

Cities, Free Speech, and Confederate Statues

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*“A city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express. . . . [Birmingham] has the right to disassociate from a pro-Confederacy message entirely.”*¹

I. INTRODUCTION

Birmingham, Alabama, has no Confederate history.² The City did not exist until 1871, six years after the Civil War’s end.³ Nevertheless, in 1905, Birmingham dedicated the Confederate Soldiers and Sailors Monument, a towering fifty-two-foot obelisk inscribed with the words of Jefferson Davis.⁴ At the unveiling ceremony, the mayor declared that the monument memorialized the valiant defense of “our property”—including enslaved Black persons.⁵

Monuments on city property are, by law, a city’s speech.⁶ In 2015, Birmingham—which was more than 70% Black—decided it no longer wished to

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1. *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 4, 6 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>], *rev’d*, 299 So. 3d 220 (Ala. 2019).

2. Eddy Rodríguez, *Birmingham Mayor Explains Removal of Confederate Statue, Says ‘Revisionist History Should Be Corrected,’* NEWSWEEK (June 2, 2020, 5:40 PM), <https://www.newsweek.com/birmingham-mayor-explains-removal-confederate-statue-says-revisionist-history-should-corrected-1508238> [<https://perma.cc/9TQR-YBWB>] (quoting mayor declaring monument “offensive to people who were regulated through slavery”).

3. Act of Dec. 19, 1871, 1871 Ala. Laws 229 (incorporating Birmingham, Alabama); *About Birmingham*, BIRMINGHAMAL.GOV, <https://www.birminghamal.gov/about/> [<https://perma.cc/EJ8B-WK3P>] (outlining City’s history).

4. See *The Birmingham Confederate Monument*, 16 CONFEDERATE VETERAN 422, 422-23 (1908) (tracing saga of Birmingham’s Confederate monument). Jefferson Davis’s quotation reads: “The manner of their death was the crowning glory of their lives.” *History of the Confederate Monument*, BIRMINGHAM NEWS, Apr. 26, 1905, at 3 (reporting on dedication of monument).

5. See Brief of Appellees at 10, *State v. City of Birmingham*, 299 So. 3d 220 (Ala. 2019) (No. 1180342) (summarizing history of monument).

6. See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 472 (2009) (declaring monuments in city park constitute government speech). The Court noted, “Governments have long used monuments to speak to the public.” *Id.* at 470. *Sumnum* is well-settled law, and the City of Birmingham relied on the case extensively in asserting its right to free speech. See Brief of Appellees, *supra* note 5, at 15 (stating monument in public park represents city’s speech).

communicate “messages of white supremacy.”⁷ The City claimed a First Amendment right to tear the monument down.⁸ In response, the state legislature—77% white—passed the Memorial Preservation Act.⁹ Alabama joined seven other Southern states to forbid local governments from removing Confederate monuments.¹⁰

Can states compel cities to speak in support of the Confederacy?¹¹ Or do cities have a First Amendment right to free speech?¹²

The Alabama Supreme Court ruled in favor of the State.¹³ The court, like many scholars, relied on two legal doctrines to reject municipal free speech.¹⁴

7. See Joseph D. Bryant, *Birmingham City Officials Take Steps to Remove Confederate Monument at Linn Park*, AL.COM (Mar. 6, 2019), https://www.al.com/news/birmingham/2015/07/finding_another_place_birmingham.html [<https://perma.cc/4LT3-JKY8>] (reporting unanimous vote by Parks and Recreation Board to remove monument); Brief of Appellees, *supra* note 5, at 31 (explaining momentum for monument’s removal); *About Birmingham*, *supra* note 3 (providing demographic overview of Birmingham).

8. See Brief of Appellees, *supra* note 5, at 3 (outlining City’s First Amendment argument).

9. See *id.* at 10-12 (providing legislative background); *State Legislator Demographics*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 1, 2020), <https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx> [<https://perma.cc/E2A5-WFRY>] (listing demographics of state legislatures); *Roll Call: AL SB60 | 2017 | Regular Session*, LEGISCAN, <https://legiscan.com/AL/rollcall/SB60/id/647570> [<https://perma.cc/UKS9-NZF9>] (detailing Senate vote); Alabama Memorial Preservation Act of 2017, No. 354, 2017 Ala. Laws 1109 (codified as amended at ALA. CODE §§ 41-9-230 to -237 (2021)) (outlawing monument removal). The Act defines a monument as any “statue, portrait, or marker intended at the time of dedication to be a permanent memorial to an event, a person, a group, a movement, or military service that is part of the history of the people or geography now comprising the State of Alabama.” § 41-9-231(6). No monument that has been located on public property for forty or more years “may be relocated, removed, altered, renamed, or otherwise disturbed.” § 41-9-232(a). Violations require a \$25,000 fine. § 41-9-235(a)(2)(d).

10. Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1, 31 (2018) (reviewing Alabama Memorial Preservation Act). The seven other states who enacted similar statutes were Virginia, South Carolina, Georgia, Tennessee, North Carolina, Mississippi, and Kentucky. See *id.* at 2 (listing states).

11. See Appellant’s Brief at 28, *State v. City of Birmingham*, 299 So. 3d 220 (Ala. 2019) (No. 1180342) (summarizing Alabama’s argument); Brief of Appellees, *supra* note 5, at 16-17, 31 (objecting to monument’s message of “white supremacy”).

12. See Brief of Appellees, *supra* note 5, at 15 (summarizing Birmingham’s First Amendment argument). This Note will use the terms “municipality,” “city,” and “local government” interchangeably to include political subdivisions such as cities, towns, counties, and villages, as well as instrumentalities such as school boards, local libraries, and the like. See Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 390 n.1 (2013) (noting law typically does not differentiate between these entities).

13. See *Birmingham*, 299 So. 3d at 234-35 (upholding Memorial Preservation Act and denying City’s First Amendment rights).

14. See *id.* at 228-29 (citing *Williams* doctrine and *Sumnum* with reliance on *CBS* principle); *infra* notes 15-16 and accompanying text (explaining doctrines). Scholars have regularly noted the obstacles presented by *Williams* and *CBS*. See, e.g., Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867-68 (1979) (citing *Williams* to reject municipal free speech); Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST (June 24, 2015, 5:17 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/> [<https://perma.cc/5UGE-F6AD>] (dismissing possibility of municipal First Amendment rights); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1643 (2006) (noting *CBS* principle considered well-settled point of law); see also Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2008 (2018) (concluding current legal doctrines provide cities few protections against state preemption).

The *Williams* doctrine, established in 1933, declares that cities may not assert constitutional rights against their parent states.¹⁵ The *CBS* principle, from 1973, maintains that the First Amendment does not protect government speech.¹⁶

These doctrines are specious.¹⁷ The United States Supreme Court has never adopted either the *Williams* doctrine or the *CBS* principle to deny a city's free speech claim.¹⁸ In fact, the Court has sidestepped every municipal free speech claim it has ever faced.¹⁹ Cities deserve a long-overdue reassessment of their First Amendment rights, rather than submitting to outdated dicta or unsettled case law.²⁰

This Note proposes a novel theory of municipal free speech.²¹ The Supreme Court provided the spark in *Citizens United v. FEC*,²² its controversial decision guaranteeing corporations' free speech.²³ While *Citizens United* does not directly address First Amendment rights for cities, the Court established a clarifying legal principle: "[A]ssociations of citizens" have First Amendment rights, which they derive from the collective constitutional rights of individuals.²⁴ In

15. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (stating doctrine). Justice Cardozo wrote, "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Id.* This Note has coined the term "*Williams* doctrine" to refer specifically to Justice Cardozo's statement, which plays a central role in municipal free speech jurisprudence. See *infra* Section II.B.1 (reviewing predecessors, progeny, and challenges to *Williams*).

16. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (stating doctrine). Justice Stewart wrote, "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." *Id.* David Fagundes coined the term "*CBS* principle" to apply to Justice Stewart's statement. See Fagundes, *supra* note 14, at 1641-42 (reviewing jurisprudence of *CBS* principle).

17. See *infra* Section III.A.2 (assessing *Williams* doctrine); *infra* Section III.A.3 (examining *CBS* principle).

18. See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 420 (2019) (noting Court has declined to rule on municipal free speech claims).

19. See *infra* Section II.B.3 (reviewing Court decisions on municipal free speech).

20. See Blank, *supra* note 18, at 371 (describing unsettled case law and dicta); Fagundes, *supra* note 14, at 1643 (calling municipal speech rulings dicta).

21. See *infra* Part III (explaining legal and policy rationale for municipal constitutional rights). The central thesis of this Note is that cities have First Amendment rights because they are "associations of citizens" as described in *Citizens United*; several scholars have briefly suggested this idea, but none have analyzed this proposition in depth. See Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 594-95 (2020) (asserting cities embody associational traits); Rachel Proctor May, *Punitive Preemption and the First Amendment*, 55 SAN DIEGO L. REV. 1, 32 (2018) (suggesting municipal free speech rights); Bendor, *supra* note 12, at 426 (stating municipalities more closely resemble associations than corporations do); Dave Fagundes & Darrell A.H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 695-96 (2021) (addressing theory of municipal "aggregate" speech rights). Prior to *Citizens United*, Meir Dan-Cohen posited the idea that cities might have First Amendment rights based on the collective rights of citizens, although he did not address the competing legal doctrines of *Williams* or *CBS*. See Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1261 (1991) (theorizing "communal self-expression" for municipalities).

