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## Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law

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# NOTE

## Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?

*Brian P. Keenan\**

### TABLE OF CONTENTS

INTRODUCTION .....	1899
I. SUITS BASED ON THE SUPREMACY CLAUSE ARE PERMITTED BECAUSE THE CASES IN THE <i>TRENTON</i> LINE WERE LIMITED TO THE CONSTITUTIONAL CLAUSES IN QUESTION.....	1905
II. EACH SUIT BY A POLITICAL SUBDIVISION AGAINST ITS PARENT STATE SHOULD BE DECIDED ON THE CONSTITUTIONAL MERITS, NOT ON STANDING .....	1907
III. FEDERALISM SUPPORTS ALLOWING SUITS.....	1913
IV. A SUBDIVISION'S NEED TO PROTECT ITSELF SUPPORTS ALLOWING SUITS .....	1919
V. THE NATURE OF THE SUPREMACY CLAUSE ALONE IS THE PROPER RATIONALE FOR ALLOWING POLITICAL SUBDIVISIONS TO SUE THEIR PARENT STATES.....	1923
A. <i>The Tenth Circuit's Rationale Misreads the Precedent....</i>	1923
B. <i>The Fifth Circuit Comes Closer to the Mark, but Still Falls Short</i> .....	1925
C. <i>The Supremacy Clause Itself Provides the Rationale for Suits</i> .....	1927
CONCLUSION .....	1928

### INTRODUCTION

Municipal government is often the closest level of government to the people, who look to their local government for police and fire protection, to maintain the roads and streetlights, and to collect the garbage. While relatively few people have regular contact with federal

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regulatory agencies, almost everyone has received a parking ticket from his local government. Few stop to think, however, about the role these political subdivisions of states play in our federal system. They offer a miniature version of federalism on the state level, dividing the power of the state and placing many important decisions in the hands of representatives closer to the people. Although cities, counties, and school districts substantially affect the lives of the average citizen, their relationship to state governments under the Federal Constitution is far from clear. States create political subdivisions, and thus have broad powers over them, but subdivisions do not always agree with their parent states' actions. Constitutional problems emerge when a subdivision thinks the laws of its parent state conflict with the Constitution or with federal law. Can the subdivision turn to the federal courts and federal law for protection from its parent state?

*Hunter v. City of Pittsburgh*<sup>1</sup> is a leading example of Supreme Court jurisprudence on municipalities. The Pennsylvania statute at issue in the case authorized the larger of two contiguous cities to annex the smaller.<sup>2</sup> Pittsburgh followed the statutory procedures to annex Allegheny and the annexation passed the referendum required by the statute.<sup>3</sup> Residents of Allegheny and the Allegheny city government filed suit to stop the annexation, lost in the Pennsylvania courts, and appealed to the Supreme Court.<sup>4</sup> The plaintiffs pursued theories that the annexation impaired a contract between the municipal corporation and its taxpayers<sup>5</sup> and that the enlarged city would subject them to higher taxes, thus depriving them of property without due process of law.<sup>6</sup> The Court upheld the annexation because of the broad authority given to states to create and manage their political subdivisions, which are "created as convenient agencies for

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1. 207 U.S. 161 (1907). Other cases in this line include: *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394 (1919); *Williams v. Eggleston*, 170 U.S. 304 (1898); *Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879); and *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U.S. 307 (1875).

2. *Hunter*, 207 U.S. at 161.

3. *Id.* at 164-65, 174.

4. *Id.* at 165-71.

5. *Id.* at 177. The Contract Clause of the Constitution says that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. Justice Moody dismissed the *Hunter* plaintiffs' "novel proposition" by saying "[i]t is difficult to deal with a proposition of this kind except by saying it is not true." *Hunter*, 207 U.S. at 177. The plaintiffs argued this tenuous theory because the Court had previously rejected the theory that the charter of a municipal corporation is a contract between the municipality and the state. *See id.*; *see also City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 91 (1891) ("[T]he municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any constitutional obligation.").

6. *Hunter*, 207 U.S. at 177-78.

exercising such of the governmental powers of the state as may be entrusted to them.”<sup>7</sup> The state decides the nature and extent of the powers of a political subdivision, so it “may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter or destroy the corporation.”<sup>8</sup> Because the state controls its subdivisions’ borders and powers to make contracts, it can modify a subdivision’s borders or contracts without violating the Constitution.

*City of Trenton v. New Jersey*,<sup>9</sup> the other leading case in this area, was a suit by a subdivision against its parent state. Trenton purchased the right to draw water from the Delaware River from a water company, which had received the right by grant from the state.<sup>10</sup> The state subsequently required all entities drawing water from rivers to pay a fee if they drew over a specified amount.<sup>11</sup> The city protested that the fee impaired the contract it had with the water company and deprived the city of property without due process of law.<sup>12</sup> The Court followed the reasoning in *Hunter* in denying the city’s claim, saying, “[t]he power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for ‘governmental purposes’ cannot be questioned.”<sup>13</sup>

While political subdivisions clearly play a subordinate role to states in the federal system, they are not completely subject to the whims of the state legislatures. For example, a state may revoke the charter of a political subdivision, but it must preserve a means for the subdivision’s creditors to satisfy their claims.<sup>14</sup> The Court has also recognized some

7. *Id.* at 178.

8. *Id.* at 178-79; *see also* *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“[T]he state may withhold, grant or withdraw powers as it sees fit.”); *New Orleans Water Works*, 142 U.S. at 91.

9. 262 U.S. 182 (1923). It was heard in conjunction with *City of Newark v. New Jersey*, 262 U.S. 192 (1923). The cases on state power over municipalities are often called the *Hunter-Trenton* line of cases, reflecting these two cases’ leading role in the law. *See, e.g.,* *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979).

10. *Trenton*, 262 U.S. at 184.

11. *Id.* at 183-84.

12. *See id.* at 186. The Court does not explicitly state what the city’s arguments were, but its opinion is directed towards the Contract Clause and the Fourteenth Amendment.

13. *Id.* at 188. The Court employed a distinction between the rights and property of the city used for governmental purposes and those used for its proprietary purposes. The Court recognized that “[t]he basis for the distinction is difficult to state, and there is no established rule for the determination of what belongs to one or the other class.” *Id.* at 191-92. The distinction “has largely been abandoned.” *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)).

14. *Port of Mobile v. United States ex rel. Watson*, 116 U.S. 289, 305 (1886).

limits to states' broad authority over determining the boundaries of their subdivisions. The Supreme Court reversed a finding of summary judgment in favor of the Alabama Legislature in a suit that challenged its new boundaries of Tuskegee, which excluded all but four African-American citizens from the city by changing the city's shape from a square to a "strangely irregular twenty-eight-sided figure."<sup>15</sup> The Court held that this redrawing of the boundaries of a city stated a cause of action for violation of the African-American residents' voting rights under the Fifteenth Amendment.<sup>16</sup> In doing so, the Court limited the holdings of *Hunter* and *Trenton*, explaining:

a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.<sup>17</sup>

The state's power over its political subdivisions is therefore not completely unlimited.

These seemingly conflicting precedents have produced confusion in the federal circuit courts of appeals when a political subdivision sues its parent state. Some circuits follow a *per se* rule that political subdivisions cannot sue their parent states under any constitutional provision.<sup>18</sup> Other circuits have reexamined the *Hunter* and *Trenton* precedents and now allow suits by political subdivisions<sup>19</sup> based on the Supremacy Clause.<sup>20</sup> Others have noted the confusion and avoided

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15. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960). States possess broad powers over the boundaries of their subdivisions, so state decisions on boundary lines are generally constitutional unless they involve race, *see id.*, or another important federal interest, like the Establishment Clause, *see Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (holding unconstitutional under the Establishment Clause a New York law which carved a school district around a community of Satmar Hasidic Jews).

16. *Id.* at 347-48.

17. 364 U.S. at 344.

18. *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999); *Gwin Area Cmty. Sch. v. Michigan*, 741 F.2d 840 (6th Cir. 1984).

19. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998); *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979).

20. U.S. CONST. art. VI, § 2, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

taking a stand on the issue,<sup>21</sup> and the Second Circuit has taken an ambiguous stance.<sup>22</sup>

The Ninth Circuit has taken the lead in advancing a per se rule prohibiting political subdivisions from suing their parent states, most recently in *Palomar Pomerado Health System v. Belshe*.<sup>23</sup> Palomar Pomerado, a health care district created by California, sued the state, claiming that the state regulations for reimbursements for care given to those insured under California's Medi-Cal program compensated the district less than required by federal Medicaid law.<sup>24</sup> The Ninth Circuit ruled that, as a political subdivision, Palomar Pomerado "lacks standing to bring an action against the state in federal court — at least to the extent that its action challenges the validity of state regulations on due process and Supremacy Clause grounds."<sup>25</sup> The Sixth Circuit follows a similar per se rule.<sup>26</sup>

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21. *City of Charleston v. Pub. Serv. Comm'n*, 57 F.3d 385 (4th Cir. 1995); *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986).

