LOCAL GOVERNMENT LAW — MUNICIPAL BOUNDARIES — GEORGIA AUTHORIZES THE CREATION OF THE CITY OF EAGLE'S LANDING. — S.B. 263, 154th Gen. Assemb., Reg. Sess. (Ga. 2018).

The Supreme Court announced more than a century ago that states have "absolute discretion"[1] to reorganize their municipalities "with or without the consent of the citizens."[2] About fifty years later, the Warren Court held that no citizen should have a disproportionate say when voting on an issue that affects everyone — introducing the doctrine of "one person, one vote."[3] These two ground rules of local government normally harmonize, allowing states to establish cities and towns while requiring equal political participation within them. In 2018, however, they ran headlong into one another in Stockbridge, Georgia, a suburb of Atlanta. Following the first rule, the state allowed residents of Stockbridge's wealthiest neighborhoods to vote on whether to secede and form their own city, Eagle's Landing. But in apparent violation of the second rule, the state denied Stockbridge's remaining residents the opportunity to vote on whether their city would be cut in half. This experience shows that federal courts need to fashion a doctrinal solution that favors state power only when it does not undercut basic democratic values.

Why did prospective Eagle's Landing residents want to leave? According to the chair of the Committee for the City of Eagle's Landing, Vikki Consiglio: "I kept seeing all of these places like Bojangle[s'], Waffle Houses, dollar stores, and all this going up in our county. And I was like, why can't we get a Cheesecake Factory, or a P.F. Chang's or a Houston's? We have areas that have high incomes, so what's the deal?"[4]

Perhaps what Consiglio was getting at was that Eagle's Landing would be whiter and wealthier than Stockbridge. Stockbridge's voting-age population is about 32% white and 53% black; Eagle's Landing would be 43% white and 44% black.[5] Eagle's Landing would contain nearly all of the census blocks in Stockbridge with median incomes greater than $74,000, while the vast majority of census blocks with median incomes below $56,000 would remain in Stockbridge.[6] Despite

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

[2] *Id.* at 179.

[3] Gray v. Sanders, 372 U.S. 368, 381 (1963).

[4] Brentin Mock, *The Strangest Form of White Flight*, CITYLAB (Nov. 7, 2018), https://www.citylab.com/equity/2018/11/eagles-landing-cityhood-vote-atlanta-stockbridge/571990/ [https://perma.cc/BD7A-L7PW].

[5] Bill Torpy, *Torpy at Large: Glad that Voters Clipped the Eagle Wannabe-City's Wings*, ATLANTA J.-CONST. (Nov. 9, 2018), https://www.ajc.com/news/local/torpy-large-good-that-voters-clipped-the-eagle-wannabe-city-wings/CEfQ8BuZTwWL4QBPExy9bN/ [https://perma.cc/X3QE-8YM9].

[6] *See* NISHA RAJAN, MOODY'S CREDIT OUTLOOK, PROPOSED DE-ANNEXATION OF STOCKBRIDGE, GEORGIA, IS A POTENTIAL BLOW TO MUNICIPALITIES IN THE STATE (2018).

containing about one-third of Stockbridge's population,[7] Eagle's Landing would take about half of Stockbridge's property value[8] and revenue.[9]

The Eagle's Landing push was an extension of metropolitan Atlanta's "cityhood" movement, through which unincorporated areas of Georgia counties have petitioned to incorporate as cities.[10] The movement's proponents claim to seek local self-determination.[11] Its opponents believe it would further entrench segregation in Atlanta.[12] According to an analysis by the *Atlanta Journal-Constitution*, whatever the movement's impetus, it has starved metro Atlanta's counties of revenue, creating "mostly white islands of safety and affluence. What's remaining is heavily black, [and] less well-off."[13] Additionally, Eagle's Landing threatened to break new ground in the cityhood movement by shearing land from an existing city rather than an unincorporated county, potentially opening a "Pandora's box" of "richer communities" unilaterally taking "property, residents and tax base against the wishes of" larger municipalities.[14]