22. 558 U.S. 310 (2010).

23. See *id.* at 365 (holding government may not suppress political speech on basis of speaker's corporate identity).

24. See *id.* at 349 (prohibiting censorship of "citizens, or associations of citizens, for simply engaging in political speech"); *id.* at 392 (Scalia, J., concurring) (summarizing rationale for corporate First Amendment rights).

other words, *Citizens United* protects groups of people—not corporate entities per se.²⁵

Cities are “associations of citizens.”²⁶ They fit the Court’s paradigm: men and women who associate in common cause and select leaders to speak on political issues.²⁷ Cities—even more than corporations—possess the vital traits of “associations of citizens” identified in *Citizens United*.²⁸ Under the Court’s logic, cities embody the First Amendment rights of residents and thereby deserve constitutional protection.²⁹

Statutory history and common law support this argument.³⁰ Part II of this Note begins with a brief account of monument protection laws and Birmingham’s unsuccessful First Amendment challenge.³¹ Next, this Note explains why Birmingham’s odds were so long: the muddled jurisprudence of municipal constitutional rights, including *Williams* and *CBS*.³² Part II concludes with a summary of *Citizens United* and its theory of First Amendment rights for associations.³³

Part III proposes First Amendment rights for cities.³⁴ The doctrinal argument is propelled by the logic of *Citizens United*; under its authority, the *Williams* doctrine and *CBS* principle must yield.³⁵ Public policy analysis focuses on why

25. See Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 462 (explaining *Citizens United* does not establish corporate “personhood,” but instead considers corporations aggregations of shareholders); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1734 (2015) (asserting *Citizens United* focuses on derivative rights of identifiable individuals).

26. See *infra* Section III.A.1 (analyzing how cities embody “associations of citizens”). This Note does not define “associations of citizens” based on a simplistic textualist reading; nevertheless, a textualist might note that Noah Webster defined the primary meaning of “association” to be a “connection of persons,” and the word “citizen” to mean the “native of a city, or an inhabitant who enjoys the freedom and privileges of the city in which he resides.” See 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 57, 148 (1st ed. 1828). Justice Scalia relied on “Patriot Noah Webster” to form his opinion in *Citizens United*. See *Citizens United*, 558 U.S. at 390 n.6 (Scalia, J., concurring).

27. See *Citizens United*, 558 U.S. at 343, 361-62 (majority opinion) (emphasizing political speech determined by democratic process); *id.* at 392 (Scalia, J., concurring) (describing individuals who associate in common cause and select leaders to speak on their behalf).

28. See *infra* Section III.A.1 (comparing Birmingham to public corporations). *Citizens United* highlights four animating characteristics for “associations of citizens”: (1) they are comprised of citizens with individual rights, (2) these citizens have “associated” for a common cause, (3) they give leaders the right to speak on their behalf, and (4) their speech is political. See *Citizens United v. FEC*, 558 U.S. 310, 343, 349 (2010) (protecting “citizens, or associations of citizens,” and asserting associations engage in political speech); *id.* at 392 (Scalia, J., concurring) (stating citizens associate in common cause and choose speakers).

29. See *Citizens United*, 558 U.S. at 388-89 (suggesting municipalities considered “associations” deserving free speech).

30. See *infra* Part II (providing overview of legislative and legal precedent).

31. See *infra* Section II.A (reviewing statutory history and *State v. City of Birmingham*).

32. See *infra* Section II.B (outlining jurisprudence of municipal constitutional rights).

33. See *infra* Section II.C (examining *Citizens United*).

34. See *infra* Part III (proposing theory of municipal First Amendment rights).

35. See *infra* Section III.A (constructing legal argument for *Citizens United* to apply to cities).

municipal speech is necessary for healthy democracy—and why state censorship denies racial equity.³⁶

The implications of municipal free speech are far broader and more enduring than the controversy over Confederate monuments.³⁷ The statues themselves are a lost cause; they will topple whether or not the First Amendment provides leverage.³⁸ Long after the monuments disappear, however, cities will seek to communicate their political views in defiance of state censorship—on issues such as immigration reform, gun control, police misconduct, and tax policy.³⁹ Citizens, united, deserve a voice in democratic debate.⁴⁰