22. The Second Circuit has decided three cases on this issue with somewhat conflicting results. It held that political subdivisions could not challenge a state statute under the Fourteenth Amendment, hinting at a per se rule. *New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). The same term, the court upheld a district court's dismissal of a city's suit because "it had no standing to assert constitutional claims." *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973). The court, however, said that a political subdivision would possibly have standing to assert a Fifth Amendment claim. *Id.* at 1100-01. A later case allowed the City of New York to join the governor of New York and the state corrections commissioner as third party defendants in a suit by prison inmates alleging overcrowding at city jails. *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986). The court did not analyze the issue on *Hunter* or *Trenton* grounds, but found the city met Article III standing requirements. *Id.* at 54. These cases taken together leave the state of Second Circuit law unclear.

23. 180 F.3d 1104 (9th Cir. 1999). The named defendant was Kimberly Belshe, Director of the California Department of Health Services. *Id.* at 1104. The court found that the action against Belshe was "under the category of actions against state officials that are in fact actions against the state." *Id.* at 1108. This Note similarly treats cases against state officials, such as the governor or a director of a state agency, as constituting suits against the state. *See also* *Indian Oasis-Baboquivari Unified Sch. Dist. No. 1 v. Kirk*, 91 F.3d 1240 (9th Cir. 1996) *vacated by reh'g en banc*, 109 F.3d 634 (9th Cir. 1997); *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir. 1980). At one time, though, the Ninth Circuit hinted in dicta that a complete bar on suits may not be warranted. *See* *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309 n.7 (9th Cir. 1981) (per curiam) ("While there are broad dicta that a political subdivision may never sue its maker on constitutional grounds, we doubt that the rule is so broad." (citation omitted)).

24. *Palomar*, 180 F.3d at 1106. Medi-Cal is California's health insurance program for the poor. *Id.*

25. *Id.* at 1108. Although the opinion appears to leave room for suits based on other grounds, it specifically denies suits based on the Supremacy Clause. *Id.* The rule is a per se rule, then, for cases arising under the Supremacy Clause. Because all challenges to state laws on federal grounds involve the Supremacy Clause, the rule is in effect a per se rule barring all suits by political subdivisions. Judge Hawkins concurred but urged the Ninth Circuit to reexamine its position in light of the *Rogers* and *Branson School District* decisions, which are discussed *infra* notes 27-33 and accompanying text. *Id.* at 1109-11 (Hawkins, J., concurring).

26. *Gwin Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984) ("The school district, as a political subdivision of the State of Michigan, was in no position to attack state

Two circuits allow suits by political subdivisions against their parent states based on the Supremacy Clause.<sup>27</sup> The Fifth Circuit was the first to allow suits of this kind when it permitted a school district to challenge a Texas statute requiring school districts to participate in the federal school breakfast program if they had one school where ten percent of students were eligible for the federal program.<sup>28</sup> Unlike the Ninth Circuit, the court held that the issue was not one of standing.<sup>29</sup> The court read the *Hunter* and *Trenton* line of cases as standing for “the substantive holdings that the Constitution does not interfere in a state’s internal political organization.”<sup>30</sup> The school district was able to proceed with its suit because its claim was “that Congress, exercising its power under Article I, has interfered with Texas’s internal political organization” and was not based on the Constitution itself.<sup>31</sup> The court found that the school district met the “criteria normally governing standing to sue in federal court.”<sup>32</sup> The Tenth Circuit joined the Fifth Circuit in allowing suits based on the Supremacy Clause, holding that suits by subdivisions based on the structural protection of the Supremacy Clause were not precluded by *Trenton*, which barred only suits based on protections of individual rights, such as those guaranteed by the Fourteenth Amendment and the Contract Clause.<sup>33</sup>

This Note argues that political subdivisions should be able to seek protection from their parent states under the Supremacy Clause when

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action as violative of the United States Constitution.”). The Sixth Circuit, however, at one time found that a local school district had standing to sue the state board of education when it alleged that the board transferred jurisdiction over a predominantly white area to an adjoining district because the transfer would violate the rights of students to attend integrated schools and possibly subject the school board to lawsuits. *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285 (6th Cir. 1974). *Gwin Area* is the Circuit’s latest ruling on the issue, so it governs.

27. See, e.g., *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998); *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979).

28. *Rogers*, 588 F.2d at 1059, 1071. The school district argued that the state law was contrary to the federal school breakfast program. *Id.*

29. *Id.* at 1069.

30. *Id.* at 1070.

31. *Id.*

32. *Id.* at 1067. The school district’s case, however, ultimately failed on the merits because the court found no conflict between the state and federal laws. *Id.* at 1071-73.

33. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-29 (10th Cir. 1998) (“Despite the sweeping breadth of Justice Cardozo’s language, both *Williams* and *Trenton* stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.”). The case involved the question of whether alterations to Colorado’s trusteeships of public lands violated the terms of a trust established by Congress when the state entered the Union. Once again the court found that school district met the Article III requirements for standing, *id.* at 630-31, yet decided the case on the merits against the school district, *id.* at 643.

alleging a conflict between state law and any federal law, be it the Constitution, treaty, or a federal statute. Part I argues that the precedential cases like *Hunter* and *Trenton* were limited to the constitutional provisions in question and therefore did not bar all suits under the Supremacy Clause. Part II shows that the issue is one of constitutional protection of political subdivisions, rather than Article III standing, which had a completely different meaning when *Hunter* and *Trenton* were decided. Part III finds that suits based on the Supremacy Clause best fit into the dual nature of our federalist system and rejects some possible counterarguments based on the idea of state sovereignty. Part IV shows that subdivisions' need to protect themselves supports allowing them to sue their parent states. Part V examines the proper rationale for Supremacy Clause suits by political subdivisions and rejects the reasoning of the Fifth and Tenth Circuits, advocating instead a rationale based solely on the nature of the Supremacy Clause.

#### I. SUITS BASED ON THE SUPREMACY CLAUSE ARE PERMITTED BECAUSE THE CASES IN THE *TRENTON* LINE WERE LIMITED TO THE CONSTITUTIONAL CLAUSES IN QUESTION

This Part argues that suits by political subdivisions based on the Supremacy Clause are constitutional because precedent in this area has disallowed only those suits by political subdivisions based on the Contract Clause and the Fourteenth Amendment. These decisions do not preclude suits by political subdivisions under different constitutional clauses. Their holdings were based on the fact that political subdivisions hold property and make contracts at the pleasure of the state, and so the state may take the subdivisions' property or alter their contracts without constitutional limitations. Because this logic does not apply to suits based on other constitutional provisions or federal statutes coupled with the Supremacy Clause, political subdivisions should have their cases resolved on the merits.

A review of the Supreme Court's holdings in this area shows that they were limited to the clauses at issue in the cases, the Fourteenth Amendment and the Contract Clause. In *New Orleans Water Works*, one of the earliest cases in this area, the Court held that the state could alter a contract between a city and a water company because "there was no contract between the city and the Water Works Company which was protected by the constitutional clause in question."<sup>34</sup> The city, as an agent of the state, could make no contracts in its public character that were not subject to modification by the

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34. *City of New Orleans v. New Orleans Water Works*, 142 U.S. 79, 92 (1891).



state.<sup>35</sup> Regarding the city's claim of deprivation of property without due process, the court held that any property the city held "was not such a vested right as was beyond the control of the legislature."<sup>36</sup> The holding in the case was substantive: all contracts the city made and all property the city held were subject to the control of the state legislature.<sup>37</sup> A political subdivision, therefore, cannot claim the protection of the Constitution under the Contract Clause for modification of its contracts and the Fourteenth Amendment for deprivation of its property.<sup>38</sup>

*Hunter* raised similar issues and came to a similar substantive conclusion about a political subdivision's rights against its parent state. A political subdivision cannot look to the Contract Clause to protect its contracts or to the Fourteenth Amendment to protect its property because "[t]he number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests [*sic*] in the absolute discretion of the state."<sup>39</sup> The state was free to force the merger of Pittsburgh and Allegheny because the laws giving political subdivisions their powers and boundaries were not "contract[s] with the State within the meaning of the Federal Constitution."<sup>40</sup> The Court mentioned a long list of actions which a state could take without violating the Constitution, a list that the Court later found to be the "seemingly unconfined dicta of *Hunter*."<sup>41</sup> The list, however, is quite confined and uncontroversial. The state can alter the boundaries of its subdivisions, take their property, alter their contracts, and define the scope of the subdivisions' powers.<sup>42</sup> This rule, though, does not allow a State to force its subdivisions to violate the Constitution or require a subdivision to act contrary to a federal statute.