Even so, the Georgia General Assembly enacted two laws to create Eagle's Landing. First, S.B. 262 set out a revision of Stockbridge's borders to accommodate the new city.[15] Second, S.B. 263 enabled the creation of Eagle's Landing within that negative space, laying out a municipal charter.[16] Though the statutes would deprive Stockbridge of

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[7] *See* Leon Stafford, *Stockbridge Leaders Oppose Eagle's Landing Cityhood*, ATLANTA J.-CONST. (Feb. 5, 2018), https://www.ajc.com/news/local-govt--politics/stockbridge-leaders-oppose-eagle-landing-cityhood/S0UgrdlACwFzhGaaYc5L6L/ [https://perma.cc/XM6G-WEYY].

[8] *See* John Hallacy, *Commentary: The Eagle Has Landed — Or Has It?*, BOND BUYER (Apr. 25, 2018, 10:56 AM), https://www.bondbuyer.com/opinion/a-closer-look-at-the-georgias-eagles-landing-de-annexation [https://perma.cc/L978-57X9].

[9] *See* CARL VINSON INST. OF GOV'T, UNIV. OF GA., STOCKBRIDGE DE-ANNEXATION FISCAL ANALYSIS 3 (2017).

[10] *See* Brentin Mock, *Why the Vote to Secede from a Black City Failed in Georgia*, CITYLAB (Nov. 9, 2018), https://www.citylab.com/equity/2018/11/eagles-landing-vote-secede-stockbridge-georgia/575371/ [https://perma.cc/8AJF-QAWZ].

[11] *See* Sam Rosen, *Atlanta's Controversial "Cityhood" Movement*, THE ATLANTIC (Apr. 26, 2017), https://www.theatlantic.com/business/archive/2017/04/the-border-battles-of-atlanta/523884/ [https://perma.cc/FLY3-BR75].

[12] *See id.*

[13] Mark Niesse, *New Cities Could Further Split Atlanta Region*, ATLANTA J.-CONST. (Feb. 21, 2015), https://www.ajc.com/news/local-govt--politics/new-cities-could-further-split-atlanta-region/zyP5X5R3PyvQa5BZ8SOsNO/ [https://perma.cc/84ES-X2QQ].

[14] Torpy, *supra* note 5; *see also* RAJAN, *supra* note 6 (warning that the Eagle's Landing plan would be "credit negative for local governments in Georgia generally because [it] establish[es] a precedent that the state can act to divide local tax bases, potentially lowering the credit quality of one city for the benefit of another"); Mock, *supra* note 10.

[15] S.B. 262, 154th Gen. Assemb., Reg. Sess. §§ 1-1 to -2 (Ga. 2018).

[16] S.B. 263, 154th Gen. Assemb., Reg. Sess. arts. II–VIII (Ga. 2018).

much of its tax base, they did not explicitly apportion Stockbridge's outstanding municipal debt between the two cities.[17] S.B. 263 would become effective if the "voters of the proposed City of Eagle's Landing" approved a referendum on the statute.[18] In short, the legislature put to a vote whether to split Stockbridge, but let only a fraction of its residents have a say in that decision. The seceders were given the power to decide the political and economic future of a city they would leave. However, on November 6, 2018, the referendum failed, with fifty-seven percent of voters opposing de-annexation.[19] The two statutes are now moot, but they may be a sign of things to come.[20]

The Eagle's Landing plan brings two lines of federal constitutional law into conflict. The first, led by *Hunter v. City of Pittsburgh*,[21] instructs that states have the power to reorganize their local governments, which are merely "convenient agencies" of the state.[22] The Court held that the state may, "unrestrained by any provision of the Constitution,"[23] do anything it wants with its cities — resize, consolidate, or even dissolve them — without popular consent.[24] This broad power rests on the federalism principle that a state's political process can be trusted to divide a state into municipalities free from federal court oversight.[25]

