rather than a unique hybrid between government and corporation. These dominant views about local governments, inaccurate as they may be, are then used to justify denying First Amendment rights to cities based on the flawed reasoning that since state and federal governments do not enjoy First Amendment protection, neither do municipalities.³⁰⁶ In this section, I show that the precedents holding that the government does not deserve First Amendment protection are deployed against municipal governments as well. But this overly simplistic application fails to recognize the profound difference between local governments and federal and state governments.

Negative precedents and dicta. The case which clearly set forth the principle that the government cannot enjoy the protection of the First Amendment is *Columbia Broadcasting System v. Democratic National Committee (CBS)*,³⁰⁷ where Justice Stewart squarely announced that "[t]he First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."³⁰⁸ The Court's reason for this sweeping denial was that the "purpose of the First Amendment is to protect *private* expression."³⁰⁹ Although the principle is articulated in broad terms, supposedly encompassing *all* governments—federal, state and local—*CBS* itself involved no local government.³¹⁰ In fact, it hardly involved any government at all; the case dealt with an entirely private broadcast company and the Court rejected the idea that since it received public funding, it should be treated as the government.³¹¹ Therefore, I claim, *CBS* was not originally meant to apply to cities and should not apply to them.³¹² Yet *CBS* has

³⁰⁶ See *Warner Cable Commc'n v. Niceville*, 911 2.Fd 634, 638 (11th Cir. 1990) (discussing competition between a private cable company and a municipal one, ruling that "[w]hen the competing speaker is the government, that speaker is not itself protected by the first amendment. . .").

³⁰⁷ 412 U.S. 94 (1973).

³⁰⁸ *CBS*, 412 U.S. at 139 (Stewart J., concurring).

³⁰⁹ *Id.* at 139 n.7 (emphasis added) (quoting THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970)).

³¹⁰ See generally *id.*

³¹¹ *Id.* at 120–21.

³¹² For David Fagundes—who wishes to expand the First Amendment's protection to all state governments—*CBS* poses a far greater problem. This Article, however, makes a more modest claim: that only local governments should be excluded from *CBS*'s force, because they are different from other governments. See Fagundes, *supra* note 51, at 1642–47.

become the primary precedent for the idea that governments do not enjoy First Amendment protection.³¹³

Note, however, that Justice Stewart contrasted “private” expression with “governmental” expression,³¹⁴ apparently including private corporations on the “private” side of the equation and municipal corporations on the “government” side. Yet, in 1973, when *CBS* was decided, corporations—municipal or private—did not receive the full protection of the First Amendment. What we have now come to accept as a given—that corporations clearly lie within the ambit of the First Amendment—has been a gradual, and rather recent, process.³¹⁵ It is possible, therefore, that the *CBS* Court did not intend to include municipal corporations within the definition of “government,” just as private corporations’ political expression was not yet protected by the First Amendment at the time. Put differently, at the time of *CBS*, private corporations did not enjoy *political* speech rights (only other speech rights), and local governments might have been considered “private” for First Amendment purposes. This might have been the case, given that only a few years later, the Court resolved, in *Bellotti*, that business corporations lie squarely within the realm of the First Amendment—and when this decision came out, it was unclear whether cities belonged to the private side of the equation or whether they were governments pure and simple. Thus, local governments can and should be distinguished from other governments, and *CBS* was not intended to apply to them. As I show later, local governments have long been treated, in various doctrines and for different purposes, as distinct from state and federal governments.³¹⁶

In several federal and state cases, however, *CBS* has been interpreted to apply to municipalities. In these cases—without much discussion—cities are denied the protection of the First Amendment based on *CBS*.³¹⁷ This application is hardly ever justified, and courts do not seriously weigh the option of distinguishing municipalities from other types of governments. They simply

³¹³ See *id.* at 1641–43.

³¹⁴ *CBS*, 412 U.S. at 139 (Stewart J., concurring).

³¹⁵ See Coates, *supra* note 232, at 241, 248 (showing that in the Founding Era, corporations were not seen as beneficiaries of the First Amendment, nor were they seen this way until rather late in the twentieth century). Several cases symbolize this transformation: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Pacific Gas and Electric Company v. Public Utility Commission*, 475 U.S. 1 (1986), and most recently *Citizens United*, 558 U.S. 310 (2010). For a discussion of the significance of these cases see generally Weiland, *supra* note 209.

³¹⁶ Local governments have been denied governmental status in antitrust cases, in sovereign immunity affairs, and elsewhere. See *infra* Part IV.B.1.

³¹⁷ In some of these cases, the denial of First Amendment protection from cities is accompanied by granting cities, at the same time, the weaker and fundamentally different protection of “government speech.” See, e.g., *Warner Cable Commc’n v. Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (ruling that when the city government operated a cable television system—thus becoming a “competing speaker” with private cable providers—it was “not itself protected by the first amendment”).

assume all types of governments are identical, and they apply *CBS* to them with cursory or no analysis.

It is possible that one of the main reasons for this negative line of precedents is the decision of the Massachusetts Supreme Judicial Court in *Anderson v. City of Boston*, and the refusal of the Supreme Court to grant certiorari and review the case on its merits.³¹⁸ *Anderson* was the first case in which a court was confronted with the question of the applicability of the First Amendment to cities—and for good reason. Until then, it was quite unthinkable that municipal corporations would have a political speech right, since not even private corporations bore such an expansive First Amendment right. In 1976, only two years prior to *Anderson* and three years after *CBS*, the Supreme Court recognized for the first time, in *First National Bank of Boston v. Bellotti*, that corporations' First Amendment right also covered their political speech.³¹⁹ And it was only then, when private corporations won their right for political speech, that the mayor of Boston argued that cities could also acquire First Amendment rights.³²⁰ In fact, as Professor Nikolas Bowie only recently demonstrated, *Bellotti* was accepted with great enthusiasm by Boston's mayor, because it was clear to him that, if business corporations won First Amendment rights, so would Boston; after all, cities were corporations, too.³²¹

However, this hope was frustrated. When the Massachusetts high court refused to import the newly established *Bellotti* corporate political speech right to cities, and the Supreme Court refused to review this decision,³²² an implicit assumption—though not a clear precedent—was formed: for purposes of the First Amendment, cities are no different than other governments, and thus are not entitled to First Amendment protection.³²³ What might have helped cement this understanding was the fact that three justices of the Supreme Court, albeit in a dissent to the stay order, took a rather extreme *Hunter*-like position, repeating the position that cities are mere “subdivisions of their state.”³²⁴ This was so, interestingly, despite the fact that the Massachusetts court did not cite *Hunter* even once, and was further willing to hypothesize that even if Boston were to be given First Amendment rights, the state would have had a legitimate interest to restrict it from partic-

³¹⁸ 380 N.E.2d 628 (1978). See discussion *supra* notes 293–300 and accompanying text.

³¹⁹ 435 U.S. 765, 802 (1978).

³²⁰ See Bowie, *supra* note 196, at 949.

³²¹ See *id.* at 969.

³²² *City of Boston v. Anderson*, 439 U.S. 1060, 1060 (1979).

³²³ This implicit assumption, I argue, causes courts to apply *CBS* without much discussion to cities, and it is shared even by some ardent proponents of city power. See, e.g., Schragger, *supra* note 4, at 61, 68.

³²⁴ In their dissent from the stay order that Justice Brennan gave as Circuit Judge, the three justices cited *Hunter* in great length, to make the point 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.” See *City of Boston v. Anderson*, 439 U.S. 951, 952 n.2 (1978).

ipating in ballot campaigning.³²⁵ Either way, both courts viewed a decision by Massachusetts to prohibit its cities from saying something—in this case, from funding a campaign against a statewide ballot initiative—as equal to the state’s decision not to say something by itself.³²⁶

However, despite the hostility to the idea that a city can express itself against the will of the state—“its creator”—Judge Wilkins of the Massachusetts court clearly refused to set a precedent on whether the city generally has a First Amendment right:

We abstain from expressing the issue before us in terms of whether a municipality ‘has’ First Amendment rights and what the scope of those rights may be. . . . In other words, [the question is whether] speech of the character involved here, expressed by a political subdivision of a State, [is] speech which the First Amendment was intended to protect?³²⁷

Despite the cryptic nature of the court’s argument, it can be read as clearly refusing to make an unequivocal statement against cities possessing any First Amendment rights. Rather, it seems to suggest that, because Boston is a creature of the state, Massachusetts can decide (a) what it wants to say (through its organs, i.e., cities), and (b) to prohibit its cities from funding campaigns in contravention of the state’s policies.³²⁸ This careful formulation is very different from squarely denying the city any free speech rights. Indeed, the court continued to entertain the possibility that cities could be entitled to free speech by discussing what should happen in this case even if the city had been granted free speech rights. In discussing this possibility, the court found that the city’s speech right could be infringed through “a State-imposed restriction” due to the existence of a “substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process.”³²⁹ Note that the Massachusetts court took the same route I have previously offered³³⁰: that granting First Amendment rights to cities does not mean they can engage in any political speech that they desire. Instead, in various cases, narrowly tailored state restrictions would be permissible due to the existence of a compelling state interest.

In conclusion, it is possible that, even considering *Anderson*, cities could have First Amendment rights, if not against their states then perhaps

³²⁵ *Anderson v. Boston*, 380 N.E.2d at 637–38.

³²⁶ *Id.* at 637.

³²⁷ *Id.* at 636–37.

³²⁸ *Id.*

³²⁹ *Id.* at 637–38. (“In this phase of the analysis we assume that the expenditure of municipal funds to promote adoption of the classification amendment involves expression protected by the First Amendment, and we conclude that a State-imposed restriction of such an expenditure survives the exacting scrutiny . . . as ‘the Commonwealth has substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process.’”).

³³⁰ See *supra* Part III.A.

against other entities (such as the federal government or other cities) or perhaps when the municipal expression does not threaten the fairness of the electoral process. And *Anderson* clearly demonstrates the profound ambivalence—rather than uniform hostility—that the idea of city speech stirred from the beginning.