35. *Id.* at 91. As noted above, *supra* note 13, the distinction between a political subdivision's public and proprietary character has largely been abandoned.

36. *Id.* at 92.

37. *Id.* at 91-92.

38. *Id.*

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

40. *Id.*

41. *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960). The so-called "unconfined dicta" actually said that a state:

at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. . . . 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.

*Hunter*, 207 U.S. at 178-79.

42. *Hunter*, 207 U.S. at 178-79.

If any doubt remained as to the scope of this line of cases, the Court has since eliminated it. In *Trenton*, the Court definitively limited these holdings to the Contract Clause and the Fourteenth Amendment.<sup>43</sup> The Court said that in the previous cases, no “power, right or property of a city or other political subdivision [was] held to be protected by the Contract Clause or the Fourteenth Amendment.”<sup>44</sup> In deciding the case before it, the Court held that “the city cannot invoke *these provisions of the Constitution*” against the state.<sup>45</sup> The Court limited its holdings in these cases to the Contract Clause and the Fourteenth Amendment<sup>46</sup> and has subsequently reaffirmed this limitation.<sup>47</sup> It would be difficult for the Court to be clearer than when it said that “a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is . . . that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.”<sup>48</sup> Those cases involved municipal property, contracts, and boundaries; they established the rule that a city may not seek the protection of the Contract Clause or the Fourteenth Amendment against the state to protect its property, contracts, or boundaries. The cases do not stand for a complete bar to all suits by political subdivisions against their parent states.

## II. EACH SUIT BY A POLITICAL SUBDIVISION AGAINST ITS PARENT STATE SHOULD BE DECIDED ON THE CONSTITUTIONAL MERITS, NOT ON STANDING

This Part argues that Article III standing is not the dispositive issue when a political subdivision sues its parent state, even though some Supreme Court cases speak of a political subdivision’s “standing” to sue its parent state. In following these cases, the Sixth and Ninth Circuits apply a *per se* rule denying “standing” to political subdivisions in suits against their parent states.<sup>49</sup> This Part begins by

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43. *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (“The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for ‘governmental purposes’ cannot be questioned.”).

44. *Id.*

45. *Id.* at 192 (emphasis added). The provisions in question were the Contract Clause and the Fourteenth Amendment. *Id.* at 188.

46. *Id.* at 192; *Hunter*, 207 U.S. at 178-79; *City of New Orleans v. New Orleans Water Works*, 142 U.S. 79, 92 (1891).

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

48. *Id.* at 344.

49. *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999) (dismissing a health-care district’s suit against its parent state of California because the district, as a political subdivision, “lacks standing to bring an action against the state in federal court — at least to the extent that its action challenges the validity of state

showing that the Court has found that political subdivisions can meet the modern requirements for standing. It then argues that the confusion stems from the fact that “standing” had a different meaning when the older cases in the *Hunter* line were decided and that standing was not the threshold issue it is today. It concludes by examining the precedential cases to show that they were decided on the merits, not on the jurisdictional question of standing.

Precedent shows that political subdivisions can meet the Article III standing requirements. The Supreme Court ruled in *Board of Education v. Allen* that school board officials have standing to challenge state laws they allege to violate the Constitution.<sup>50</sup> In *Allen*, school board officials brought suit against the state education commissioner, claiming that a state law which required public school districts to loan textbooks to private school students was unconstitutional.<sup>51</sup> The Court found standing for the board members because they faced a choice between violating their oath to support the Constitution should they follow the statute and losing their jobs should they refuse to do so.<sup>52</sup> The injury asserted by a political subdivision facing a choice of whether to follow an allegedly unconstitutional law or to face the consequences of disobedience thus fits in the Article III standing requirements. It is an imminent harm, causally related to the state’s action, which can be remedied by an injunction prohibiting enforcement of the state law or a judgment that the state law is constitutional.<sup>53</sup> The federal circuit courts which deny “standing” do not address *Allen* and give only conclusory reasoning to state that political subdivisions lack standing.<sup>54</sup>

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regulations on due process and Supremacy Clause grounds.”); *Gwin Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984) (“We agree with the district court’s treatment of the standing question. The school district, as a political subdivision of the State of Michigan, was in no position to attack the state action as violative of the United States Constitution.”).

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

51. *Id.* at 240.

52. *Id.* at 241 n.5. Justice White, the author of *Allen*, later dissented from the denial of certiorari of a Ninth Circuit case on the grounds that the court’s per se rule against suits by political subdivisions against their parent states was inconsistent with *Allen*. *City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 449 U.S. 1039 (White, J., dissenting).

53. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

54. *See Indian Oasis-Baboquivari Unified Sch. Dist. No. 1 v. Kirk*, 91 F.3d 1240, 1246 (9th Cir. 1996) (Reinhardt, J., dissenting). As Judge Reinhardt explained:

*South Lake Tahoe* did not explain whether concerns about the standing of political subdivisions or concerns about the constitutional rights they possess underlay its holding. The court discussed the issue in a section of the opinion that concerned its jurisdiction and was entitled ‘The City’s Standing’. However, it made no reference to the usual standing criteria, and its reasoning, although elliptic, appears to be addressed to whether the city possessed a cause of action. (citation omitted).

The Sixth and Ninth Circuits, though, based their rule on a few Supreme Court cases that declared that political subdivisions lacked “standing” to bring Constitutional claims against their parent states.<sup>55</sup> The Court, in deciding a case which did not involve political subdivisions, said in dicta, “municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.”<sup>56</sup> The Court has also said that political subdivisions were “without standing to invoke the protection of the Federal Constitution.”<sup>57</sup> This language was based on different conception of standing and has misled some of today’s courts into denying standing to political subdivisions.

Reliance on the word “standing” by the Sixth and Ninth Circuits is a case of judicial equivocation. Standing today has a distinct meaning<sup>58</sup> and is a necessary element of federal-court jurisdiction that must be satisfied before the court reaches the merits of a case.<sup>59</sup> Standing did not have this definite meaning in the early twentieth century when *Hunter, Trenton* and their progeny were decided.<sup>60</sup> In the early part of

55. See *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (citing *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)); see also *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999); *Gwin Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984).

56. *Coleman*, 307 U.S. at 441. A municipal corporation, i.e., a city, is a species of political subdivision. *Coleman* involved the validity of the Kansas legislature’s approval of a constitutional amendment, involving questions of the lieutenant governor’s tie-breaking vote in the State Senate, whether time had lapsed for approval of the amendment, and whether the legislature could subsequently approve the amendment after previously rejecting it. *Id.* at 433-38. As the Court’s discussion of political subdivisions was unnecessary for its holding, the language is dicta. It should be noted that the Court, even in dicta, limits the impact to the Contract Clause and the Fourteenth Amendment.

57. *Williams*, 289 U.S. at 47.

58. See *Lujan*, 504 U.S. at 560-61. The Court summarized standing law as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. (internal quotations and citations omitted).

*Id.*

59. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (explaining that Article III “requires a litigant to have ‘standing’ to invoke the power of a federal court”).

60. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988). As Fletcher explained:

In the late nineteenth and early twentieth centuries, a plaintiff’s right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or

this century, “[a] party had standing — or a ‘right to sue’ — if it was correct in its claim on the merits that the statutory or constitutional provision in question protected its interests; standing was not seen as a preliminary or threshold question.”<sup>61</sup> The Court’s old conception of standing is exemplified by *City of New Orleans v. New Orleans Water Works Co.*<sup>62</sup> In the case, the Court held that a political subdivision, “being a municipal corporation and the creature of the state legislature, does not *stand in a position* to claim the benefit of the constitutional provision in question.”<sup>63</sup> The city thus had no standing, as understood in the late nineteenth century and early twentieth century to mean that the constitutional clause in question protected its interests, to claim the benefit of the Contract Clause when its parent state altered a contract the city had with a water company. This holding does not mean that the city has no standing whatsoever, in the modern sense, to bring constitutional claims against its parent state.

