the issue. Even from a Dillon’s rule analysis, the power to sue and be sued is an essential component of juridical personality regardless of whether the state is the object of the litigation.

B. Standing to sue.

Here again I would argue that federal courts should defer to state law on this issue. However I am aware of USSCT caselaw that generally denies standing to state taxpayers pressing federal claims even when a state court is willing to entertain such claims. I do not have the will or the expertise to explore the attenuated subtleties of Federal caselaw on this issue but it should be addressed.

C. Justiciability

Once more the shape and thrust of federal case law are beyond my competence. But it is my recollection that federalism concerns are part of the legal landscape concerning this doctrine.

D. Sovereignty and related concerns.

Hunter is a case involving a challenge to a jury-rigged statute that essentially forced the City of Allegheny to merge with the city of Pittsburgh. There is a persistent body of USSCT caselaw from Coyle v. Smith to the cases surveyed by Mosk, J. in the Sacramento LAFCO case,838 P.2d 1198, that tells me that whether the plaintiff in that case was Mrs. Hunter or the City Of Allegheny, the claim would have been rejected. Coyle v. Smith is, of course, not squarely decided under the 10th Amendment, although it is cited in subsequent 10th Amendment cases. But Cameron County Water District is no access to protections of Federal municipal bankruptcy law without express consent of state statutory law.

There are also 11th Am issues involving caselaw denying state employees a federal forum in which to press their claims against their state employer.

E. Merits

As previously observed under D, established Federal doctrine does not protect local government units from boundary change decisions mandated by the state legislature. Only bondholders (Port of Mobile v. Watson) and victims of racial gerrymander (Gomillion) are constitutionally protected. I am not so sure that body of case law is unsound — although a doctrinaire marxist would not be surprised by the privileged status of bondholders under the Contracts clause. I am more troubled by the failure of federal law to recognize that local government units have property rights against state uncompensated takings or can make contracts with the state that bind the state.

All holders of the right to divert river water were compensated by the state of New Jersey - except Newark and Trenton - even though those cities had purchased diversion rights from private sector entities Hendrik Hartog and others have documented that municipal corporations in some states were recognized as possessing property interests held in the entity’s proprietary capacity. State cases recognizing the proprietary capacity distinction would seem to fit within Erie. I could, as an aging bore, go on citing cases, but the point is that the case for applying Federal constitutional norms to state-local relations calls for a clause by clause selective incorporation approach.

F. Concluding remarks.

It is my view that the heart of the conceptual problem lies exactly where Hartog and Horwitz and others, have indicated — the strong dichotomy between public and private. Adherence to that dichotomy led to the differentiation between municipal corporations and private corporations. The former even though juridical persons were not. through the prism of sovereignty crafted by lawyers and judges seen as constitutional right bearers, whereas the latter possess a nearly full measure of the protections afforded “persons”. The result has been a reign of state legislative hegemony over the activities and affairs of local government whose negative consequences in Pennsylvania, for example, are shared by municipalities of every size. (For thorough documentation, see the website of 10,000 Friends of Pennsylvania.)

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Constitutionalizing Local Politics

Kathleen Morris has written a bold and exciting article on an issue that deserves more attention than it has received: local governments' role in constitutional enforcement. Rather than engage the merits of the article's central doctrinal argument—that *Erie Railroad v. Tompkins* effectively overruled *Hunter v. Pittsburgh*—this short response makes a brief foray into what Morris calls the "normative debate over local constitutional enforcement." Specifically, it offers a few thoughts on how increased local involvement in constitutional enforcement might change the political and constitutional landscape.

Such a changed role would, by definition, raise new challenges as well as new opportunities for local government, and the former may be more significant than Morris's article suggests. For example, she argues that perhaps localities are "uniquely competent, rather than uniquely incompetent, to interpret the Constitution," because they are in effect the places where the constitutional rubber meets the real-life road. But local governments' responsibility for applying laws that might raise constitutional problems—Morris points to the announcement of time, place, and manner restrictions on speech and the creation of strip-search policies—simply highlights the stakes of constitutional issues at the local level, not necessarily the desirability of local government officials' role in resolving them.

This potential shortcoming is only reinforced by the fact that—holding aside extraordinary counter-examples such as San Francisco's role in the same-sex marriage debate—voters generally seem to elect municipal leaders precisely because they have expertise in issues like . . . well, like real-life roads (not to mention schools, law enforcement, zoning, and the like). Since few city council members, selectmen, or aldermen are elected on the basis of any particular constitutional vision, it is unclear how "welcoming localities into constitutional cases as plaintiffs would democratize constitutional litigation." Moreover, the most important actors in a post-*Hunter* world of local government constitutional enforcement would presumably be city attorneys and corporation counsel—roughly the municipal equivalent of state attorneys general—only some of whom are directly accountable to voters. How, then, are any of these officials well-positioned to democratize constitutional litigation?

Of course, all of that could change. Local government officials undoubtedly could articulate constitutional visions, and one implication of Morris's argument is that overruling *Hunter* would
incentivize them to do just that. Perhaps if local government were allowed to engage in constitutional enforcement, more local government officials would be subject to election. And more city attorneys might start taking public positions on substantive constitutional issues like prayer in local schools or free speech in municipal parks.

But there are reasons to doubt that the constitutionalization of local politics would be a good thing. It could lead to significant mission creep, distracting local government officials from traditional and vital functions like the nitty-gritty operations of schools and parks themselves. Moreover, it’s not entirely clear that a politically savvy city attorney would always argue in favor of the interests of the city qua city. There are undoubtedly many situations in which an ambitious attorney’s political career could be advanced by arguing a politically popular constitutional claim that would limit city power and autonomy—against municipal authority to regulate guns, for example, or for prayer in local schools.

Perhaps the political process would prevent that, too. Maybe voters simply wouldn’t support candidates who prioritize constitutional claims over roadwork, or who sacrifice the city’s interests for some other legal or political goal. But the story would be complicated at the very least. Overruling Hunter could radically alter the role of the city attorney, and that transformation’s implications for the internal structure of the city are unclear. Presumably a higher proportion of city attorneys would be chosen by election than by appointment, in order to give voice to the people’s constitutional vision; many city attorneys would use their positions as stepping stones to higher office, as state attorneys general occasionally do now; and conflicts might well arise between bold city attorneys, mayors, and city councils, as occasionally happens between attorneys general and Governors. The internal structure of local government, in other words, would need to shift to accommodate this new weight.

Over time, increased local constitutional enforcement could also prompt an unexpected shift in cities’ civic character. A municipality’s vigorous litigation in support of, say, school prayer, could act as a signaling device—a local constitutional flag—to prospective residents. Even as the city’s advocacy of its constitutional vision attracted likeminded citizens, it could drive out those more comfortable with the status quo. Rather than enriching public discourse, increased local engagement with polarizing constitutional issues might contribute to urban spaces’ homogenization and the accompanying erosion of cities’ capacity to nurture diverse communities.

To be clear, these are musings on the implications of Morris’s article, not an effort to evaluate its powerful and provocative central argument. As local governments shoulder tremendous burdens with diminished resources, serious reflection is needed on their place in our constitutional landscape. That the article facilitates such engagement is, hopefully, evidence of the influence it will have on discussions about the proper role of local government in political and constitutional life.


2 Id.

3 Id. at 44


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