Positive precedents and dicta. Parallel to these supposedly negative precedents, there is a competing current, which is more than willing to entertain the option of interpreting the First Amendment so that it would encompass city speech. The Seventh Circuit’s *Creek v. Village of Westhaven*³³¹ dealt most thoroughly with the idea that localities could have First Amendment protection. In fact, Judge Posner’s opinion in *Creek* is the only federal court decision in which this idea was not summarily rejected, but instead addressed in an elaborate manner.³³² After reaching the conclusion that the question of municipal First Amendment rights had barely been addressed by courts,³³³ Posner reasoned that it was “[not] out of the question that a municipality could have First Amendment rights” despite a small number of negative rulings.³³⁴ Although his conclusions were mere dicta, as the case was decided on other grounds, he went on to write that:

[T]o the extent . . . that a municipality is the voice of its residents . . . a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents. 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.³³⁵

A few years earlier, in 1989, a district federal court ruled in *County of Suffolk v. Long Island Lighting Co.*³³⁶ that the County of Suffolk, a municipal corporation, had a First Amendment right “to speak and act in opposition to” a nuclear power plant it believed posed danger to its residents. The view of the locality that the plant represented a danger to its residents, the court explained, “may be expressed in exercising its power to petition any agency of government including the legislature, administrative agencies and the courts.”³³⁷ And the reason that the locality can express itself in such ways is that “[a] municipal corporation, *like any corporation*, is protected under the First Amendment in the same manner as an individual.”³³⁸

Although *County of Suffolk* focused on the right of cities to petition administrative agencies, the court generalized it by equating the First

³³¹ 80 F.3d 186 (7th Cir. 1996). See *supra* note 209 and accompanying text.

³³² *Id.* at 192–94.

³³³ *Id.* at 192–93.

³³⁴ *Id.* at 192.

³³⁵ *Id.* at 193.

³³⁶ 710 F. Supp. 1387 (E.D.N.Y. 1989).

³³⁷ *Id.* at 1390.

³³⁸ *Id.* (emphasis added).

Amendment right of municipalities to that of “any corporation,” explicitly relying on *Bellotti*, where corporations were given the expansive right for political speech.³³⁹ The justified connection that the court made between the right to freely speak and the right to petition the government (both included in the First Amendment) highlights the importance of city speech: First Amendment protection of city speech can be seen as an important corrective to the erosion of municipal petitioning over the past century.³⁴⁰ As Maggie McKinley recently observed, until some seventy years ago, “petitions provided the primary mechanism by which Congress identified the need for improvements, as cities, localities, and occasionally associations of individuals and merchants petitioned Congress for improvements in their areas.”³⁴¹ It was thus an important vehicle through which cities, towns, and localities were able to express their views and influence government.³⁴² This recent history points to the normative desirability and interpretative possibility of reading the First Amendment as protecting city speech. And, given the deterioration of vibrant municipal petitioning,³⁴³ protecting city speech is indeed required.

Given the conclusory application of *CBS* to municipalities, it is telling that courts are struggling to decide if municipal speech is protected by the First Amendment, even if they fall short of expressly granting cities First Amendment protection as in *Creek and County of Suffolk*. The Ninth Circuit’s decision in *Environmental Defense Center, Inc. v. E.P.A.*³⁴⁴ demonstrates this ambivalence towards First Amendment rights to cities: while the court did not grant local governments a free speech protection, it also refused to address the EPA’s claim that “municipalities do not receive full First Amendment protections.”³⁴⁵ Likewise, state courts have ruled differently on the matter, expressing ambivalence and lack of clarity concerning the prospect of granting First Amendment protection to cities.³⁴⁶

³³⁹ Indeed, as Adam Winkler shows, prior to the decisions of the Court from the 1970s and 1980s, business corporations were not given free speech rights. See Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 867 (2007).

³⁴⁰ See *supra* Part I.A.

³⁴¹ Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1595–96 (2018) (“Petitions included requests for construction of navigation aids, like lighthouses, fog signals, and beacons; the designation of ports of entry to administer duties and tariffs; and improvement of the nation’s waterways with channels, bridges, and ports.”).

³⁴² *Id.*

³⁴³ *Id.* at 1570.

³⁴⁴ 344 F.3d 832 (9th Cir. 2003).

³⁴⁵ *Env’t Def. Ctr. v. E.P.A.*, 344 F.3d 832, 849 n.23 (2003) (refusing to address the EPA’s argument that this conclusion is required based on *Muir v. Ala. Educ. Television Comm.*, 688 F.2d 1033 (5th Cir.1982)).

³⁴⁶ The courts friendliest to this idea have been California’s, although they too have fluctuated in their position. See, e.g., *Stanson*, 17 Cal.3d 206, 218 (1976); *Nadel v. Regents of Univ. of Cal.*, 34 Cal. Rptr. 2d 188, 197 (Cal. Ct. App. 1994) (“[I]t is appropriate to extend the limited First Amendment protection of the New York Times standard to government speech.”); *Bradbury v. Superior Court*, 57 Cal. Rptr.2d 207, 49 Cal. App. 4th 1108, 1116 (Cal. Ct. App. 1996) (discussing the *Nadel* case and noting that “[t]he same First Amendment principle applies here”); *Schaffer v. City and County of San Francisco*, 85 Cal. Rptr. 3d 880, 888, (Cal.

* * *

While Professor David Fagundes labels the negative precedents I presented as the “majority rule”³⁴⁷ and the more positive precedents as the “dissent” from this rule,³⁴⁸ I view these outcomes differently. Fagundes is examining the possibility to grant First Amendment rights to government actors generally, lumping together state and local governments in this broad category, without taking into account the specific traits or unique legal status of local governments in American law.³⁴⁹ Hence, his purported majority rule, which for him is a “categorical denial of First Amendment protection for government speech,” is based on cases dealing with the federal or state governments, not with local governments.³⁵⁰ As I have shown, once we look more closely at local entities, courts are much more ambivalent, even sympathetic, to the idea of recognizing local entities as First Amendment speakers.³⁵¹

Two key legal principles explained below would help overcome courts’ ambivalence. First, local governments are hybrids between a government and a corporation, and they have been recognized as bearers of constitutional rights. Second, more concretely, the First Amendment can apply to cities. After elaborating on these principles, I turn to the final step in securing an effective First Amendment right for cities: their ability to sue their own states.

B. *Local Governments are a Hybrid between Government and a Corporation*

Since colonial times, local governments have been defined—historically, politically, and legally—as municipal corporations. They are both governments and corporations, a unique combination of a public and a private entity, of state agents and democratic associations.³⁵² Numerous schol-

Ct. App. 2008) (“[G]overnmental entities and their representatives do enjoy First Amendment protections in regard to statements they make on matters of public concern.”); *Vargas v City of Salinas*, 205 P.3d 207, 216 (2009) (“Whether or not the First Amendment of the federal Constitution or article I, section 2 of the California Constitution directly protects government speech in general or the types of communications of a municipality that are challenged here—significant constitutional questions that we need not and do not decide”). Only recently, courts in Alabama also declared a First Amendment right to city speech. *See Alabama v. City of Birmingham*, CV 17-903426-MGG *3 (Cir. Ct. of Jefferson Cty., Ala. Jan. 14, 2019); *supra* notes 160–165 and accompanying discussion.

³⁴⁷ Fagundes, *supra* note 51, at 1641–43.

³⁴⁸ *Id.* at 1643–47.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 1641 (describing *CBS*, where the Court ruled that government entities such as Columbia Broadcasting Service could not claim the protection of the First Amendment).

³⁵¹ Indeed, Josh Bendor (more abstractly on the general issue of constitutional rights) and Matthew De Stasio (more concretely on the right to distribute information gathered by body cameras) reach a similar conclusion to mine: that the doctrine is ambiguous enough to leave open the room for such First Amendment recognition. *See Bendor, supra* note 35, at 425; De Stasio, *supra* note 51, at 979, 983.

³⁵² *See Frug, supra* note 59, at 1109–19.

ars have described the process by which cities gradually lost their corporate powers and privileges and became the long arms of their states.³⁵³ Yet cities still remain a hybrid entity with both public and corporate traits.

Until the nineteenth century, American law made no distinction between what we understand today to be private corporations and those we label public ones. All of them—business corporations, counties, cities, and towns—were thought of in the same way.³⁵⁴ However, the emergence of the private/public divide as a significant theoretical distinction in liberal thought caused a set of legal ramifications. Among them was the schism between municipal corporations—which from the middle of the nineteenth century were understood to be public, state-like, devoid of rights and “creatures of their states”—and private corporations that slowly began acquiring the privileges and protections previously given only to individuals.³⁵⁵ Yet despite the seemingly impenetrable wall that currently separates public corporations from private ones, and despite the dominance of the creature of the state doctrine, municipal corporations still retain their independence from their states, and they still bear various similarities to private corporations.

This separateness manifests itself doctrinally. Cities enjoy a separate corporate and associational status in American law, and they possess rights. Scholars have tried to capture the unique status of local governments in American law by describing it as hybrid,³⁵⁶ dual,³⁵⁷ ambivalent,³⁵⁸ or

³⁵³ See, e.g., Frug, *supra* note 59, at 1095–1119; Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 579–85 (2018). See generally, HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1982).

³⁵⁴ The most famous of the cases articulating the newly formed distinction is the 1819 case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (explaining that private associations were different than public ones, in that the former were embodiments of their members and hence deserving the same protections, while the latter were created by the government and thus fully belonged to it). See Frug, *supra* note 59, at 1100–04. Indeed, what we today perceive as “public” corporations and “private” ones were all corporations, and their existence, powers, privileges and immunities were dependent on and enumerated in a charter (in the beginning by the King, later by the state), or a statute. See *id.* No distinct set of legal rules or principles applied to each of these types of corporations, and the clear dichotomy between “public” corporations and “private” ones did not exist prior to the nineteenth century. See *id.*

³⁵⁵ It was only during the nineteenth century that political theory and legal doctrine created a division between business corporations on the one hand and public ones on the other hand; until that time, all corporations were all as identical in principle. See Frug, *supra* note 59, at 1099; Schanzenbach & Shoked, *supra* note 353, at 579–80. Famously, Justice Cardozo concluded 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.” *William v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933). See generally WINKLER, *supra* note 43; Frug, *supra* note 59, at 1105–08.

³⁵⁶ Schragger, *supra* note 4, at 60 (“This vulnerability is a function of the city’s—all cities’—liminal status in American law. Cities are state actors, but without the real power of the state.”).