The precedential cases in this area were actually decided on the merits.<sup>64</sup> *Hunter* held that the relationship between the citizens of a city and the city itself is not a contract<sup>65</sup> and that “inhabitants and property owners . . . have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.”<sup>66</sup> *Trenton* held that the state’s power over its political subdivisions was “unrestrained by the contract clause or the Fourteenth Amendment.”<sup>67</sup> The Court, therefore, held that “the city cannot invoke these provisions of the federal Constitution against . . . the state law in question.”<sup>68</sup> These cases were not dismissed

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sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles. . . . But no general doctrine of standing existed. Nor, indeed, was the term ‘standing’ used as the doctrinal heading under which a person’s right to sue was determined. (footnotes omitted).

*Id.* “The creation of a separately articulated and self-conscious law of standing” began in the last half of the twentieth century due to the emergence of the administrative state. *Id.* at 225. A watershed case in the development of the standing doctrine was *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The *Lujan* court developed its three-part test from a survey of the Court’s cases “over the years.” 504 U.S. at 560.

61. *Rogers v. Blockette*, 588 F.2d 1057, 1070 (5th Cir. 1979).

62. 142 U.S. 79 (1891).

63. *Id.* at 89 (emphasis added). The clause in question was the Contract Clause.

64. See Alexander Willscher, Comment, *The Justiciability of Municipal Preemption Challenges to State Law*, 67 U. CHI. L. REV. 243, 250 (2000).

65. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176-77 (1907).

66. *Id.* at 179.

67. *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923).

68. *Id.* at 192. The Court reached a similar conclusion in *Trenton’s* companion case, *Newark v. City of Newark v. New Jersey*, 262 U.S. 192 (1923). The Court held that “[t]he enforcement by the state of the provision of the act . . . does not violate the equal protection

for lack of jurisdiction, as they would be if they did not satisfy modern standing requirements,<sup>69</sup> but instead established a substantive rule that the Contract Clause and the Due Process Clause do not protect political subdivisions against actions by their parent states. They do not establish a rule of standing whereby a political subdivision is presumptively unqualified to bring federal legal actions against its parent state.

Early twentieth century holdings regarding “standing” cannot be applied today because of the drastically different meaning the term had then. Continuing to analyze the status of political subdivisions under the heading of “standing” breeds confusion and is not faithful to precedent. As the Fifth Circuit has explained, “[t]he opinions in the *Hunter* and *Trenton* line of cases do occasionally — but by no means uniformly — speak of ‘standing.’”<sup>70</sup> The opinions do not reflect anything resembling the modern test for standing, looking for actual injury, causation, and whether the injury could be redressed by the court.<sup>71</sup> Analyzing past suits by political subdivisions using modern standing doctrine is a misunderstanding of the *Trenton* line and of the historical development of the standing doctrine.

Furthermore, “the sweeping breadth of Justice Cardozo’s language”<sup>72</sup> in *Williams v. Mayor of Baltimore*<sup>73</sup> should not be allowed to turn a rule developed for particular constitutional clauses into a complete bar to suits by political subdivisions against their parent states. In *Williams*, the Court said that a political subdivision “has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”<sup>74</sup> Arguing that this case means that political subdivisions can never invoke the Constitution against its parent state involves a drastic overreading of precedent. This one sentence is the only support for such a universal rule, and the first two cases cited for the proposition are *Trenton* and its companion

clause of the Fourteenth Amendment. . . . The city cannot invoke the protection of the Fourteenth Amendment against the State.” *Id.* at 196.

69. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (“we finally arrive at the threshold jurisdictional question: whether respondent, the plaintiff below, had standing to sue”).

70. *Rogers v. Brockette*, 588 F.2d 1057, 1070 (5th Cir. 1979). See, for example, *Trenton*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907); and *City of New Orleans v. New Orleans Water Works*, 142 U.S. 79 (1891) for cases that do not use the word “standing.”

71. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); see also *Indian Oasis-Baboquivari Unified Sch. Dist. No. 1 v. Kirk*, 91 F.3d 1240, 1246 (9th Cir. 1996) (Reinhardt, J., dissenting).

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

73. 289 U.S. 36 (1933).

74. *Id.* at 40.

case, *City of Newark v. New Jersey*.<sup>75</sup> As this Note has discussed earlier, *Trenton, Newark*, and their predecessors were limited to the constitutional clauses in question. If that were not enough, the Supreme Court itself has said these cases stand for the proposition that “the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in these cases.”<sup>76</sup>

Courts today should follow the model established in *New Orleans Water Works* and *Trenton*, deciding the case on the merits based on the constitutional clauses in question.<sup>77</sup> These cases implicitly involved the Supremacy Clause, because every attempt to invalidate a state law on federal constitutional grounds includes a Supremacy Clause claim to establish the primacy of federal law over state law.<sup>78</sup> The Supreme Court in *New Orleans Water Works* and *Trenton* gave the political subdivisions a fair hearing on their constitutional claims but ultimately decided that the Constitution afforded them no protection under the facts of their cases.<sup>79</sup> Political subdivisions today deserve no less. Of course, a political subdivision must realize that to win on the merits, it must overcome the broad powers that a state holds over its subdivisions. States, though, should not be able to hide behind those powers to shield themselves from all suits. The courts need to ensure that states stay within their constitutional bounds in their treatment of political subdivisions.

75. *Id.* (citing *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923)).

76. *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960).

77. *See Vill. of Arlington Heights v. Reg’l Transp. Auth.*, 653 F.2d 1149 (7th Cir. 1981) (dismissing a suit by a political subdivision against its parent state under the Fourteenth Amendment because it was barred by precedent, including *Newark* and *Williams*).

78. *See McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). As Chief Justice Marshall explained:

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, “this constitution, and the laws of the United States, which shall be made in pursuance thereof,” “shall be the supreme law of the land.”

*Id.*

79. *See, e.g., Trenton*, 262 U.S. at 192 (“We hold that the City cannot invoke these provisions of the federal Constitution.”).

## III. FEDERALISM SUPPORTS ALLOWING SUITS

Allowing suits by political subdivisions also fits with the nature of our constitutional system. These suits merely allow federal courts to ensure that states respect their constitutional limitations. Although “the cases . . . reflect the general reluctance of federal courts to meddle in disputes between state governmental units,”<sup>80</sup> and the federal courts should be very cautious about interfering in the internal political organization of a state, federal courts have every right to interfere with the internal political organization of a state if it violates the Constitution.<sup>81</sup> The Court has even said that “the power of the legislature over all local municipal corporations is unlimited *save by the restrictions of the state and Federal constitutions.*”<sup>82</sup> *Hunter* and the cases in its line held that certain activities of states, such as modifying a contract of one of its subdivisions or annexing a smaller city to a larger city, do not violate the Constitution.<sup>83</sup> The power of a state over its political subdivisions should guide a court when it decides the cases on the merits, as it did in *Hunter* and *Trenton*, but should not act as a complete bar to suits by political subdivisions.

Suits by political subdivisions that allege a violation of federal law are in keeping with the structure of our federal system. These suits are a restraint on states that act contrary to federal law, the supreme law of the land. The federal government serves as a check on the state governments just as state governments act as a check on federal power.<sup>84</sup> To this effect, the Court has quoted approvingly from the Federalist Papers:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state government, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.<sup>85</sup>

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80. *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991).

81. *Gomillion*, 364 U.S. at 345.

82. *Williams v. Eggleston*, 170 U.S. 304, 310 (1898) (emphasis added).

83. *Trenton*, 262 U.S. at 192; *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907); *City of New Orleans v. New Orleans Water Works*, 142 U.S. 79, 92 (1891). Of course, even these actions may be unconstitutional. *Gomillion*, 364 U.S. at 346. The Court said that a state is not insulated from judicial review in these matters of state interest if “state power is used as an instrument for circumventing a federally protected right.” *Id.* at 347.

84. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse on either front.”).

85. *Id.* at 459 (quoting THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).



Some try to defend a per se rule on the grounds that suits by subdivisions undercut the states' ability to serve as checks on federal power.<sup>86</sup> This argument, though, misunderstands the dual nature of our federal system. Federal protection is needed to ensure that states operate within their constitutional bounds just as much as states are needed to ensure that the federal government respects its limits. If the states operate within their bounds, they will have no problem defeating suits by their political subdivisions.