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[17] Three financial institutions read the secession statutes to leave Stockbridge on the hook for the whole of its debt. *See* RAJAN, *supra* note 6; S&P GLOBAL MKT. INTELLIGENCE, GEORGIA CITIES FACE POTENTIAL NEGATIVE IMPACT IF ISSUES WITH LARGE-SCALE DEANNEXATIONS BECOME MORE PERVASIVE OR GO UNADDRESSED (2018); Letter from Laura Appleby, Chapman & Cutler LLP, on behalf of Capital One Pub. Funding, LLC, to the City of Stockbridge (Mar. 30, 2018) (on file with the Harvard Law School Library). However, a federal district court held, in denying a preliminary injunction against the referendum, that the statutes did make Eagle's Landing a successor in interest to Stockbridge's obligations, though the court did not specify how Stockbridge's debt would be allocated. Capital One Pub. Funding, Inc. v. Lunsford, No. 18-CV-3938, slip. op. at 13–19 (N.D. Ga. Oct. 19, 2018). The referendum failed before the case reached final judgment or appeal.

[18] S.B. 263 art. VII, § 7.13.

[19] Joe Adgie, *Eagle's Landing Referendum Fails*, HENRY HERALD (Nov. 6, 2018), https://www.henryherald.com/news/eagles-landing-referendum-fails/article_d5b4df50-3437-5b9b-b53e-b8b904d235f8.html [https://perma.cc/W84W-KN5A].

[20] *See* Leon Stafford, *Threat of Inheriting Debt Puts New Spin on Georgia's Cityhood Movement*, ATLANTA J.-CONST. (Oct. 24, 2018), https://www.ajc.com/news/local-govt--politics/threat-inheriting-debt-puts-new-spin-georgia-cityhood-movement/2dIhrYBTWT4NVclnw2mCKP/ [https://perma.cc/YAA2-ZXXR] (suggesting that wealthy communities could use Eagle's Landing as a "template to break away from their home cities"); *supra* note 14.

[21] 207 U.S. 161 (1907).

[22] *Id.* at 178; *see id.* at 178–79. In *Hunter*, disgruntled residents of Allegheny, Pennsylvania, challenged the state's decision to merge Allegheny and Pittsburgh upon a vote of the cities' combined populations (Pittsburgh, much larger than Allegheny, could dominate the vote). *See id.* at 174–75.

[23] *Id.* at 179.

[24] *Id.* at 178–79.

[25] *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 73–74 (1978) ("[T]his Court does not sit to determine whether [the state] has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature, and . . . citizens are free to urge their proposals to that body."); Rogers v. Brockette, 588 F.2d 1057, 1069 (5th

The second is the doctrine of one person, one vote, which reads the Fourteenth Amendment to require that when a municipality's residents are similarly interested in a plebiscite, no group may be disenfranchised absent a compelling state interest.[26] The analysis for municipal elections has two steps. First, the court weighs the interests of the disenfranchised citizens and the enfranchised citizens.[27] If it finds that the in- and out-groups are similarly interested, then it concludes that a fundamental constitutional interest of the excluded group — the right to vote — has been burdened. Second, it subjects any burden on the right to vote to strict scrutiny, upholding voting restrictions only if they are justified by a compelling, narrowly tailored state interest.[28] One person, one vote has required equal participation in elections for local governing bodies[29] and votes on municipal bond issues,[30] among other situations.