³⁵⁷ Schanzenbach & Shoked, *supra* note 353, at 573 (“The law thus conceives of the city as an entity of a dual nature: a public entity that can, in certain circumstances, be treated as private.”).

oscillating.³⁵⁹ This fluctuation between viewing cities on the one hand as creatures of the state, administrative conveniences,³⁶⁰ and governments, and on the other hand as autonomous corporations, self-governing associations, and democratic representatives, lies at the heart of local government doctrine, and manifests itself in often-conflicting doctrines and precedents.³⁶¹

1. *Doctrines Demonstrating the Non-State Aspect of Cities*

Various doctrines demonstrate the non-state character of cities. Such doctrines include: the deprivation of state immunities from local governments;³⁶² the venerable status given to local democracy—nothing of that sort exists in any other “creature” or “long arm” of the state;³⁶³ the public trust doctrine that places various duties on cities that are usually put only on private entities and not on governmental ones;³⁶⁴ and the refusal to attribute past unconstitutional conduct by municipalities to the state for the purposes of

³⁵⁸ Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 397 (2002) (“*Bush v. Gore* reflects a legal culture that is ambivalent about local government . . .”).

³⁵⁹ Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1846 (1994) (“Two competing normative analyses mirror the doctrinal oscillation between the conception of local governments as agents of state power and the conception of local governments as self-validating political communities.”).

³⁶⁰ This idea means that local governments were created by the state for administrative purposes only, as an administrative branch of the state, for the state’s own purposes.

³⁶¹ See Briffault, *supra* note 71, at 85; Ford, *supra* note 359, at 1886; Frug, *supra* note 59 at 1108–09.

³⁶² This deprivation includes antitrust and sovereign immunity (of the Eleventh Amendment). See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (discussing whether Port Authority could be classified as a state agency for Eleventh Amendment purposes and reiterating that “ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates”); *Cnty. Comm’n Co. v. City of Boulder*, 455 U.S. 40, 52–57 (1982) (holding that the city of Boulder could be liable for antitrust violations based on anti-competitive conduct that resulted from municipal ordinance that prohibited a cable company from expanding its operations); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979) (“[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities . . .”); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 36–37 n.31 (1983) (claiming that there are many cases which “exalt the privileges of local governments, sometimes to the point of giving them rights to legislate, that states would lack because of their uneven effects on states’ residents”). Although exposing local governments to antitrust claims might seem to be weakening them—and it was indeed presented, and rightfully so, as another sign of anti-local bias—it also demonstrates their independence and separateness from their state. See Briffault, *supra* note 71, at 92; see also GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 270–74 (6th ed. 2014).

³⁶³ See Briffault, *supra* note 71, at 103 (“The Court treats local zoning ordinances with the deference normally accorded state laws and has broadly sustained local authority to wield the zoning power to shape the economic and social features of local communities.”).

³⁶⁴ See Schanzenbach & Shoked, *supra* note 353, at 585–93 (analyzing the city’s duties as property owner, including fiduciary obligations and the public trust doctrine).

Section 5 of the Fourteenth Amendment.³⁶⁵ Below are examples of two doctrines that treat local governments as non-state actors.

The Eleventh Amendment. Take, for example, the deprivation of the Eleventh Amendment's sovereign immunity protection from cities. In the late nineteenth century, the Court had already decided that, although states enjoy protection from private suits under the Eleventh Amendment, cities should not be accorded the same immunity.³⁶⁶ The reason that cities should be treated differently, Justice Brewer explained, was that "the county is territorially a part of the state, yet *politically it is also a corporation*. . . . [I]t is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state."³⁶⁷ The persistence of this doctrine to this day exhibits courts' continuing acknowledgment of the duality of the municipal corporation. Notwithstanding cities' status as creatures of the state, cities still retain, albeit inconsistently and ambivalently, their separateness from the state. Thus, what is unimaginable for other arms of the state—that they would be deprived of the protection of the Eleventh Amendment—is not only conceivable but also the actual outcome for cities.³⁶⁸

Section 5 of the Fourteenth Amendment. The lack of sovereign immunity for cities has affected the doctrine regarding when Congress can use its power to legislate based on Section 5 of the Fourteenth Amendment.³⁶⁹ Section 5 empowers Congress to enforce the Fourteenth Amendment, including through legislation that permits private suits against the government, which is usually immune from private suits based on the Eleventh Amendment. To trigger its Section 5 authority, Congress is required to demonstrate past unconstitutional state conduct.³⁷⁰ Therefore, an important question is occasionally raised: does past *municipal* behavior count as "state conduct" for the purposes of Section 5? Courts have struggled with this question. On its face, if cities are viewed as creatures of the state, their actions should be considered state conduct; specifically, if the state controls its political subdivisions without limitations, and these subdivisions demonstrate a pattern of constitutional violations, federal intervention is warranted as if it were the state itself

³⁶⁵ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–69 (2001) (explaining that unconstitutional discrimination extends only to States themselves, as only States are beneficiaries of the Eleventh Amendment, and not to units of local governments, such as cities and counties (state actors)). Cf. *Tennessee v. Lane*, 541 U.S. 509, 513–27 (2004). For further discussion see FRUG, FORD & BARRON, *supra* note 362, at 270–72.

³⁶⁶ See *Lincoln Cty. v. Luning*, 133 U.S. 529, 530–31 (1890); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 756 (1978); Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 596–98 (1994); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 58 (1990).

³⁶⁷ *Luning*, 133 U.S. at 530 (emphasis added).

³⁶⁸ See, e.g., *Stewart v. Baldwin Cty. Bd. of Educ.*, 908 F.2d 1499, 1509–10 (11th Cir. 1990); *Weaver v. Madison City Bd. of Educ.*, 947 F. Supp. 2d 1308, 1324 (N.D. Ala. 2013).

³⁶⁹ U.S. CONST. amend. XIV, § 5.

³⁷⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

that demonstrated such behavior. Yet, in the application of Section 5, we encounter once again the lack of full identification between the state and its local governments, a mismatch which prevents the Court from attributing past municipal conduct to the state. In *Board of Trustees of the University of Alabama v. Garrett*,³⁷¹ the Court explained that the refusal to activate Section 5 based on municipal conduct stemmed from the fact that cities are already exposed to civil liability, as they are deprived of sovereign immunity:

[T]he Eleventh Amendment does not extend its immunity to units of local government. These entities are subject to private claims for damages under the ADA It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.³⁷²

The dissent was quick to point to the fact that “local governments often work closely with, and under the supervision of, state officials, and in general state and local government employers are similarly situated,” thus it would make a lot of sense to view past patterns of local government action or inaction as indications for triggering Section 5 legislation.³⁷³ In a more recent case, *Tennessee v. Lane*,³⁷⁴ the Court was willing to view violations made by cities as basis for congressional legislation.³⁷⁵ The majority ruled that Congress was justified in legislating parts of the Americans with Disabilities Act, allowing individuals to sue their states for denial of services, because it had enough evidence that fundamental rights such as the right to access the court were being infringed—in part by local governments.³⁷⁶ Despite this greater willingness to attribute local conduct to the state, the Court stressed the fact that its ruling was limited to “the provision of judicial services, an area in which local governments are typically treated as ‘arms of the State’ for Eleventh Amendment purposes.”³⁷⁷ It is therefore likely that in areas where localities are not treated as “arms of the state,” the separateness of municipal entities would still inform the jurisprudence of Section 5. Thus, even after *Lane*, municipal action or inaction might not be attributed to the state for the purposes of Section 5.

Although some of these doctrines are hostile to local power while others are more sympathetic to it, all of them go against the notion that cities are state-like, and that local governments are mere creatures of the state, entirely subsumed under the state’s plenary powers. Some of these doctrines

³⁷¹ 531 U.S. 356 (2001).

³⁷² *Id.* at 369 (citations omitted).

³⁷³ *Id.* at 378–79 (Breyer, J., dissenting).

³⁷⁴ 541 U.S. 509 (2004).

³⁷⁵ *Id.* at 517.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 527 n.16.

view cities as closer to private persons,³⁷⁸ while others consider cities to be fully “public.”³⁷⁹ As a leading textbook on local government law recently stated in discussing the oddities of the federal-local relations: “[i]f the state/city distinction is no longer ‘peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity,’ why should cities not be distinguished from states with respect to other federalism protection more generally?”³⁸⁰

This Article shares the tenor of this rhetorical question by arguing that cities *should* indeed be distinguished from states and receive First Amendment protection. If cities are not to be identified as the government pure and simple, then they might be entitled to some constitutional protection. The fact that they are not fully identified with their states further supports the claim that *CBS* was never intended to deprive cities of First Amendment protection. Lastly, the more cities are viewed as corporations rather than creatures of the state, the easier it would be to apply the precedents concerning corporate free speech rights to cities.

2. *Cities Can Have Constitutional Rights*

The fact that local governments are unique hybrid organizations—governments and associations, public and private—has also meant that throughout the years, courts have struggled with the dilemma of whether local governments could also enjoy some constitutional rights. Since the nineteenth century, local governments were recognized as bearers of at least one constitutional right: the right to private property. This property right even served as a shield against state legislative acts that attempted to take or confiscate municipal property. However, this property right was founded on a distinction that courts made between the city as property owner and the city as regulator. While performing its regulatory functions, the city could not enjoy any protections or immunities vis-à-vis the state, as it supposedly functioned as the state’s long arm. Yet, when the city functioned as private property owner, it was entitled to private-like property rights, possibly even preventing the state from telling the city what to do with its property.³⁸¹

Indeed, even in *Hunter v. Pittsburgh*,³⁸² where the Court galvanized the doctrine defining cities as creatures of the state, under the unlimited control of their states, and deserving of no federal constitutional protection, the

³⁷⁸ *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (“For many purposes, for example diversity jurisdiction and Fourteenth Amendment liability, municipalities are treated by the law as if they were persons.”) (citing *Monell v. Dep’t of Social Services*, 436 U.S. 658, 690 (1978); *Moor v. Cty. of Alameda*, 411 U.S. 693, 717–18 (1973)).

³⁷⁹ This is the case with respect to the Establishment Clause, for example.

³⁸⁰ FRUG, FORD & BARRON, *supra* note 362, at 270 (quoting Scalia, J. in *Printz v. United States*, 521 U.S. 898, n.15 (1997)).

³⁸¹ *People ex rel. Bd. of Park Comm’rs v. Mayor of Detroit*, 28 Mich. 228, 240–43 (1873).

³⁸² 207 U.S. 161 (1907).

Court clarified that this unlimited state power does not apply to municipal private property:

[I]n describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such [municipal] corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts . . . and it has been held that, as to the latter class of property, *the legislature is not omnipotent*.³⁸³

Thus, despite the strong statements that the *Hunter* court made regarding the supremacy of the state over its localities—that the state’s “legislative body . . . may do as it will, unrestrained by any provision of the Constitution of the United States”³⁸⁴—the exception for municipal private property ownership still held. Crucially, the Court in *Hunter* stood by the idea (albeit in dicta) that municipalities are bearers of federal constitutional protection, insofar as their private property is concerned. Thus, there is no principled position, in *Hunter* or in subsequent cases, that simply because cities are governments, they can never be entitled to (qualified) federal constitutional protection.