Nor do suits by political subdivisions contravene notions of state sovereignty because the proper scope of state sovereignty can only be determined after an investigation of substantive federal law, which provides the bounds of state sovereignty. A Supremacy Clause challenge to a state law by its nature alleges that the state is acting outside of its sovereign powers. Some argue that suits by political subdivisions impede state sovereignty and unacceptably weaken states in our federal system because a state's decision on its internal political organization is an important element of state sovereignty that should be left to the states without federal interference.<sup>87</sup> This argument fails to note, though, that the bounds of state sovereignty can only be determined by first addressing the merits of the subdivision's claim. If a state is acting within its constitutional bounds, the political subdivision's suit will be dismissed on the merits, as in *Hunter* and *Trenton*.<sup>88</sup> States still can rely on precedents like *Hunter* and *Trenton* to justify their decisions on the boundaries and powers they give to their subdivisions. The broad powers of states over their subdivisions, as defined in *Hunter*,<sup>89</sup> also ensure that mere political disagreements between states and their subdivisions will not end up in federal courts. Suits based purely on political disagreement would be precluded because a political subdivision must allege a conflict between state law and a specific federal law to state a claim.<sup>90</sup> The only problem for states with suits by political subdivisions would be when they are

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86. See Willscher, *supra* note 64, at 254 (“[S]tates sued by their municipalities will suffer a blow to their dignity.”).

87. Willscher, *supra* note 64, at 254-55.

88. It is interesting to note that the two most recent federal circuit court cases which recognized political subdivisions' ability to sue their parent states ultimately rejected the subdivisions' claims on the merits. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 643 (10th Cir. 1998); *Rogers v. Brockett*, 588 F.2d 1057, 1073 (5th Cir. 1979).

89. See *supra* note 8 and accompanying text.

90. *Branson School District*, 161 F.3d at 630 (“[M]ere disagreement by a political subdivision with the policies of its parent state will not be sufficient to overcome the traditional barrier to political subdivision standing.”). The Tenth Circuit reasoned that the requirement that the state allegedly violate a controlling federal law eliminated the concern about political subdivisions turning to federal courts whenever they disagreed with their parent states. *Id.*

acting unconstitutionally and hence cannot defend their actions based on state sovereignty.

*Washington v. Seattle School District No. 1*<sup>91</sup> shows how debates about state sovereignty are actually debates about whether a constitutional violation exists in the first instance. Voters in the state of Washington approved a ballot referendum requiring children to attend the school nearest to their residences, and the Seattle, Tacoma, and Pasco school districts brought suit to defend their now-illegal busing programs used to achieve racial integration.<sup>92</sup> The Court, by a five-to-four margin, held that the referendum was unconstitutional because it subjected integration programs to “a debilitating and often insurmountable disadvantage,” thus denying equal protection of the law to minorities.<sup>93</sup> Justice Powell, for the four dissenting justices, argued that the Constitution permitted a state to adopt a neighborhood schools program because “the State — exercising its sovereign authority over all subordinate agencies — should be free to reject” mandatory busing in the absence of segregation.<sup>94</sup> What seems to be a debate between those willing to interfere with state sovereignty and those who are not is really a veiled debate about the protections afforded by the Equal Protection Clause. The majority believed that Washington violated the Equal Protection Clause with its law; the fact that the law was passed through the popular political process was therefore irrelevant.<sup>95</sup> The majority reached its conclusion because “the State is obligated to operate [its educational] system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.”<sup>96</sup> The dissent, while using state sovereignty arguments, found

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91. 458 U.S. 457 (1982).

92. *Id.* at 459-64. The busing programs were initiated by the school districts, not in response to a lawsuit or court order. *Id.* 460-61. The proposed law said that “no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence.” *Id.* at 462 (quoting WASH. REV. CODE § 28.A.26.010 (1981)). The Court did not address the specific issue of whether the school districts, as political subdivisions, could sue their parent states. The Court indirectly answered the question by framing the issue as “not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause.” *Id.* at 476.

93. *Id.* at 484. The Court did not analyze any standing issues, but seemed to assume that a school district could raise the constitutional rights of individual minority students. Community groups intervened in support of the districts, and these groups presumably had standing to represent the interests of parents and students. *See id.* at 464.

94. *Id.* at 500 (Powell, J., dissenting).

95. *Id.* at 476 (“But ‘insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it.’” (quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969))).

96. *Seattle School District*, 458 U.S. at 487.

that there was no Equal Protection violation.<sup>97</sup> Courts should consider the broad powers of states over their subdivisions and notions of state sovereignty when deciding whether a constitutional violation exists, but not use them as a preemptive bar to all suits by political subdivisions.

While state legislatures are the proper forums for working out political questions in states, legislatures cannot avoid judicial review merely by the fact that they represent the people.<sup>98</sup> In the context of political subdivisions, the Court has said that a “statute which is alleged to have worked unconstitutional deprivations of petitioners’ rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.”<sup>99</sup> Defenders of a *per se* rule advance the arguments that municipalities’ interests the state political system protects and that any conflict between states and their political subdivisions amounts to a political question not appropriate for resolution in court.<sup>100</sup> This argument, however, suffers from the same weaknesses as the argument based on state sovereignty because “insisting that a State may distribute legislative powers as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate” the Constitution.<sup>101</sup>

Furthermore, there are mechanisms other than a *per se* ban on suits by political subdivisions to ensure that purely political questions stay out of the courts. Established doctrines, like the standing doctrine and the political question doctrine, make certain that these purely political disagreements stay out of the courts.<sup>102</sup> A court also can rule

97. *Id.* at 494 n.8 (Powell, J., dissenting) (“The Court has held that ‘the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.’” (quoting *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527, 538 (1982)). Justice Powell also found the ballot initiative to be race-neutral and did not present significant enough burdens “such that interference with the State’s distribution of authority is justified.” *Id.* at 495-96 (Powell, J., dissenting). The State was free to legislate as it chose because there was no constitutional violation, but Justice Powell did recognize that judicial intrusion could be justified if there were a violation. *See id.* (Powell, J., dissenting).

98. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

99. *Id.* The Court further elaborated that “[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.” *Id.*

100. Willscher, *supra* note 64, at 258 (“The state lawmaking process is the exclusive forum for working out controversies between a state and its municipalities.”).

101. *Seattle School District*, 458 U.S. at 476.

102. *See Allen v. Wright*, 468 U.S. 737, 750 (1984). As the Court explained:

Article III of the Constitution confines the federal courts to adjudicating actual “cases” and “controversies” . . . [T]he “case or controversy” requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are

as a matter of law that a certain state action is properly resolved through the political process; the Supreme Court did so in *Hunter* regarding municipal annexations, holding that “[t]he power [to authorize annexations] is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.”<sup>103</sup> The subdivision’s claim must be heard, though, because it alleges that the state had no power to make the challenged law in the first place either because it was unconstitutional or precluded by federal law. The court must examine the state action in question before it can decide whether it is best left to the political process. An *a priori* rule that all state actions concerning its political subdivisions are political matters not subject to judicial review contradicts *Allen*’s resolution of an Establishment Clause challenge to a state law by a school board<sup>104</sup> and *Gomillion*’s warnings that state actions in areas traditionally left exclusively to the state are reviewable if used as a pretext to circumvent constitutional rights.<sup>105</sup> The real debate is about the proper role of federal law as applied to a state’s internal political organization. These questions should be resolved explicitly in each case on the merits, not through a per se rule preventing suits by political subdivisions regardless of the constitutional clause or federal law alleged to be violated. Thus, concerns that suits by political subdivisions would give political subdivisions that lost in the political process a “second bite at the apple” are misplaced.

While courts should allow suits by political subdivisions against their parent states, they should continue, as they always have, to give proper weight to issues of state sovereignty and the broad powers states enjoy over their subdivisions. Some suits are foreclosed by precedent, such as suits challenging state alterations of municipal contracts under the Contract Clause and the Due Process Clause<sup>106</sup> and suits challenging the state’s decisions as to the boundaries and powers it gives to subdivisions under the same clauses.<sup>107</sup> Some federal

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founded in concern about the proper — and properly limited — role of the courts in a democratic society. (citations and internal quotations omitted).

*Id.*

103. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907). Some actions that affect political subdivisions clearly are not wholly within the domain of the state. It would be ridiculous to argue that the exclusive forum for school boards to challenge loans of textbooks to students at religious schools is the state legislature. See *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968). The Establishment Clause of the First Amendment clearly bears on the question and so the issue is appropriate for judicial review. See *id.* at 242-44.