These two doctrines offer conflicting constitutional instructions for Eagle's Landing. Since the vote was to reorganize a city, it fell under the legislature's broad *Hunter* power. But since both the included and excluded groups had pressing interests in the fate of their shared community, it also implicated one person, one vote. The Supreme Court has never addressed which rule takes precedence "in the politically freighted incorporation process."[31] However, in two cases involving other kinds of municipal organization, the Court upheld unequal voting, giving overriding "significance" to the *Hunter* presumption of state power.[32]

First, in *Holt Civic Club v. City of Tuscaloosa*[33] the Court held that residents of unincorporated territory around Tuscaloosa could be excluded from Tuscaloosa elections even though they were under its "police jurisdiction."[34] Instead of balancing the interests of the included

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Cir. 1979) (stating that *Hunter* and "allied cases" hold "that the Constitution does not interfere in states' internal political organization").

[26] *See, e.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204, 206, 209 (1970); Reynolds v. Sims, 377 U.S. 533, 567–68 (1964).

[27] *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 630 (1969) (finding that a disenfranchised plaintiff was "substantially interested in and significantly affected by" a school board election's outcome).

[28] *See, e.g.*, *id.* at 632–33. One person, one vote fits under the fundamental interests branch of equal protection law, which subjects burdens on fundamental interests to strict scrutiny. *See, e.g.*, San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973).

[29] *See* Bd. of Estimate v. Morris, 489 U.S. 688, 692–93 (1989) (city-management board); *Kramer*, 395 U.S. at 632 (school board); Avery v. Midland County, 390 U.S. 474, 484–85 (1968) (county government).

[30] *See City of Phoenix*, 399 U.S. at 209 (general obligation bonds); Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969) (per curiam) (revenue bonds).

[31] Bd. of Supervisors v. Local Agency Formation Comm'n, 838 P.2d 1198, 1206 (Cal. 1992) (in bank).

[32] Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) ("While [*Hunter* has] undoubtedly been qualified by later cases . . . [it] continues to have substantial constitutional significance . . . .").

[33] 439 U.S. 60.

[34] *Id.* at 61; *see id.* at 61–63.

and excluded groups, the Court treated Tuscaloosa's boundary as determinative, applying rational basis review because the disenfranchised class "resid[ed] beyond the geographic confines of the [city]"[35] and because the state possessed "extraordinarily wide latitude . . . in creating . . . political subdivisions."[36] Second, in *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*,[37] the Court upheld a New York statute that conditioned enactment of a new county charter on concurrent majority votes of county residents living in and outside of cities, effectively giving the citizens residing outside of cities a veto.[38] The Court subjected the statute to rational basis review because the state had identified "the distinctive interests of the residents of the cities and towns"[39] relative to "noncity residents."[40] Reviewing the voting scheme for rationality was consistent with "the wide discretion that States have in forming . . . local subdivisions."[41] In both cases, the Court permitted the state, through its *Hunter* power, to define the jurisdictional unit in which equal voting should apply, even when that meant excluding interested citizens.[42]

A court reviewing a local government reorganization plan that selectively enfranchises classes of citizens should instead apply the one person, one vote doctrine free of *Hunter*'s influence, weighing the interests of all directly affected citizens without deferring to the state's proposed boundary lines. The Supreme Court's current doctrinal compromise is unsatisfactory for four reasons. First, the *Hunter* doctrine assumes that states have a functional political process; there is reason to believe this is not always the case. Second, local government decisions afforded *Hunter* deference are often indistinguishable from those subjected to one person, one vote. Third, one person, one vote is flexible enough to take account of the interests *Hunter* protects, but the reverse is not true. Fourth, changes in constitutional law since *Hunter* render it outdated.

The *Hunter* doctrine suggests that local democracy is best served by letting state politics handle municipal reorganization. The *Hunter* power rests in the state legislature[43] and is therefore accountable to the

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[35] *Id.* at 68.

[36] *Id.* at 71.

[37] 430 U.S. 259 (1977).

[38] *See id.* at 260–63.

[39] *Id.* at 268–69.

[40] *Id.* at 269.