In the years following *Hunter*, some federal courts have expanded the “creature of the state” doctrine, denying cities the ability to raise various Equal Protection, Due Process, and Contract Clause claims against their states. Meanwhile, another line of cases has left at least some of these options open.³⁸⁵ The distinction between municipal private and public property, though blurred, has survived these developments, and with it remained the conceptual and doctrinal possibility for cities to shield themselves from their states when the states infringe on their private property rights.³⁸⁶ This is so,

³⁸³ *Id.* at 179–80 (citations omitted and emphasis added). As the Court implies, John Dillon objected to the distinction between municipal public and private property because he thought it was too ambiguous, dangerously empowering cities and courts. See 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 110 (5th ed. 1911). Indeed, Dillon referred to this distinction as “difficult to exactly define” and said that it gave too much power to judges. *Id.* However, the Court in *Hunter* adopted it, despite the general hostility toward local power that it exhibited. *Hunter*, 207 U.S. at 179.

³⁸⁴ *Hunter*, 207 U.S. at 179.

³⁸⁵ See *infra* Part IV.D.

³⁸⁶ See, e.g., *City of Worcester v. Commonwealth*, 185 N.E.2d 633, 634 (Mass. 1962) (discussing compensation in relation to the taking of land owned and used by municipalities in their public capacity, for the purpose of creating a state highway); *Madison Metro. Sewerage Dist. v. Comm. on Water Pollution*, 50 N.W.2d 424, 436 (Wis. 1951) (“[The Fourteenth Amendment] applies only to property held by a municipality in its proprietary capacity.”); Ralph W. Dau, *Problems in Condemnation of Property Devoted to Public Use*, 44 TEX. L.

notwithstanding the unworkability and incoherency of the attempt to separate the regulatory-public side of cities from their proprietary-private one, which commentators and courts have complained about almost since the distinction's inception.³⁸⁷ Local governments were seen for over a century as possessing the duality of government and of corporation, of public and private, and of regulatory and proprietary. And this duality has also meant that cities were able to enjoy the protection of a federal constitutional right against their own states. While this constitutional protection of property might be an outlier, it demonstrates that not only conceptually but also doctrinally, there is a possibility of granting municipal corporations a constitutional right against their own state.

C. *The Promise and the Problem with the Government Speech Doctrine*

There is also no clear authoritative precedent denying cities the possibility to have First Amendment rights.³⁸⁸ This is so not only because the Court has refused to say so explicitly, but also because the distinct hybrid government-corporate status of local governments could allow them to bear the rights that corporations do.³⁸⁹ This interpretative conclusion is supported by the emergence of the government speech doctrine³⁹⁰ and the value it at-

REV. 1517, 1528 (1966) (analyzing the government/proprietary distinction and its implications for the need to compensate for taking); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 COLUM. L. REV. 1083, 1092-98 (1967) (discussing the protection of public property under state law, the development of the governmental-proprietary distinction and the benefit theory); John M. Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949, 977 (1983) (discussing the proprietary/governmental distinction, specifically that compensation is required only when property is classified as proprietary). For a discussion of the related topic of intergovernmental taking—meaning, takings of state and municipal lands by the federal government, see generally Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989) (criticizing the Court's failure to distinguish between taking of property from public entities to taking property from private parties). Although the duty of the federal government to compensate cities and states when it takes their property is a distinct legal issue, it has some bearing on the topic of municipal rights since the Supreme Court was willing to read the Fifth Amendment to include the property of municipalities and states. In 1984, the Supreme Court galvanized the idea that local governments and states can bear constitutional property rights when it decided, almost matter-of-factly, that "private property" in the Takings Clause should be construed to include municipal property. See *United States v. 50 Acres of Land*, 469 U.S. 24, 31-32 (1984).

³⁸⁷ After all, these two functions cannot be truly distinguished. The city is never a true proprietor, since all its real possession of property is, and has to be, for public purposes. This also puts limits on the purposes for which this property possession is allowed. As Dillon states, "general authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit." See DILLON, *supra* note 383, at 531. Likewise, in order to manage and handle its property in an efficient and rational manner, the city also has to behave like a proprietor. See Schanzenbach & Shoked, *supra* note 353, at 582-83 (describing critiques of the distinction between these two municipal functions by scholars such as Dillon and Seasongood).

³⁸⁸ See *supra* Part IV.A.

³⁸⁹ See *supra* Part IV.B.2.

³⁹⁰ See *supra* notes 44-46, 76-80 and accompanying text.

taches to expressive conduct made by government. In this section, I examine the government speech doctrine in greater depth.

Although the government speech doctrine does not grant cities—or any government—the constitutional protection I seek, it has created space for increased recognition and protection for expressive conduct of cities. Advocates of the government speech doctrine emphasize government speech’s potential to provide information, present a unique point of view, advance government accountability, and amplify silenced voices.³⁹¹ Government speech doctrine is explained as both necessary and ideal. It is necessary because without it, the government could not work.³⁹² It is ideal because it advances First Amendment values and enables the government to advance its democratically legitimate goals, to pursue its agenda, and disseminate and gather information.³⁹³ Without this doctrine, it has been explained, too many governmental activities would have been classified as providing a public forum where government neutrality would be able to function. Despite its ambiguity,³⁹⁴ the growing discussion surrounding the merits and drawbacks of government speech has brought to the fore of judicial discourse the merits of city speech and serves as segue to a full recognition of a constitutional right to city speech. Yet, the more the government speech doctrine evolves, the more it bears the risk that courts will stay within its comforting contours, stopping short of extending cities their much needed First Amendment protection.³⁹⁵ If this remains the case, we leave cities defenseless against their states.

Furthermore, the government speech doctrine has already been applied to a host of municipal activities, ranging from erecting monuments in front

³⁹¹ See De Stasio, *supra* note 51, at 993–96; YUDOF, *supra* note 46, at 38–41.

³⁹² See Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 VA. L. REV. 1 (forthcoming 2019) (criticizing the use of government speech doctrine to silence dissent).

³⁹³ See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 636 (1980); YUDOF, *supra* note 46, at 9–10; De Stasio, *supra* note 51, at 993.

³⁹⁴ See Bezanson & Buss, *supra* note 80, at 1406 (describing the different poles of government speech doctrine interpretations).

³⁹⁵ There seems to be an interesting temporal correlation between the growing acceptance of the government speech doctrine on the one hand, and the failure of courts to grant local (or state) governments First Amendment protection on the other hand. Although it is impossible to make a causal connection between the two, I think that if not for the government speech doctrine, courts would have had a hard time not extending some form of constitutional protection to the government against dissenting parties. What Nikolas Bowie has termed “the government could not work” doctrine—the sometimes exaggerated threat as to what would happen if some legal challenges against the government were accepted—would have forced courts to find some method to reject challenges by disgruntled parties, claiming that their First Amendment rights were infringed by a host of expressive behaviors by the federal, state and local governments. Bowie, *supra* note 392. Either way, the expansion of the government speech doctrine has benefitted federal and state governments more than it has helped municipalities, since the latter—although able to defeat private challenges against some of their expressive conduct—cannot use the doctrine to shield themselves from censoring actions by their states and the federal government. See also Irena Segal Ayers, *What Rudy Hasn’t Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property*, 42 ARIZ. L. REV. 607, 637 (2000).

of city hall,³⁹⁶ to posting policies on municipal internet websites,³⁹⁷ to holding prayers during city council meetings.³⁹⁸ In recent decades, more and more governmental activities have been designated as “government speech” by courts, thus providing them with immunity from heightened judicial scrutiny in cases where private parties argued that their First Amendment rights were infringed by the non-neutral expression of the government.³⁹⁹ Hence, this doctrine is conducive for the evolution of a First Amendment protected city speech right since it clarifies that some city activities should be considered “speech” rather than subject to “forum designation.”⁴⁰⁰ It therefore has the potential to carve a space for city expression that will be protected from state intervention, but only once we grant city speech First Amendment protection.

The government speech doctrine is a powerful shield against two First Amendment claims that can be made by dissenting citizens. First, when government speaks, an individual cannot claim she was compelled into its speech by the sheer fact that she could not express her views and was excluded from a forum that the government created. In such cases, courts have ruled that as long as the government did not designate it to be an open forum, the government can speak its mind without it being considered an infringement of the duty of the government not to abridge the “equality of status in the field of ideas.”⁴⁰¹ And, as long as the government does not enlist the individual into speaking himself—for example by making him a “mobile billboard” for the government’s position—individual First Amendment rights cannot limit the government’s ability to disseminate its messages.⁴⁰²

³⁹⁶ *Pleasant Grove City v. Summum*, 555 U.S. 460, 472–74 (2009); *See* Mary J. Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 13–17 (2008)

³⁹⁷ *Kromko v. City of Tucson*, 47 P.3d 1137, 1139 (Ariz. Ct. App. 2002).

³⁹⁸ *Page v. Lexington Cty. Sch. Dist.*, 531 F.3d 275 (4th Cir. 2008). However, generally, city council meetings are not considered government speech and have been repeatedly recognized to be a designated public forum. *See, e.g.,* *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011) (ruling that city council meetings constituted a designated public forum); *Steinburg v. Chesterfield Cty. Planning Comm’n*, 527 F.3d 377, 385 (4th Cir. 2008) (finding that a local government entity can limit its meeting to specific agenda items, but such restriction must not discriminate on the basis of a viewpoint); *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011) (deciding that the government may enact “reasonable time, place, and manner restrictions on speech,” but any restrictions on the content of speech must be tailored narrowly to serve a compelling government interest). Other parts of council meetings, however, cannot be considered an open public forum for the expression of private speech, as they are intended to manage the city’s doings. *Turner v. City Council*, 534 F.3d 352, 354–57 (4th Cir. 2008) (“We conclude that the central purpose of the Council meeting is to conduct the business of the government, and the opening prayer is clearly serving a government purpose.”); *Town of Greece v. Galloway*, 572 U.S. 565, 574–92 (2014) (upholding constitutionality of prayers during council meetings).

³⁹⁹ *Bezanson & Buss*, *supra* note 80, at 1380–81; *Fagundes*, *supra* note 51, at 1638.

⁴⁰⁰ Indeed, this distinction lies at the core of the government speech doctrine.

⁴⁰¹ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (citation omitted).

⁴⁰² *See* *Wooley v. Maynard*, 430 U.S. 705, 713–714 (1977). Clearly, this principle raises many questions, where the line between coercing an individual into saying something with which he does not agree or preventing him from saying something that he does is untenable.