104. See *Allen*, 392 U.S. at 241 n.5.

105. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

106. See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923).

107. *Hunter*, 207 U.S. at 178-79. To successfully challenge these actions, a subdivision would have to allege some sort of racial bias in the way the state drew the boundaries or

circuit courts of appeals have relied on *Trenton* to foreclose suits by political subdivisions under the Equal Protection Clause,<sup>108</sup> though this is in tension with *Seattle School District*, a Supreme Court case that dealt with an Equal Protection claim brought by a school district against its parent state.<sup>109</sup> Political subdivisions face an uphill battle to succeed in their suits, meaning lawsuits will rarely be an effective solution.<sup>110</sup> Mere political disagreements between subdivisions and their states do not belong in federal court, which should only be used to resolve legitimate questions of the constitutionality of a state action.<sup>111</sup>

States may also be concerned that allowing political subdivisions to sue under federal statutes via the Supremacy Clause will lead to undue Congressional interference in state affairs.<sup>112</sup> To address this concern, the Supreme Court provides states with protection from congressional overreaching through its “working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power.”<sup>113</sup> The Court used this assumption to find that states could prevent their subdivisions from providing telecommunications service, even though the Telecommunications Act of 1996 says that “[n]o State . . . may prohibit or have the effect of prohibiting the ability of any entity to

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allocated powers to subdivisions. See *Gomillion*, 364 U.S. at 347. Other avenues could possibly succeed if the subdivision alleged that the state action was somehow a way of “circumventing a federally protected right.” *Id.*

108. *Trenton*, 262 U.S. at 188 (“The power of the state, unrestrained by the . . . Fourteenth Amendment, over the rights and property of cities held and used for ‘governmental purposes’ cannot be questioned.”). See, e.g., *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *City of Moore v. Atchison, Topeka & Santa Fe Ry. Co.*, 699 F.2d 507 (10th Cir. 1983).

109. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). A political subdivision would probably have to allege some sort of racial discrimination in the way its parent state allocated powers to subdivisions, for example if a predominantly black city was given inferior powers to a predominantly white city without an adequate justification. In any event, the subdivision would be a proxy, asserting the right of its inhabitants to Equal Protection.

110. See *supra* note 88.

111. See *supra* note 59.

112. At one time the Court found this reasoning persuasive and prevented Congress from extending the Fair Labor Standards Act to state employees and the employees of political subdivisions. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976). The Court found that the Commerce Clause did not give Congress the power to “displace the States’ freedom to structure integral operations in areas of traditional governmental functions.” *Id.* at 852. The Court soon retreated from this stance, though. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Court found the “traditional government function” test is not only “unworkable but is also inconsistent with established principles of federalism.” *Id.* at 531.

113. *Nixon v. Mo. Mun. League*, 124 S. Ct. 1555, 1565 (2004).

provide any interstate or intrastate telecommunications service.”<sup>114</sup> Thus, courts will not infer that a statute was meant to interfere in the relationship of a state and its subdivisions absent clear congressional intent.<sup>115</sup> States also can argue that a statute is unconstitutional because it exceeds Congress’s power under Article I.<sup>116</sup> Suits by political subdivisions based on the Supremacy Clause merely require that states act within their constitutional bounds by obeying applicable Constitutional provisions and validly passed federal laws. The possibility of Congressional interference, however, results from federal supremacy and the courts’ expansive reading of Congress’s Article I powers,<sup>117</sup> and is a problem for states whether or not political subdivisions can sue their parent states.

#### IV. A SUBDIVISION’S NEED TO PROTECT ITSELF SUPPORTS ALLOWING SUITS

Political subdivisions are created by states “as convenient agencies for exercising such of the powers of the state as may be intrusted to them.”<sup>118</sup> It is only reasonable to allow these agents the ability to protest when they believe the state is asking them to do something they could not do themselves, i.e., violate federal law. Political subdivisions would be subject to lawsuits by individuals harmed by these alleged violations of federal law,<sup>119</sup> so political subdivisions should have the ability to prospectively protect themselves from such

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114. *Id.* at 1559 (citing 47 U.S.C. § 253(a) (2000)). The Court interpreted the statute to exclude political subdivisions because the text and legislative history did not show congressional intent for their inclusion as “entit[ies]” under the Act. *Id.* at 1565.

115. *Id.* at 1565; *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985). *Lawrence County* involved a South Dakota statute that required subdivisions to distribute federal payments in lieu of taxes (payments from the federal government to substitute for taxes not collected by the subdivision on tax-exempt federal property) in the same manner as they distribute local taxes. *Id.* at 258. The Court held the state statute unconstitutional because “the language and legislative history of the federal statute indicate that Congress intended local governments to have more discretion in spending federal aid than the State would allow them.” *Id.*

116. *See Rogers v. Brockette*, 588 F.2d 1057, 1070-71 (5th Cir. 1979). The state’s arguments, if advanced today, would be limited by *Garcia*, but the state would still have strong arguments under *Hunter* if Congress attempted to draw municipal boundaries or interfere in a similar area of state interest.

117. *Garcia*, 469 U.S. at 560 (“[T]oday’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”) (Powell, J., dissenting).

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

119. *See, e.g., Benjamin v. Malcom*, 803 F.2d 46 (2d Cir. 1986). The case involved a suit by prisoners under 42 U.S.C. § 1983 brought against New York City’s Department of Corrections, and the city moved to join the State of New York as a third-party defendant.

lawsuits by challenging the state action before they are forced to obey an arguably unconstitutional law.<sup>120</sup>

*Benjamin v. Malcolm*,<sup>121</sup> a Second Circuit case that addressed solely modern standing requirements without considering the *Hunter* and *Trenton* line of cases, powerfully shows the need to allow political subdivisions to sue their parent states. In *Benjamin*, prisoners at a New York City jail sued city prison officials under 42 U.S.C. § 1983, alleging overcrowding in violation of their constitutional rights under the Eighth and Fourteenth Amendments.<sup>122</sup> The district court granted the city's motion to join the Governor and state prison commissioner when the city alleged that state policies, including housing state prisoners in city jails, contributed to the overcrowding.<sup>123</sup> The state appealed the joinder, arguing in part that the city had no standing to press a joinder claim, an argument which the court found "needs little discussion."<sup>124</sup> Several potential injuries gave the city standing: contempt sanctions from the court for noncompliance, the cost of millions of dollars for more detention facilities, and the threat of another riot if the state did not promptly remove its prisoners from the city jails.<sup>125</sup>

A per se rule barring suits by subdivisions against their parent states would allow the state to pass state violations of federal law, like overcrowded prisons, and the resulting legal liabilities onto political subdivisions without giving the subdivisions judicial recourse to make the state pay its fair share. Suits by political subdivisions allow subdivisions to protect themselves against their parent states and serve to hold states accountable when states shift the blame for their unconstitutional behavior onto subdivisions. As shown by *Benjamin*, the state should not be able to pawn its constitutional wrongs off onto its subdivisions and then claim that political subdivisions have no right

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120. See *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1290 (6th Cir. 1974) (recognizing "the right of a school board to resist in the federal courts pressures upon it to prevent its performance of its duties in accord with the Constitution of the United States") (citing *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956)). The constitutional duty in the case was the duty to provide racially integrated schools. *Id.*

121. 803 F.2d 46 (2d Cir. 1986).

122. *Id.* at 47.

123. *Id.* at 49. The city was detaining state offenders until they could be moved to state facilities. *Id.* The district court ordered the state to take the prisoners within forty-eight hours, "finding that the State's failure promptly to take these prisoners off the City's hands strained the latter's facilities beyond constitutionally tolerable limits so that the State was in effect simply seeking to spread the burden of impermissible overcrowding rather than eliminating it." *Id.*

124. *Id.* at 54.

125. *Id.* The Court did not mention the fact that the City could be subject to § 1983 money damages allegedly due in part to state conduct, which seems to be another potential injury to the city.

under federal law to challenge state actions. In fact, the state could avoid political accountability for some of its constitutional wrongs by shifting the blame to subdivisions and transferring the fiscal responsibility for the violations to local taxpayers. Political subdivisions should have judicial recourse to avoid this kind of blame shifting by the state.

Furthermore, a per se rule could keep the party in the best position to claim an injury out of court. In fact, the standing doctrine sometimes makes political subdivisions the only parties in a position to challenge a state action, as exemplified by *Rogers*. In *Rogers*, a school district challenged a state law that required it to provide breakfast at school, claiming that the law forced it to expend money to administer an allegedly unconstitutional law.<sup>126</sup> A taxpayer likely would not have standing to challenge the state law based solely on the expenditure of funds.<sup>127</sup> A student's claim that an expenditure of money on breakfasts would entail less money for other programs might not suffice to confer standing on the student, as a court could find that the interest in funds is not particular to that student.<sup>128</sup> The school board is the party in the best position to bring suit, and the only one that definitely meets the Article III standing requirements.<sup>129</sup> It is most familiar with federal and state education law, is in the best position to know of a potential conflict, and faces the most direct injury from the state law, the same injury the Court recognized in *Allen*. The per se rule could possibly

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126. *Rogers v. Brockette*, 588 F.2d 1057, 1059-60 (5th Cir. 1979).

127. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 478 (1982) ("This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure."); see also *Massachusetts v. Mellon*, 262 U.S. 447, 487-88 (1923) (holding that an individual taxpayer suffered an injury only in an "indefinite way in common with people generally" when challenging the expenditure of funds, and so there was no justiciable case).

128. See *supra* note 127. The student would have to show an "injury in fact," for example, that somehow the expenditure of money on the school breakfasts consequently reduced spending in another area which hurt him. This may be difficult to prove and could be rejected as analogous to the problems associated with taxpayer standing. See *Mellon*, 262 U.S. at 487-88 (dismissing taxpayer's suit claiming that an expenditure of funds was unconstitutional because the spending did not cause the taxpayer an injury distinct from people generally). While municipal taxpayers have standing to challenge their municipality's actions which result in the expenditure of municipal funds, see, e.g., *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992), they do not necessarily have standing to challenge state actions that cause their municipality to spend money, see *Bd. of Educ. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 111 (2d Cir. 1995). But see *Gwin Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984) (finding standing for municipal taxpayers to challenge state action). Thus, the school district may be the only party with Article III standing to sue.

129. The school board would have standing under *Bd. of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968), and under the court's reasoning in *Rogers*, 588 F.2d at 1059-60, as was noted in *supra* Part I.



leave no one with standing to bring suit, effectively barring judicial review of the allegedly unconstitutional state action.

Another possible important use for suits by political subdivisions is to protect themselves when acting more as private entities than governments, such as employers, health care providers and other functions not unique to governments.<sup>130</sup> The need for such protection is increasing as states create more subdivisions that blend public and private functions, like the Business Improvement District, which “[c]ombin[es] public and private, as well as city government and neighborhood elements” to improve the quality of life and business environment of the district.<sup>131</sup> Allowing suits by subdivisions acting as businesses while preventing others would run close to the now-abandoned distinction between subdivisions acting in their public capacity and acting in their private, proprietary capacity.<sup>132</sup> As noted above,<sup>133</sup> the Court has recognized the ability of Congress to regulate the employment of state and municipal employees.<sup>134</sup> If a state tried to prevent its subdivisions from complying with the federal workplace guidelines, the subdivisions would have a good argument to enjoin the enforcement of such an action. While the individual workers would also have standing to challenge the state action, there is no good reason why a political subdivision acting as an employer should be forced to sit out and risk hurting relations with its employees, merely because it is an agent of the state.

*Palomar Pomerado* provides a good example of an area in which suits by political subdivisions may be needed to ensure state compliance with federal law. *Palomar Pomerado* was a state-created health care district formed under California law that provided nursing

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130. See *City of Cleveland v. Indus. Comm'n*, 455 N.E.2d 1085, 1089 (Ohio Ct. App. 1983) (distinguishing *Trenton* because “the actions in this case are proprietary in nature as they relate to the employer-employee relationship like any other Ohio employer”). The case was a dispute over whether the state Industrial Commission could collect premiums from the City of Cleveland, which had been underbilled as a result of a mistake by the Commission. *Id.* at 1086-87. The court found that the Commission’s practice of not billing employers for underbilled premiums, if the error was not discovered for more than two years after the original bill was submitted, should apply to the city as well as to private corporations and individuals. *Id.* at 1089-90.

131. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366-67 (1999) (reporting that there are over one thousand Business Improvement Districts in the United States, with many being created in the 1990s). The health care districts in *Palomar Pomerado* similarly provided a service, health care, that often is provided by private entities. See *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999).

132. See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 191 (1923). The distinction has been described as a “quagmire” and “has largely been abandoned.” *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986). But see *City of Cleveland*, 455 N.E.2d at 1089.

133. See *supra* note 112.

134. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

services.<sup>135</sup> Palomar Pomerado alleged that the state's formula for reimbursement under the state health insurance plan was below the federally mandated rates under Medicaid.<sup>136</sup> If Palomar Pomerado's allegations were true, California could subvert federal health care policy merely by forming health care subdivisions, and the Ninth Circuit's per se rule would preclude review.<sup>137</sup> Conceivably, a state could undermine federal schemes for health care, or any other issue, by forming political subdivisions. Of course, California's plan may have been perfectly consistent with federal law, but its legality was never tested because the Ninth Circuit's per se rule precluded a judgment on the merits. Courts should tread carefully when judging a state's actions, but a per se rule would deny a court the opportunity of reviewing even the most egregious state violations of federal laws merely because the complaining party is a political subdivision.

#### V. THE NATURE OF THE SUPREMACY CLAUSE ALONE IS THE PROPER RATIONALE FOR ALLOWING POLITICAL SUBDIVISIONS TO SUE THEIR PARENT STATES

The Constitution makes federal law supreme, whether it be a statute, a treaty or the Constitution itself. Therefore the Supremacy Clause alone requires that political subdivisions be allowed to prove that a state is violating any controlling federal law. More complex rationales for allowing such suits, like those employed by the Tenth Circuit and the Fifth Circuit, impose additional limitations which are inconsistent with the Supremacy Clause. Part V.A analyzes and rejects the reasoning the Tenth Circuit used to allow subdivision suits to proceed on the merits. Part V.B finds the Fifth Circuit's rationale to be an overreading of the precedent. Part V.C shows that the Supremacy Clause gives political subdivisions the ability to argue that a state law violates either the Constitution or a controlling federal law.

##### A. *The Tenth Circuit's Rationale Misreads the Precedent*

The Tenth Circuit used a distinction between individual rights and structural rights when it allowed a suit by a school district against its parent state.<sup>138</sup> The court read the *Trenton* line of cases as standing

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135. Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104, 1106 (9th Cir. 1999).

136. *Id.* The Ninth Circuit never reached the merits of the claim because it followed the Circuit's per se rule against suits by political subdivisions against their parent states. *Id.* at 1108.

137. *Id.* at 1108.

138. Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 628-30 (10th Cir. 1998). The case involved a Colorado referendum that changed the managing principles of its public lands

“only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.”<sup>139</sup> The court found the Supremacy Clause to be a structural protection and thus not barred by the *Trenton* line.<sup>140</sup> The court held that the subdivision must be “substantially independent” from its parent state to proceed with its suit and found school districts in Colorado to be independent from the state government.<sup>141</sup>

While the Tenth Circuit was creative in its reading of precedent, its creativity does more to confuse the issue than to clarify it. The initial problem is the distinction between individual and structural rights, which does not come from Supreme Court jurisprudence. The Tenth Circuit imported concepts into the precedents that the Court did not consider. The Supreme Court in *Hunter*, *Trenton*, and like cases did not draw distinctions between constitutional provisions that protected individuals and those that were structural protections. Further, the Court in those cases hinted that municipalities could seek the protections of the Constitution for property or contracts held in its proprietary capacity, showing that the Court was not completely opposed to giving municipalities the protection of “individual rights” in certain circumstances.<sup>142</sup> The Court’s holdings in the precedential cases were based on the powers states have over their subdivisions, not on whether the right involved was individual or structural. For example, the Court in *Trenton* found that the Contract Clause did not protect the city’s contract with the water company because the state controlled the city’s powers to make contracts and the state could therefore modify the city’s contract, not because the Contract Clause is an individual right which does not protect political subdivisions.<sup>143</sup>

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trust. *Id.* at 626. The land trust was established by Congress when Colorado entered the Union; thus the school district argued that the Supremacy Clause did not allow the state to override the terms provided by Congress. *Id.*

139. *Id.* at 628.

140. *Id.* at 629.

141. *Id.* The court followed the reasoning of the Supreme Court in *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 459 n.1 (1967). School districts were independent because state law allowed them to hold property in their own name, to enter into contracts, and to sue and be sued in their own name, and because they were led by independently elected school boards. *Branson School District*, 161 F.3d at 630. Most political subdivisions would meet this test.

142. *City of Trenton v. New Jersey*, 262 U.S. 182, 191 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (“It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes.”). The distinction has largely disappeared, see *supra* note 13, but its existence shows that the Court at the time was not analyzing the problem based on the categories of individual and structural rights.

143. *Trenton*, 262 U.S. at 188.

The Tenth Circuit also did not provide any guidance in determining the difference between an individual right and a structural right or cite cases that illustrate the distinction; it merely stated that the Contract Clause and the Fourteenth Amendment protect individual rights and that the Supremacy Clause is a structural right.<sup>144</sup> The court did not address the fact that the Supremacy Clause is not a right but only a gateway to challenge a state law on federal grounds.