[41] *Id.* Other courts have taken a similar approach in incorporation and de-annexation cases. *See, e.g.*, City of Herriman v. Bell, 590 F.3d 1176, 1185–86 (10th Cir. 2010); Bd. of Supervisors v. Local Agency Formation Comm'n, 838 P.2d 1198, 1206 (Cal. 1992) (in bank); City of New York v. State of New York, 562 N.E.2d 118, 121 (N.Y. 1990) (per curiam).

[42] *See* Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 794, 798 (1992).

[43] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

political process by design, as its progeny make clear.[44] To this end, *Hunter*'s normative viability depends on the political process being fair and open. Some evidence suggests that in Eagle's Landing it was not. The Georgia legislature "didn't give the majority of . . . voters — the ones left behind — any say in the matter."[45] The people of Stockbridge were excluded not just from the fail-safe final referendum, but from the entire de-annexation petition process.[46] At no point did Stockbridge have a meaningful chance to veto Eagle's Landing: the seceders started the process on their own, and legislators other than those representing Stockbridge took it to the finish line.[47] In other one person, one vote challenges to municipal reorganizations, *Hunter* withstood challenge in part because the political process as a whole protected all interested citizens, even if the final referendum did not.[48] In an Eagle's Landing–type case, one person, one vote's role would be to reinforce the political system that *Hunter* assumes is functioning freely.[49] More broadly, the Eagle's Landing experience suggests that *Hunter* decisions are vulnerable to political gamesmanship. This risk justifies assuming the key premise of one person, one vote — that courts must monitor and guarantee "political equality"[50] — in *Hunter* situations, too.

Second, because state action invoking *Hunter* is often hard to distinguish from state action requiring one person, one vote, it is unclear why they should get different standards of review. It is difficult to describe which local decisions are important enough for one person, one vote protection without including the very decisions *Hunter* keeps out. For instance, had Eagle's Landing seceded, Stockbridge would have been financially crippled, facing a significant erosion of its tax base and potentially responsible for more debt than it could afford. Stockbridge voters' interest in financial stability echoes a canonical one person, one vote case: *City of Phoenix v. Kolodziejski*,[51] which held that a state could not limit voting on general obligation bond issues to property owners.[52] Non–property owners, despite ostensibly having less at stake, had

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[44] *See id.* at 179 ("[T]hose who legislate for the State are alone responsible for any unjust or oppressive exercise of [the reorganization power]."); *supra* sources cited at note 25.

[45] Torpy, *supra* note 5.

[46] *See* Mock, *supra* note 10.

[47] *See id.* (quoting Stockbridge's assistant city manager as follows: "[T]hose individuals who put up the bill did not represent us").

[48] *See, e.g.*, Bd. of Supervisors v. Local Agency Formation Comm'n, 838 P.2d 1198, 1203 (Cal. 1992) (in bank) (approving a unilateral incorporation vote because nonvoters' views were aired through a "process containing elaborate safeguards designed to protect the political and economic interests of [those] affected").

[49] *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[50] Gray v. Sanders, 372 U.S. 368, 381 (1963).

[51] 399 U.S. 204 (1970).

[52] *See id.* at 212–13.

enough of an interest to merit a say.[53] By contrast, in Eagle's Landing, departing residents alone could decide whether to leave Stockbridge with its significant financial obligations while depriving it of much of its revenue.[54] A unilateral de-annexation vote thus allowed a more extreme version of what *City of Phoenix* prohibited: those with *less* on the line were empowered to alter significantly Stockbridge's financial outlook, cutting out those primarily impacted. Here, the distinction between *Hunter* and one person, one vote decisions collapses.