Second, a taxpayer cannot claim that she was compelled to speak because she funds these expressions through her tax money. In these so-called compelled-subsidy cases, as long as these are *governmental* subsidies, “it is imperative that governments be free to make unpopular decisions without opening the public fisc to opposing views.”⁴⁰³ I return to this point in the next section.⁴⁰⁴

These characteristics of the government speech doctrine explain why it is both under- and over-inclusive, and why it has been criticized by many. Classifying city activities as government speech might cause the easy dismissal of genuine complaints by residents who have been wrongly excluded by their city, or whose individual rights had been violated by its supposed speech. Especially since the doctrine has been accurately described as “imprecise”⁴⁰⁵—it is often extremely hard to figure out why some activity was deemed “speech” and the other “public forum”⁴⁰⁶—there is a risk that it will be used to silence dissenting or minority residents. In this sense it is over-inclusive. But it is also under-inclusive, or under-performing, because it does not protect cities from states—which is why cities need First Amendment protection. Although the problem of over-inclusivity will not be directly solved once we recognize a First Amendment right for city speech, courts might be more cautious in labeling various activities as “speech” given that the ramifications would be even more far reaching.⁴⁰⁷

Including city speech within the First Amendment is not only possible given my analysis, it is also desirable since, as I have argued, it protects the values protected by the First Amendment. It is also in line with current developments in First Amendment jurisprudence, including the expansion of the government speech doctrine.

See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 215–16 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). I will address this point later, *see infra* Part IV.E.

⁴⁰³ *Kidwell v. City of Union*, 462 F.3d 620, 625 (6th Cir. 2006).

⁴⁰⁴ *See infra* Part IV.E.

⁴⁰⁵ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“The government-speech doctrine is relatively new, and correspondingly imprecise.”).

⁴⁰⁶ Scholars have often criticized the public forum/government speech distinction for its complexity and incoherence. *See, e.g.*, Bezanson & Buss, *supra* note 80, at 1422; *The Curious Relationship between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2431 (2004). Over the years, courts have developed the following criteria for deciding whether the government created an open forum for private speech or whether it in fact intended to express its own position. Three main tests seem to apply: (1) History: has government long used this kind of speech, expression or mode of communication as a means of communicating with the public? (2) Public Perception: does the public reasonably and continuously interpret the communication as conveying a governmental rather than a private message? (3) Control: does the government exercise and maintain control over the selection of the message? *See, e.g.*, Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 49 (2017).

⁴⁰⁷ Since giving First Amendment protection to city speech would significantly curtail states’ ability to preempt or otherwise regulate municipal expressive activities, it is logical to assume that courts might be reluctant to find that a certain city action should be seen as “expressive” and thus falling within the ambit of the First Amendment.

D. *Why Hunter v. Pittsburgh Does Not Prevent Cities from Suing Their States*

Does *Hunter*'s strong "creature of the state" principle not nullify any attempt to grant cities First Amendment protection since it flatly denies cities the option to sue their states? Indeed, one of the perplexing questions for students of local government law is how far courts are willing to go in equating cities with their states. That is, what are the various concrete meanings of the general principle that "cities are creatures of the state"? Are they truly no different from any other state agency, bureau, or office? If they were, we could expect that in every instance, city action would be attributable to their state, and that they would always receive the same legal treatment as their state does. In that case, cities—like other state organs—would obviously not be able to possess any constitutional rights, let alone raise constitutional claims against their states. *Hunter*'s broad terms⁴⁰⁸ and the fact that it has not yet been *explicitly* overturned by the Court,⁴⁰⁹ make it susceptible to different interpretations, and courts and scholars still debate whether it is a standing rule,⁴¹⁰ declaring that cities cannot raise claims against their states, a substantive rule, concerning cities' inability to have any constitutional status or rights, or perhaps neither.⁴¹¹

As I have already argued, many cases and doctrines highlight the corporate side of cities.⁴¹² These cases, together, constitute "*Hunter*'s others": an alternative jurisprudential strand according to which cities are independently incorporated associations, whose power stems from both their state and the community that they represent. Therefore, not entirely subsumed by the state, cities can bear constitutional rights and sue their states in courts.

It is my view that *Hunter* should be read as a narrow substantive rule, only denying the ability of cities to argue that their property rights were infringed by state-sanctioned annexation. Even if we accept the idea that municipal corporations are creatures of their states, *Hunter* and ensuing cases do not rule out the possibility to recognize cities' capacity—as corporations—to raise constitutional claims against their own states. To begin with, *Hunter* is unnecessarily broad and general for the concrete result it aimed to justify. When faced with Allegheny residents' and politicians' attempt to oppose as unconstitutional the annexation of the town of Allegheny to the city of Pittsburgh, the Court could easily have dismissed the claim on its merits, without saying how utterly powerless cities were, how fully sub-

⁴⁰⁸ See *infra* note 413 and accompanying text.

⁴⁰⁹ Cf., Morris, *supra* note 52, at 18–25 (arguing that *Hunter* was implicitly overturned).

⁴¹⁰ For example, the Ninth and Tenth Circuits have interpreted *Hunter* as barring localities from raising constitutional or federal statutory claims against their states. See Morris, *supra* note 52, at 18–19; De Stasio, *supra* note 51, at 971–72; Bendor, *supra* note 35, at 392.

⁴¹¹ See De Stasio, *supra* note 51, at 971–78.

⁴¹² See *supra* Part IV.B.

ordinated they were to their states, and how lacking any federal constitutional status they were. Yet, the Court used these severe terms:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.⁴¹³

Hunter, scholars convincingly showed, represented a dominant streak within nineteenth century American legal thought, which struggled, theoretically as well as doctrinally, with the growing power and importance of corporations.⁴¹⁴ On the one hand, as entities that represented collectives, corporations were seen as antithetical to liberalism, with its hostility and suspicion towards collectives. Not only was corporations' metaphysical existence seen as a dubious remnant of feudalism, but their actual power was viewed as potentially threatening to individual liberty.⁴¹⁵ On the other hand, corporations were fundamental to the booming capitalist economy, a necessary instrument for the massive risk-taking that propelled the Industrial Revolution and territorial expansion. Even more broadly, corporations enabled individuals to cooperate on a large scale and undertake a host of activities that were supposedly out of reach without the corporate form.⁴¹⁶ The creation of the schism between private corporations and public ones was one way in which this ambivalence towards corporations manifested itself: public corporations, primarily cities and towns, bore the brunt of suspicion and hostility, thus becoming identified with the state and subjected to its strict

⁴¹³ *Hunter v. Pittsburgh*, 207 U.S. 161, 178–179 (1907).

⁴¹⁴ See Frug, *supra* note 59, at 1097–98.

⁴¹⁵ See Frug, *id.* at 1120 (“The idea of the city as a powerless ‘creature of the state’ derived from the liberal fracturing of all medieval corporate forms into spheres of the individual and of the state.”); HARTOG, *supra* note 353, at 1–6; Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1014–15 (2005) (describing deeply entrenched hostility towards “bigness”).

⁴¹⁶ ROBERT D. COOTER & HANS-BERND SCHÄFER, *SOLOMON'S KNOT: HOW LAW CAN OVERCOME THE POVERTY OF NATIONS* 123–41 (2012).

check and control,⁴¹⁷ while private corporations became like individuals and were gradually let loose to operate with relatively little state control.⁴¹⁸

Despite its ideological bias against municipal corporations, and notwithstanding its attack on cities' power, the *Hunter* Court fell short of fully equating cities with their states, and, even more importantly, it did not deny the theoretical possibility for cities to constitutionally challenge their states. Neither its explicit language, nor ensuing decisions by the Supreme Court, categorically rule out cities' ability to raise substantive constitutional claims vis-à-vis their states, their capacity to sue them, or their standing in courts in such challenges.⁴¹⁹ Indeed, although the language in *Hunter* is expansive, the limitations it puts on cities' constitutional claims should be read as tailored around the specific legal questions, and the exact facts of the case: annexation, local jurisdiction delineation and change, and the powers that the state vests in its local governments. While in all these specific matters, the Court deprives municipal corporations of the ability to raise constitutional claims, it does not explicitly strip them of the ability to claim, for instance, that they might enjoy First Amendment rights while performing their *state-given* authorities.

The main argument that the *Hunter* Court considered—and specifically rejected—is that the charter of the city constitutes a contract within the meaning of the Contracts Clause of the Constitution.⁴²⁰ Explicitly declining to view the municipal charter and the various authorities vested in it as a constitutionally protected contract was crucial for the Court to allow states maximum discretion in the context of the massive metropolitan consolidation process taking place at that time, which required annexation and was central for the consolidation of major American metropolitan areas.⁴²¹ This context explains the emphasis of the *Hunter* decision on the state's absolute prerogative to change “the territory over which [municipal powers] shall be exercised,” and to “expand or contract the territorial area, unite the whole or

⁴¹⁷ Frug, *supra* note 59 at 1120–28.

⁴¹⁸ See generally WINKLER, *supra* note 43; Ian Speier, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 152 (2012); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447–48 (1987); R. Kent Newmyer, *Justice Joseph Story's Doctrine of “Public and Private Corporations” and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 832–33 (1976).

⁴¹⁹ *Hunter v. Pittsburgh*, 207 U.S. 161, 177 (1907).

⁴²⁰ The residents of Allegheny argued that the annexation of their city to Pittsburgh impaired the obligation of a contract existing between them and the city of Allegheny, in violation of the Contracts Clause of the U.S. Constitution. This claim rested on the theory that “there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated.” *Hunter*, 207 U.S. at 177. The Court rejected this argument, ruling that there was no contract between the city and its residents. *Id.*

⁴²¹ DAVID GOLDFIELD, *ENCYCLOPEDIA OF AMERICAN URBAN HISTORY* 460 (2007); RONALD K. VOGEL & JOHN J. HARRIGAN, *POLITICAL CHANGE IN THE PETROPOLIS* 270 (8th ed., 2016).

a part of it with another municipality, repeal the charter and destroy the corporation.”⁴²²

But these vast state powers over the municipal corporation do not necessarily imply denying cities, as *corporate* entities, all their potential constitutional rights, nor their ability to sue their state in courts. As I showed earlier, the *Hunter* Court itself leaves open the door for cities to possess a protected right in their private property, and to use it in courts.⁴²³ Indeed, in later cases where municipal boundaries were concerned, the Court narrowed the possible implication of *Hunter* and explained that a racially motivated scheme of municipal boundaries could be struck down on constitutional grounds. In 1960, in *Gomillion v. Lightfoot*,⁴²⁴ the Court made it clear that *Hunter*’s “seemingly unconfined dicta” did not mean that “the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporation.”⁴²⁵ Rather, “the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.”⁴²⁶ These “particular prohibitions,” are only the Contracts Clause and the Takings Clause as it applies to public property.⁴²⁷ However, the *Gomillion* Court importantly qualified, other constitutional limitations might very well curb state control of its cities: “[l]egislative control of municipalities, no less than other state powers, lies within the scope of relevant limitations placed by the United States Constitution.”⁴²⁸ Indeed, scholars have argued that following *Gomillion*, most of *Hunter* should be read as dicta, and narrowly construed.⁴²⁹

Pushing this point further is the Supreme Court’s general neglect of *Hunter*. Despite, or perhaps because of, *Hunter*’s broad language, the Court

⁴²² *Hunter*, 207 U.S. at 178–79.