In addition, the distinction does not accurately reflect the Supreme Court's decisions in this area. The Court in *Allen* allowed a suit by a school board challenging a state law on the grounds that it violated the Establishment Clause of the First Amendment.<sup>145</sup> The protections of the First Amendment, along with the whole Bill of Rights, seem to be best classified as individual rights. One could argue, however, that the Establishment Clause is a structural right because it prevents the establishment of a state religion and keeps religion out of the structure of government. The difficulty in deciding the question, though, further points out the confusing nature of the Tenth Circuit's distinction between individual rights and structural rights. The distinction also does not account for the Supreme Court's decision in *Seattle School District*, which overturned a state neighborhood-schools law that was challenged by school districts on Equal Protection grounds.<sup>146</sup> The Tenth Circuit lists the Fourteenth Amendment as an individual right, yet the Supreme Court granted relief to a school district against its parent state on Fourteenth Amendment grounds. To be fair, the Supreme Court itself, in *Seattle School District*, did not explicitly address the issue examined in this Note. It is not helpful, however, to add a poorly defined distinction on top of an already confusing area of law.

#### B. *The Fifth Circuit Comes Closer to the Mark, but Still Falls Short*

The Fifth Circuit read the *Trenton* line of cases to stand for the proposition that "the Constitution does not interfere in the internal political organization of states."<sup>147</sup> The court read the cases in harmony with a principle dating back to Chief Justice Marshall:

[T]he framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and . . . the instrument they have given us, is not to be so construed . . .

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144. *Branson School District*, 161 F.3d at 628-29.

145. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

146. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

147. *Rogers v. Brockette*, 588 F.2d 1057, 1069 (5th Cir. 1979).

... If the act ... be a grant of political power, if it create a civil institution to be employed in the administration of government ... the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.<sup>148</sup>

The Fifth Circuit then reasoned that while the Constitution does not interfere in states' internal political organization, "[t]here is every reason to think that Congress may interfere with a state's internal political organization in ways that the Constitution itself does not."<sup>149</sup> Therefore, the court allowed the school district to argue its claim that Texas's school breakfast statute contravened the federal school breakfast statute.<sup>150</sup>

The Fifth Circuit's reading of precedent is more accurate than the Tenth Circuit's reading, but it still lacks the necessary precision. The court, while noting that the Supreme Court has recognized constitutional limits on a state's power over its subdivisions,<sup>151</sup> interpreted the precedential cases as standing for an absolute rule that gives the Constitution no role in the political organization of states.<sup>152</sup> This absolute rule contradicts Supreme Court cases, even those cited by the court; most notably, *Gomillion* acknowledged that the Fifteenth Amendment limits a state's ability to draw the borders of its subdivisions, particularly when done for racial reasons.<sup>153</sup> In a slightly different context, the Court held that the Equal Protection Clause limits a state's ability to apportion the seats in its state legislature<sup>154</sup> and draw voting districts for its political subdivisions.<sup>155</sup> The Court, while consistently recognizing the broad powers of states over their subdivisions, has noted that the "the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the

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148. *Id.* (quoting *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-30 (1819)).

149. *Rogers*, 588 F.2d at 1070. The case was decided while *National League of Cities v. Usery*, 426 U.S. 833 (1976), was still good law, so Congress was bound by the holding that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.* at 845.

150. *Rogers*, 588 F.2d at 1071.

151. *Id.* at 1069.

152. *Id.*

153. *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

154. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). While legislative districts are not political subdivisions as understood for the purposes of this Note, legislative districts would seem to fit the Fifth Circuit's broad language of "internal political organization." *Rogers*, 588 F.2d at 1069. At the very least, the Fifth Circuit needs to refine its definition of "internal political organization" to exclude voting districts.

155. *Avery v. Midland County*, 390 U.S. 474 (1968).

state and Federal constitutions.”<sup>156</sup> The Fifth Circuit would have been better to avoid such a categorical denial of the constitutional limits on state power over its internal political organization. While the Court has not recognized many limits, some cases do run afoul of the constitutional limits, and the Fifth Circuit’s categorical phrasing would preclude review of these cases merely because the complaining party is a subdivision.<sup>157</sup>

### C. *The Supremacy Clause Itself Provides the Rationale for Suits*

Although both circuits used faulty rationales in reaching the conclusion to recognize suits by political subdivisions, they both contain the seeds of the proper reasoning. The Tenth Circuit recognized that federal law “trumps any contradictory state law through the operation of the Supremacy Clause.”<sup>158</sup> The Constitution makes federal law supreme, so political subdivisions should be given the opportunity to prove that a state is transgressing a controlling federal law, whether it be a statute, treaty, or the Constitution itself. It is antithetical to the supremacy of federal law to forbid a court from deciding a case on the merits if it is brought by a party who meets the standing requirements and involves a claim that a state is acting contrary to federal law. The nature of the Supremacy Clause demands that a political subdivision receive the opportunity to prove its case in court; it may win or lose, but at least the case should be heard. A rule of this kind “simply allows a political subdivision to sue its parent state when the suit alleges a violation by the state of some controlling federal law.”<sup>159</sup>

The Fifth Circuit and Tenth Circuit allow suits based on controlling federal law, but do not extend this to constitutional challenges.<sup>160</sup> The Supremacy Clause logic that would allow suits based

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156. *Williams v. Eggleston*, 170 U.S. 304, 310 (1898).

157. The Eleventh Amendment acts as an independent limitation on suits against states, and such independent limitations should be honored. There is no such explicit limitation on suits by political subdivisions, and the Eleventh Amendment does not bar most suits by political subdivisions because they seek injunctions to prevent continuing violations of federal law and not money damages. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 US 123, 155-56, 159 (1908)). As the Court said in *Green*, “the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.” *Green*, 474 U.S. at 68. This reasoning works for all suits of this kind, whether brought by political subdivisions or not.

158. *Branson School Dist. v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998).

159. *Id.*

160. *Rogers v. Brockett*, 588 F.2d 1057, 1069 (5th Cir. 1979) (“[T]he Constitution does not interfere with a state’s internal organization of its political functions.”). See *Branson School District*, 161 F.3d at 628 (“[W]e conclude that a political subdivision has standing to

on federal law works equally well with suits based on the Constitution. The Supremacy Clause makes both the Constitution and laws passed by Congress supreme, so a distinction between federal statutes on one hand and the Constitution on the other makes no sense. Courts should not adopt a flat rule that the Constitution never intrudes on a state's regulation of its subdivision, as the Fifth Circuit appeared to do, because the precedent in this area involved the application of specific constitutional provisions to specific state actions.<sup>161</sup> Rules developed in cases of annexations and charter alterations should not be extended blindly to the cases of today, which involve issues like prison conditions and the interaction of federal and state education law. While the Constitution has often afforded no protection to the municipalities in past cases, it may provide protection in the future under different circumstances.<sup>162</sup> Courts should see cases like *Hunter* as guides, not as dispositive of the issues. Each case should be decided on whether the state law in question violates the Constitution or an applicable federal law. As noted by the Tenth Circuit, "[t]he Supremacy Clause guarantees no less."<sup>163</sup>

#### CONCLUSION

Political subdivisions should be allowed to sue their parent states when they allege a conflict between state law and federal law, whether the Constitution, a treaty, or a statute. The circuits that dismiss these cases based on "standing" misinterpret the precedent from a time when "standing" had a different meaning than the jurisdictional meaning it has today. The Supreme Court precedent in this area does not foreclose these suits, and in fact a decision on the merits in each case would be in keeping with the precedents, which themselves were decisions on the merits. In addition, these suits help ensure that states comply with federal law and give political subdivisions an option when their parent states ask them to follow an arguably unconstitutional

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bring a constitutional claim against its creating state when the substance of the claim relies on the Supremacy Clause and a putatively controlling federal law."). The Tenth Circuit does not explicitly bar claims based on the Supremacy Clause coupled with a constitutional provision, but its use of "federal law" seems aimed at federal statutes. *See id.*

161. *See supra* Part I.

162. *See Ala. NAACP State Conference v. Wallace*, 269 F. Supp. 346 (M.D. Ala. 1967). Alabama passed a statute that prohibited local school districts from complying with the school desegregation requirements of Title VI of the Civil Rights Act of 1964. *Id.* at 349. The federal district court held that the action by the Alabama legislature violated the Supremacy Clause. *Id.* A political subdivision would have a strong argument against a similar attempt by a state legislature to supersede federal law, showing that federal law might sometimes intrude upon a state's "internal political organization."

163. *Branson School District*, 161 F.3d at 630.

law. Political subdivisions should receive the same protection from the Supremacy Clause that every other entity enjoys.