Third, one person, one vote is capacious enough to account for the *Hunter* power even without giving it special weight. In many — perhaps most — boundary-change cases, the interests of the in- and out-groups will be different enough to allow a court to subject the state's classification to rational basis review even without *Hunter*'s influence.[55] *Lockport* is a good example. There, the state offered a convincing account of why city-county and non-city-county residents had distinct interests in a new county charter: the former relied on the county for basic services, while the latter received those services from interposed city governments.[56] Though the *Hunter* rule informed *Lockport*, one person, one vote could have reached the same result standing alone. By contrast, in Eagle's Landing, *Hunter* and one person, one vote diverge. The former would permit restricting the franchise to Eagle's Landing residents. The latter would likely subject the restriction to strict scrutiny; though the interests of Eagle's Landing residents (self-determination) and Stockbridge residents (financial security) are "distinctive,"[57] both groups are "primarily interested."[58] Even at its strict scrutiny phase, one person, one vote still permits the state to "selectively distribute the franchise"[59] when its interest in doing so is compelling as a matter of fact (rather than as a matter of *Hunter*'s categorical supposition).

In short, because one person, one vote rarely produces categorical rules about who must be enfranchised and when,[60] it is flexible enough to account for a state's interest in organizing its municipalities. The reverse is not true. *Hunter* does not protect one person, one vote's animating value: political equality. Instead, by trusting the legislature to

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[53] *Id.* at 209.

[54] RAJAN, *supra* note 6.

[55] When the interests of the enfranchised group really are more significant, the state has broad discretion to weight their votes disproportionately. *See, e.g.*, Ball v. James, 451 U.S. 355, 368, 370–71 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 731 (1973).

[56] Town of Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 270–71 (1977).

[57] *Id.* at 266.

[58] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969).

[59] *Id.*

[60] *Kramer*, for instance, does not state that voting restrictions in school board elections are automatically subject to strict scrutiny, only that *interested* residents may not be excluded absent a compelling state interest. *Id.*

adequately represent its citizens, it merely assumes a level political playing field, notwithstanding facts on the ground.[61]

Finally, applying pure one person, one vote rebalances *Hunter* with the dramatic changes in constitutional law over the intervening century. *Hunter*, announced before the rise of the Court's rights jurisprudence, "bespeaks the judicial confidence of a simpler era."[62] When *Hunter* was decided, for instance, the Supreme Court had not yet developed its tripartite framework for adjudicating rights disputes.[63] Viewed in this light, *Hunter*'s categorical prioritization of the state's interest above all reads as a matter of historical contingency.[64] Since then, the Court's equal protection analysis has developed the capacity to assess government classifications by analyzing the interests of the state and the interests of the burdened group together. Now, judicial deference to state legislatures is only appropriate when they do not burden individual rights, cut out a disfavored group, or otherwise undermine the political process. But, perhaps because of the strength of *Hunter*'s "unconfined dicta,"[65] its principle was never fully circumscribed by equal protection.

When all residents of a city are interested in a decision involving municipal boundaries, does state supremacy or political equality prevail? *Hunter* and one person, one vote each express a view of a court's role in supervising and safeguarding democracy. One person, one vote rests on the equal protection principle that if a constitutional right is at stake or the political process is closed, then searching review of state action is required. Unspoken in *Hunter* is the inverse proposition: because the political process is assumed to fairly represent all citizens, it is improper for the court to second-guess the legislature. Therefore, the appropriate rule in an Eagle's Landing–type case depends in part on the empirical question of which triggering conditions are present. In light of what was at stake, did the state burden a fundamental right? Was the process closed to interested citizens? There is reason to believe the answer to both questions in Eagle's Landing was yes, leaving one person, one vote the only tenable rule of decision. Otherwise, those facing down Atlanta's fracturing may be left without any voice at all.

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61 *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

62 Bd. of Supervisors v. Local Agency Formation Comm'n, 838 P.2d 1198, 1205 (Cal. 1992) (in bank).

63 *See* Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1406–08 (2016); Note, *The Right to Vote in Municipal Annexations*, 88 HARV. L. REV. 1571, 1579 (1975).

64 *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 564, 566–68 (1999); Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 406–07 (2013); *see also* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 6 (2012) (characterizing *Hunter* as a rule of "federal general common law" that should be overruled on *Erie* grounds (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))).

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