⁴²³ *Id.* at 179 (emphasis added) (“[I]n describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. . . . [A]nd it has been held that, as to the [private] property, *the legislature is not omnipotent.*”)

⁴²⁴ 364 U.S. 339 (1960).

⁴²⁵ *Id.* at 344.

⁴²⁶ *Gomillion*, 364 U.S. 339 at 344 (emphasis added). The cases the Court is referring to are *Trenton v. New Jersey*, 262 U.S. 182 (1923) [“*Trenton*”], *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919), *Hunter*, 207 U.S. 161, and *Laramie Cty. Commissioners v. Albany Cty. Commissioners*, 92 U.S. 307 (1875). As the *Gomillion* Court explains, the other cases are “far off the mark” as they deal with the lack of contractual relation between the state and its localities; they do not deny the applicability of the Constitution to local governments. See *Gomillion*, 364 U.S. at 343.

⁴²⁷ See *supra* notes 383, 419 and accompanying text.

⁴²⁸ *Gomillion*, 364 U.S. at 344–45 (emphasis added). Indeed, although in *Gomillion* it was not the city (Tuskegee) that was given rights to sue its state, but rather its African-American residents as individuals, its importance for this Article stems from the narrowing of *Hunter*’s “seemingly unconfined dicta.” See *id.* The *Gomillion* Court read *Hunter* in its precise context and historical meaning—to let states draw and redraw municipal boundaries without being limited by Contract Clause or property claims—rather than as a general principle concerning the ability of cities to acquire constitutional corporate rights. See *id.*

⁴²⁹ See Barron *supra* note 38, at 568; De Stasio, *supra* note 51, at 968–70, Morris, *supra* note 52, at 3.

itself has hardly ever used it to prevent local governments from suing their states. Kathleen Morris has convincingly argued that the Court made use of *Hunter* in just three cases in the early 1920s and 1930s to bar cities from suing their state for violating their constitutional rights,⁴³⁰ and since then, not a single local constitutional challenge was turned down by the Supreme Court on the basis of *Hunter*.⁴³¹ Instead, the Court “has reached the merits of several such cases with barely a mention of the *Hunter* doctrine.”⁴³² Similarly, Josh Bendor argues that in cases involving local challenges based on the Free Exercise Clause,⁴³³ the Supremacy Clause,⁴³⁴ and the Equal Protection Clause,⁴³⁵ the Court has either rejected or accepted the local constitutional claims without relying on *Hunter* as a principle obstacle.⁴³⁶ By contrast, some lower courts have construed *Hunter* as rule of standing, barring local governments from bringing any constitutional claims against their states,⁴³⁷ and still other courts have interpreted *Hunter* in a “more nuanced” way,⁴³⁸ allowing cities to bring Supremacy Clause challenges, for example, against their states.⁴³⁹ State courts have also taken different positions regarding the scope of *Hunter*’s rule against cities bringing constitutional challenges against their states,⁴⁴⁰ thus leaving the door open for municipal constitutional challenges.

Additionally, the parallel yet alternative legal historical evolution of *private* corporations demonstrates that *Hunter* itself, and the creature of the state doctrine, do not preclude municipal corporations from claiming other constitutional rights vis-à-vis their state. Indeed, throughout the nineteenth century, and during the early twentieth century—right as *Hunter* galvanized the idea that municipal corporations were creatures of the state—private corporations, too, were viewed as creatures of the state. Yet, this identical idea, that corporations, both municipal and private, were creatures of the state, came to mean different things. While private corporations gradually ac-

⁴³⁰ See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) [*“Williams”*] (“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.”); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (“The city cannot invoke the protection of the Fourteenth Amendment against the state.”); *Trenton*, 262 U.S. at 187 (“A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.”).

⁴³¹ Morris, *supra* note 52, at 15–16.

⁴³² *Id.* at 4, 16–17.

⁴³³ *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

⁴³⁴ *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-41*, 469 U.S. 256 (1985).

⁴³⁵ *Romer v. Evans*, 517 U.S. 620 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

⁴³⁶ See Bendor, *supra* note 35, at 407–09.

⁴³⁷ See *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998).

⁴³⁸ See Bendor, *supra* note 35, at 408.

⁴³⁹ See *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628–30 (10th Cir. 1998); *Rogers v. Brockett*, 588 F.2d 1057, 1067–68 (5th Cir. 1979).

⁴⁴⁰ See, e.g., *De Stasio*, *supra* note 51, at 971.

quired constitutional rights, municipal ones did not enjoy the same fortune. I therefore argue that nothing in *Hunter* or the creature of the state doctrine prevents cities from bearing constitutional rights, including the First Amendment. Although important differences between private corporations and municipal corporations exist, this Article argues that they are not sufficient to justify the complete denial of all rights to cities; rather, they might suggest that local governments deserve a different scope of protection, a different balance between rights and duties, or that taxpayers receive exit options from speech they do not agree with. I will address these questions later on.⁴⁴¹

E. *The Problem of Compelled Speech*

What enables city speech and makes it effective is its coercive nature. Unlike unorganized groups and individuals who must actively recruit money and support from freely consenting individuals in order to be able to express ideas, support political causes, and participate in campaigns, cities are institutions who have at their disposal skills, resources, and personnel that can be used to express themselves. Ordinarily, cities do not ask for their citizens' specific approval when they engage in speech acts, beyond the general mandate that mayors and councilmembers receive during local elections. This is why cities can relatively easily expend funds in order to disseminate information and express their ideas. Consequently, however, some residents might disagree, mildly or vehemently, with what their cities say. Forcing an individual into speech with which she does not agree infringes on individual autonomy, which is a value lying at the core of the First Amendment.⁴⁴² Thus, from the perspective of the free speech rights of city residents, this poses a problem, especially in light of the "coerced speech" doctrine.⁴⁴³ Indeed, it has been long held that "compulsion of citizens to support candidates, parties, ideologies, or causes that they are against," constitutes an unconstitutional abridgement of free speech.⁴⁴⁴

This problem should not prevent us from recognizing a First Amendment right to city speech. First, the fact that private parties have a right not to be compelled to say something against their will does not abolish the rights—including speech rights—of other parties. Rather, this individual right against compelled speech might narrow the scope of other parties' free speech rights so that they cannot compel those private parties in disagreement to talk. Thus, we can still acknowledge the right of a city to talk, as long as it does not compel its residents to talk. Here, we can take another cue from the government speech doctrine, according to which citizens can-

⁴⁴¹ See *infra* notes 449, 473 and accompanying text.

⁴⁴² See *supra* Part II.B.

⁴⁴³ This doctrine originated in the famous case of the forced pledge of allegiance, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where the Court ruled that the state could not compel citizens to speak against their will.

⁴⁴⁴ *Kidwell v. City of Union*, 462 F.3d 620, 623 (6th Cir. 2006).

not argue that they have been coerced into the government's speech, as long as they have not been truly forced to say something against their will for the government's expression.⁴⁴⁵ The fact that there exists a forum that the city funds and where the city advocates its position on various public matters does not mean that the residents' individual free speech rights were infringed.⁴⁴⁶

Second, with respect to money spent by cities, it is doubtful that citizens can claim they are coerced into "speaking" simply because their tax money was in part used to fund the city's expression, or that they are implicated in their city's speech because of their residency.⁴⁴⁷ As the Supreme Court held in *Board of Regents of University of Wisconsin System v. Southworth*: "The government, as a general rule, may support valid programs and policies by taxes or other exactions *binding on protesting parties*. Within this broader principle, *it seems inevitable that funds raised by the government will be spent for speech and other expressions to defend its own policies*."⁴⁴⁸ Professor Dan-Cohen has explained that in such contexts, to attribute every expression of an association to each of its members ignores the reality of how organizations operate, how people understand them, and what people expect organizations to do.⁴⁴⁹ Indeed, people cannot genuinely claim that once their city speaks, they are implicated in this speech. Along these lines, the court in *Kidwell* recently ruled that, once the city government controls and approves the speech, "its content must be considered that of the city itself, not that of the quoted private citizen"⁴⁵⁰

Lastly, even if we were to assume that in certain cases some individuals' right not to be coerced might be infringed by city speech, it does not

⁴⁴⁵ But once the government moves beyond speaking by itself and enlists citizens to speak on its behalf, the citizens can claim the government has forced them to say something against their will and thus violated their free speech rights. For example, when the government uses them as "mobile billboards," as in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (discussing compelling an affirmative act versus a passive act and the use of private property as a "mobile billboard" for the State's ideological message—here, New Hampshire's "live free or die" printed on automobile license plates). Cf. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (invalidating outright compulsion of speech and discussing the difference between compelled-speech and compelled-subsidy cases).

⁴⁴⁶ *Kidwell*, 462 F.3d at 625–26.

⁴⁴⁷ See generally *Am. Freedom Def. Initiative v. King Cty.*, 136 S. Ct. 1022 (2016); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489 (9th Cir. 2015); *Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 158 F. Supp. 3d 247 (M.D. Pa. 2016). Indeed, generally speaking, courts have given wide latitude for cities (and other governmental entities) to spend taxpayer money on saying things and supporting causes with which the residents do not agree, based on the notion that "[t]he town treasury is not a public forum," *Kidwell*, 462 F.3d at 624, and is not, "by tradition or designation a forum for public communication," *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983).

⁴⁴⁸ 529 U.S. 217, 229 (2000) (emphasis added).

⁴⁴⁹ Dan-Cohen, *supra* note 102, at 1234–37.

⁴⁵⁰ *Kidwell*, 462 F.3d at 624. The Supreme Court ruled on a similar challenge, although not in the context of city speech, that "when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes," not the citizens'. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559–67 (2005).

mean that the city should not be entitled to a First Amendment protection in principle. Rather, it means that in various cases we will need to either silence the city based on a compelling state interest or allow the dissenters to “exit” from or “opt out” of the speech by getting tax rebates or by making their dissent more clearly visible.⁴⁵¹ We could also require that expressions that are more controversial and thus might be considered more coercive by dissenters should be approved through more stringent procedures such as approval by a supermajority of the city council.

But all this is true only as long as the city is considered to be a government. If, on the other hand, the city is seen as a private association, the problem of compelled speech is more severe, especially after the recent ruling in *Janus v. American Federation of State, County, and Municipal Employers, Council 31*.⁴⁵² Courts have long held that “compelled support of a private association is fundamentally different from compelled support of government . . .” and that “[c]ompelled support of government—even those programs of government one does not approve of—is of course perfectly constitutional, as every taxpayer must attest.”⁴⁵³ Yet “[c]ompelling a person to *subsidize* the speech of other private speakers raises . . . First Amendment concerns.”⁴⁵⁴ Hence, for example, government employees were found to be impermissibly “compelled” into the political speech of their union when their employer enabled them to make deductions through their payroll;⁴⁵⁵ students of public universities were found to be unconstitutionally “compelled” into supporting speech of student organizations through their tuition;⁴⁵⁶ and members of state bars were deemed illegally “compelled” into the political activities of the bar by paying their bar dues.⁴⁵⁷ Thus, government subsidies are permissible, and they have been distinguished from labor unions dues, state bars fees, and state universities subsidies, because the government needs to be free to run its affairs without being interrupted or becoming bankrupt by the need to allow and subsidize every opposing view.⁴⁵⁸

Thus, there might arise a concern that if cities are not pure governments but rather a duality, a mixture of the private and the public, then they will be treated like a labor union or public university, prohibited from using its

⁴⁵¹ An appropriate analogy is the various proposals made by Bebchuk & Jackson, *supra* note 136.

⁴⁵² 138 S. Ct. 2448 (2018) (ruling that allowing unions in the public sector to collect union fees from nonmembers violates the First Amendment rights of nonmembers).

⁴⁵³ *Johanns*, 544 U.S. at 559.

⁴⁵⁴ *Janus*, 138 S. Ct. at 2464.

⁴⁵⁵ *See, e.g., Ysursa*, 555 U.S. 353, 362–63 (2009) (applying the prohibition on payroll deductions for political speech to local government entities as well as state).

⁴⁵⁶ *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 243 (2000).

⁴⁵⁷ *Keller v. State Bar of Cal.*, 496 U.S. 1, 7–10 (1990).

⁴⁵⁸ But these organizations, which are separately incorporated, yet public, entities—hence straddling the line between “the private sector” and “government”—do not enjoy the protection of government speech doctrine and may not “coerce” individuals into their speech by subsidizing non-neutral expressions.

funds to express non-neutral positions. Without getting too deep into the complexity of the doctrine governing public-private entities like unions, I would suggest that, despite the narrowing of their ability to compel non-members to pay fees,⁴⁵⁹ these entities still have unequivocal First Amendment rights. Even though these rights have been curtailed in recent years,⁴⁶⁰ they could still serve as a model for city speech rights. Unions possess an unquestionable First Amendment right to speak, and the compelled speech doctrine has not, thus far, deprived them of their ability to speak, or even to use payroll deductions for collecting general union fees as long as these are not used for political activities.⁴⁶¹

In the recent case of *Ysursa v. Pocatello Education Association*, unions representing state and local government employees brought a First Amendment challenge against the Idaho Voluntary Contributions Act's ban on public sector employees' voluntary payroll deductions for political activities.⁴⁶² While the law allowed a worker to choose to have a portion of her salary deducted and remitted to her union, she could not choose to have such amount deducted for the union's political activity. The trial court found that the law was constitutional as applied to state employees when the state was paying for part of the payroll deduction program—since the state was under no obligation, under the First Amendment, to subsidize payroll deductions, even through mere administration. However, the court declared the law unconstitutional as applied to municipal workers because Idaho did not provide any subsidy for the management of the payroll deductions that the locality merely enabled, and thus had no compelling interest in limiting the speech of the union.⁴⁶³ The Ninth Circuit upheld the trial court's decision, ruling that the relationship between Idaho and its cities "was analogous to that between the state and other regulated private entities,"⁴⁶⁴ and Idaho had no compelling state interest to prohibit voluntary local deductions.⁴⁶⁵

The Supreme Court, however, reversed the decision, holding, "The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities."⁴⁶⁶ The Court reached this conclusion based on the assumption that the municipal administrative costs of allowing for payroll deductions were attributable to Idaho,

⁴⁵⁹ See *Janus*, 138 S. Ct. at 2459–60.

⁴⁶⁰ See generally *id.*

⁴⁶¹ See *Ysursa*, 555 U.S. at 358–63.

⁴⁶² *Id.* at 355.

⁴⁶³ See *Pocatello Educ. Ass'n v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at *2, *4–6 (D. Idaho Nov. 23, 2005).

⁴⁶⁴ *Ysursa*, 555 U.S. at 358; see also *Pocatello Edu. Ass'n v. Heideman*, 504 F.3d 1053, 1065 (9th Cir. 2007).

⁴⁶⁵ *Pocatello*, 504 F.3d at 1066–68.

⁴⁶⁶ *Ysursa*, 555 U.S. at 355.

because cities are considered “political subdivisions” of the state.⁴⁶⁷ Given the negative nature of free speech, the state is allowed to refuse to subsidize union political speech without it being considered a violation of the union’s First Amendment⁴⁶⁸—even when such subsidy is made by the state’s political subdivisions, its cities. Although this decision is problematic in its view of local governments as mere state agents,⁴⁶⁹ the Court ruled so in the specific context of payroll systems, and thus it cannot be said to cover all matters of local activity. In activities that are more clearly local, and where the speech is the city’s—rather than someone else’s—*Ysursa* does not apply. In such cases, I contend, the state will need to present a compelling interest in order to prevent the city from speaking. Indeed, in *Ysursa* no First Amendment claim was made by the locality itself, and thus the decision does not deal with this possibility at all. The Court limits, wrongly in my view, the political First Amendment rights of unions, ruling that they impose no duty on the state to enable union speech through the state’s payroll system. But the Court does not rule on the possibility, raised in this Article, that cities themselves might have First Amendment rights.

Thus, while *Ysursa* poses danger to unions’ ability to raise money for political activities from their members, it does not foreclose the possibility of granting First Amendment rights to cities, or of gathering money from their residents to fund municipal political speech. First, the *Ysursa* Court does not prohibit such voluntary money gathering; rather, it allows the state to refuse to facilitate such fee collection. Second, where a possible (although wrong, in my mind) distinction between political and nonpolitical activities can be made as regards unions,⁴⁷⁰ much of what cities are authorized and expected to do is “political” by definition, as city actions almost always involve the distribution of goods and resources based on political decision-making. It would make no sense to allow cities to collect taxes for municipal political activities, but to prohibit such taxation for municipal political speech.

Putting all this aside, even after *Ysursa*, and the more limiting decision in *Janus*, unions still have a clear First Amendment right to political speech; thus, cities, too, should claim such a right. Even if the Court acknowledged cities’ free speech rights but limited their ability to spend tax money on political expenditures, the power balance between cities and their state would change significantly. Recognizing this right would give cities a weapon against vindictive and silencing states, and require tighter scrutiny on the

⁴⁶⁷ *Id.*

⁴⁶⁸ For this reason, the state need only present a rational basis for its decision, rather than the more exacting strict scrutiny test. *Ysursa*, 555 U.S. at 359.

⁴⁶⁹ This position is particularly apparent in Chief Justice Robert’s analysis, where he repeats *Williams v. Mayor of Baltimore* and *Trenton v. New Jersey*, cases in which the Court articulated the subordinate nature of localities. *Ysursa*, 555 U.S. at 362–64. These remarks by the Chief Justice, I argue, do not preclude the possibility that cities have First Amendment rights, as this possibility was not raised, and the Court did not discuss it.

⁴⁷⁰ But see Sachs, *supra* note 136, for justified critiques of this position.

means by which states limit cities' right to speak. Additionally, the asymmetry between the application of the compelled speech doctrine on unions and the refusal of courts to apply it to corporate speech could yield other beneficial recommendations. Numerous scholars, worried about the harmful consequences and unjustifiability of this asymmetry, have suggested focusing on allowing associational free speech by unions and corporations alike while accompanying these free speech rights with exit rights—for union members and shareholders—and various other procedural duties that would be placed on officers of the association.⁴⁷¹ Such exit rights would alleviate the fear that members of unions and corporations will be compelled into political speech with which they disagree, without crippling the ability of the organization to speak.

Furthermore, one should bear in mind the critique launched against the overblown compelled speech doctrine.⁴⁷² As various scholars have argued in recent years, the compelled speech doctrine went far beyond protecting individuals from being forced to actually say things they do not agree with.⁴⁷³ Instead, this doctrine expands, to use Morgan Weiland's terminology, the protection of interests that are at the "periphery" of free speech—not being associated with a controversial expression—while threatening the "core" of free speech—the ability of individuals and organizations to express themselves without every dissenter silencing them.⁴⁷⁴ The expansion of the compelled speech doctrine can be seen as one of the hallmarks of the libertarian, individualistic turn in First Amendment jurisprudence; it privileges individual silence and desire not to speak over collective or public conversation and dialogue, and it threatens the ability of organizations to form effective speech in an age when individual speech can hardly be heard.

The compelled speech turn is especially worrisome given that not all associational speech is threatened by this turn to the same degree. As Professor Benjamin Sachs has demonstrated, because shareholders do not have veto rights or exit rights over business corporations' expressions with which they disagree, corporations are able to speak rather freely—even when this speech clearly discomforts, angers, or enrages their shareholders. In contrast, unions find it harder and harder to speak and advance their political goals given the compelled speech doctrine.⁴⁷⁵ In this sense, this Article joins a

⁴⁷¹ See, e.g., Bebchuk & Jackson, *supra* note 136 at 89–93; Coates, *Corporate Politics, Governance and Value Before and After Citizens United*, *supra* note 232 at 660, 666; Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1056 (2018).

⁴⁷² See, e.g., Weiland, *supra* note 209, at 1453, 1462.

⁴⁷³ See *id.* at 1395–97; Peter Bozzo, *The Treachery of Images: Reinterpreting Compelled Commercial-Speech Doctrine*, 66 DEPAUL L. REV. 965, 974–75 (2017).

⁴⁷⁴ Weiland, *supra* note 209, at 1469.

⁴⁷⁵ See Sachs, *supra* note 138, at 838–43. One of the rationales for this distinction that the Court has made is that shareholders do not need a unique exit right, since they can sell their shares at any moment, while union members, especially those in closed shops, cannot. While this argument might sound convincing, it ignores the realities of "forced" shareholdings through pension plans, for example.

growing body of literature calling for a nuanced and contextual approach towards free speech.⁴⁷⁶ Both the First Amendment and the government speech doctrine are too broad and too dull to be dealing with the complicated issues raised by the distinct institutions making the different types of expressions in our society. This is especially the case in a time of the expansion of both the First Amendment and the government speech doctrine, where so many actions are being labeled as speech for the purposes of the First Amendment.

Hence, despite the similarities between unions and local governments, we ought to take into account the unique traits of each institution and the different characteristics and purposes of their expressions, and see what these might mean for the protection of city speech rights. Clearly, cities and unions are different in one respect in particular: cities are also governments—even if of a peculiar kind—while unions are not. This fact should matter a lot, in that cities will not be able to function at all if every dissenting resident will be able to either silence or entirely withdraw her taxes from every expression. Still, as I indicated, it might mean that we would need to develop mechanisms of ensuring that the city is committed to democratic, participatory, and representative procedures, which do not systematically ignore dissenting minorities. Indeed, the degree of democratic responsiveness and accountability is a crucial factor in determining what force should be given to compelled speech.⁴⁷⁷ I would therefore like to stress once more that given cities' democratic nature, city speech usually reflects the choices of democratically elected representatives. Curbing city speech because of dissenting residents means setting aside the will of the majority in favor of the will of a minority—often with only insignificant harm that was caused to this minority. Although protecting minorities is extremely important, the harm caused to these minorities by municipal expression with which they disagree is hardly the type of harm that justifies setting aside decisions taken by democratically elected bodies such as city councils or mayors. Additionally, because democratic accountability is a crucial component of the type of city speech that I am advocating, one of the takeaways is that cities will be

⁴⁷⁶ Bezanson & Buss, *supra* note 80, at 1384–87 (suggesting eight typologies of government speech); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1558 (2007); Leslie Cooper Mahaffey, *Note: 'There is Something Unique. . . About the Government Funding of the Arts for First Amendment Purposes': An Institutional Approach to Granting Government Entities Free Speech Rights*, 60 DUKE L.J. 1239, 1239–44 (2011); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270–79 (2005). Meir Dan-Cohen also expresses his discomfort with the notion that there is such thing as “government speech.” He stated: “Government is here referred to in the singular. Such usage conjures up the image of government as one mammoth bureaucracy that speaks with a single—and most likely deafening—voice. This characterization understates the fragmentation of modern government into numerous units and entities, which each enjoy various degrees of independence and often feud with one another.” See Dan-Cohen, *supra* note 102, at 1260.

⁴⁷⁷ See generally Hemel & Larrimore Ouellette, *supra* note 406.

incentivized to improve their democratic accountability and participatory processes in order to obtain a greater First Amendment protection.

Importantly, rather than silencing the associational speech altogether, a conflicting compelled speech claim might result in exit rights for dissenters or in setting different fall back options in paying municipal taxes for various purposes. But we should be hesitant to make these concessions—diminishing the full scope of city speech—without a thorough examination of the validity of the dissenter’s claim for compelled speech violation.

* * *

The implications for recognizing First Amendment protection to cities can be quite radical, but not all of them are necessary. Indeed, expanding the constitutional protection of the First Amendment over various forms of city speech does not require that there be no regulation or restriction on city speech. For example, it can be argued that if we gave cities the right to say what they want, then cities would use speech to advance policies that discriminate on the basis of race and gender or express themselves in ways that would contravene their duty not to establish religion. It is therefore imperative to clarify that granting cities speech rights does not allow local governments to shed their constitutional duties. My proposal is not geared towards turning cities into private corporations, but rather to augment the duties that they have towards their residents with rights they will bear vis-à-vis their state and the federal government. This means a balance will need to be struck between speech rights and equality. It is possible that as a government entity—dual as it may be—the city would be unable to speak as freely as an individual given compelling interests that would justify curbing city speech. Thus, by receiving free speech rights, cities will not escape their other constitutional duties arising from the Due Process, Supremacy, and Establishment Clauses. Local governments are still governmental entities, and as such they will be required to operate according to their constitutional duties. Moreover, to protect dissenters, in some cases it might be necessary to consider “exit” options from particularly problematic expressions.⁴⁷⁸

V. CONCLUSION

While cities are currently engaged in many expressive activities—speaking their mind on issues pertaining to foreign relations, immigration, religion, the environment, and more—they are at the mercy of their states, who can, often by a single and simple enactment, prohibit and preempt them

⁴⁷⁸ See *supra* Part I.A. In *University of Pennsylvania v. Equal Opportunity Commission*, 110 S. Ct. 577, 588 (1990), the university’s academic freedom—recognized to be a part of the First Amendment—conflicted with Equal Protection-based demands for sex- and race-equality. Although in this case, the Court found that the injury to academic freedom was remote, and thus found no real conflict between the university’s First Amendment right and its Equal Protection duty, it can still be inferred that such conflict could exist and that it cannot be a reason to deny either the First Amendment right or Equal Protection duty.

from any or all such expressions. In recent years, such state measures have multiplied and become more extreme—from Alabama prohibiting its municipalities from removing or altering Confederate monuments and names,⁴⁷⁹ to North Carolina banning its cities and towns from “endors[ing] or oppos[ing]” any referendum,⁴⁸⁰ to Texas’ extreme ban on cities “endorsing” sanctuary policies.⁴⁸¹ Consequently, cities are deprived of their ability to represent their people by expressing their views on matters that affect them, to engage in dialogue with other actors within and without their state, to act as independent corporate entities, and more generally to participate in the marketplace of ideas. Although conflicts between local governments and their states are nothing new, the intensity and breadth of these conflicts, the encroachment of states into the realm of city speech, as well as the broader political context in which these battles are taking place makes it more urgent than ever to recognize that cities deserve the protection of the First Amendment.

Constitutional protection for city speech would have important consequences, because attempts made by states or by Congress⁴⁸² to curb city speech would trigger First Amendment review. Hence, for example, various states’ prohibitions on municipal spending in order to influence or inform people regarding the issues at stake in statewide ballot initiatives could be deemed unconstitutional.⁴⁸³ When states legislate a statewide prohibition on removing Confederate monuments or changing street names that previously honored Confederate heroes, such legislation could be challenged as infringing cities’ First Amendment rights and might result in the prohibition’s annulment.⁴⁸⁴ Additionally, states’ gag on local “endorsement” of certain positions that the state dislikes would be a clear infringement of the city’s right to free speech.⁴⁸⁵

⁴⁷⁹ See *supra* note 159 and accompanying text.

⁴⁸⁰ N.C. Gen. Stat. §§ 160A-499.3, 153A-456 (2010).

⁴⁸¹ See *El Cenizo v. Texas*, 890 F.3d 164, 165 (5th Cir. 2018) (upholding a Texas bill mandating local governments to comply with federal immigration policies, except for the application of the prohibition on “endorsing” sanctuary policies).

⁴⁸² Note that I am not dealing in this Article explicitly with municipal claims against the federal government, although my suggested First Amendment right might be extended to work against the federal government as well. Developing and defending such a right is a task I am not seeking in this Article, partly because it is also less urgent given that federal silencing measures against cities could be seen as violating state’s rights under the Tenth Amendment (and the anti-commandeering doctrine). See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding that requiring local police officers to comply with federal gun control law is an attempted “commandeering” in violation of the Tenth Amendment).

⁴⁸³ See *Anderson*, 380 N.E.2d at 635–36. In North Carolina, for example, N.C. Gen. Stat. §§ 160A-499.3 and 153A-456 prohibit cities and counties from using public funds “to endorse or oppose a referendum, election or a particular candidate for elective office.” See *Kidwell*, 462 F.3d 620, 626 (6th Cir. 2006).

⁴⁸⁴ Schwartzman & Tebbe, *supra* note 269; see Jaweed Kaleem, *In Some States, It’s Illegal to Take Down Monuments, or Change Street Names Honoring the Confederacy*, L.A. TIMES (Aug. 16, 2017), <https://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-htmlstory.html>, archived at <https://perma.cc/4N5T-29NB>.

⁴⁸⁵ See *supra* notes 22–24 and accompanying text.

Crucially, city speech could still be regulated. After all, not every instance of speech should receive the same degree of protection.⁴⁸⁶ Some forms of racialized speech (which demeans racial minorities), religious speech (which prefers one religion over the other), and political speech (which involves contributions⁴⁸⁷) might still be regulated, perhaps prohibited altogether, even under a conceptual framework that recognizes city speech as protected by the First Amendment; compelling state interests could still override the city's right to speak. Furthermore, granting First Amendment rights to cities does not exempt them from other constitutional obligations, such as the Equal Protection Clause or the Establishment Clause. In some such cases, courts would have to develop a jurisprudence determining which constitutional right or duty wins over the other, given the city's competing rights and obligations.

Despite these caveats, granting cities First Amendment rights might nevertheless seem like a risky move, given the various uncertainties that might ensue. But giving our cities the right to speak is an act of faith in our ongoing constitutional dialogue and in the vibrancy of our democracy. We should not fear doing that.

⁴⁸⁶ This would be much like the cases involving corporate political speech, where even the *Citizens United* Court was willing to retain various regulations and limitations on corporate expression, such as disclosure requirements and prohibition on direct donations to political candidates. See Bechuk & Jackson, *supra* note 136 at 85–86 (discussing corporate law rules for political speech decisions); Bechuk & Jackson, *supra* note 232 at 949–50 (discussing disclosure of corporate political spending to protect shareholder interests); Brudney, *supra* note 229 at 261 (criticizing the results of granting First Amendment rights to business corporations); Coates, *supra* note 232 at 248–55 (discussing empirical evidence on the corporate take-over of the First Amendment); Coates, *supra* note 193 at 659 (discussing corporate political activity).

⁴⁸⁷ Indeed, an even more radical ramification that could result from such conceptualization, which this Article does not pursue, is that even state prohibitions on municipal donations to political candidates—sometimes embedded in state constitutions—might be deemed an infringement of cities' First Amendment rights, following *Citizens United*.