II. HISTORY

A. Monument Protection Laws

Between 1890 and 1920, municipalities across the South erected more than 700 Confederate monuments on public property.⁴¹ This era coincided with the

36. See *infra* Section III.B (proposing public policy arguments). The ten largest cities in the United States are majority nonwhite; every state legislature, except Hawaii's, is majority white. See MARC PERRY, U.S. CENSUS BUREAU, WHO'S LIVING IN AMERICA'S CITIES? 21 (2012), https://www.census.gov/newsroom/cspan/poptrends/cspan_poptrends_slides.pdf [<https://perma.cc/TN5L-84MX>] (detailing demographics of urban areas); *State Legislator Demographics*, *supra* note 9 (listing demographics of state legislatures).

37. See Blank, *supra* note 18, at 367-70 (summarizing implications of state censorship).

38. See *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [<https://perma.cc/E8M9-39JS>] [hereinafter *Whose Heritage?*] (documenting removal of more than 100 Confederate monuments and symbols since Charleston massacre); Hilary Green, *Monument Removals, 2015-2020*, GOOGLE MAPS (July 23, 2021), <https://www.google.com/maps/d/u/0/viewer?fbclid=IwAR2DR-ULjxTtS9h0qZL-nkSsofae3jIT6RrGyKx40oRk6mwtO5VNRfuiTo&mid=142t5-uHjv2fl293rKwx2R71IL-5kAJ8o&ll=30.66206705876177%2C-92.47569974718297&z=4> [<https://perma.cc/E3QL-VNWR>] (maintaining interactive map of Confederate monument removals). Even in states with monument protection laws, local officials have removed statues through political compromise, responses to public-safety threats, and statutory loopholes. See, e.g., Maria Morava & Saeed Ahmed, *A Georgia City Is Replacing a Confederate Monument with a Statue of Civil Rights Hero John Lewis*, CNN (Jan. 29, 2021, 5:05 PM), <https://www.cnn.com/2021/01/29/us/georgia-monument-decatur-john-lewis-tmd/index.html> [<https://perma.cc/XVW5-RYME>] (reporting statue removal based on public-safety threat); *Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2019 WL 2355332, at *2, *9 (Tenn. Ct. App. June 4, 2019) (upholding City's sale of park with Confederate statues to private group, which removed them).

39. See Blank, *supra* note 18, at 368-70 (listing examples of states censoring city speech); *Anderson v. City of Boston*, 380 N.E.2d 628, 640 (Mass. 1978) (prohibiting City from supporting tax reform referendum); TEX. GOV'T CODE ANN. § 752.053(a)(1) (West 2022) (banning municipalities from "endors[ing]" limited enforcement of immigration laws); *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018) (upholding statute's application to city employees); Sarah Holder, *Florida Cities' New Tactic in the Fight for Gun Reform*, BLOOMBERG CITYLAB (Apr. 5, 2018, 10:46 AM), <https://www.citylab.com/equity/2018/04/south-florida-cities-want-to-control-guns-on-their-own-terms/557207/> [<https://perma.cc/H8MX-FT9B>] (reporting on state law banning cities from discussing local gun ordinances); Matthew A. De Stasio, Comment, *A Municipal Speech Claim Against Body Camera Video Restrictions*, 166 U. PA. L. REV. 961, 963 (2018) (analyzing state laws prohibiting cities from releasing police bodycam footage).

40. See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (affirming collective free speech rights).

41. See *Whose Heritage?*, *supra* note 38 (detailing history of Confederate monuments).

rise of Jim Crow and the Ku Klux Klan; Southerners of all races understood that Confederate monuments were symbols of white supremacy.⁴²

Frederick Douglass denounced the statues as “monuments of folly” and “a needless record of stupidity and wrong.”⁴³ In 1931, W.E.B. DuBois suggested an inscription: “Sacred to the memory of those who fought to Perpetuate Human Slavery.”⁴⁴

1. Statutory Evolution

Monument protection laws are largely a recent phenomenon, and they have two related goals.⁴⁵ First, these laws safeguard a pro-Confederacy narrative against rising opposition.⁴⁶ Second, they are a tool for supermajority white state legislatures to restrict the autonomy of predominantly Black urban centers.⁴⁷

The first state to enact a “statue statute” was Virginia.⁴⁸ In 1904, the State made it illegal to “disturb or interfere” with Confederate monuments.⁴⁹ Notably, the statute prohibited “authorities of [the] county” from removing any monuments—explicitly preempting local action.⁵⁰

42. See Bray, *supra* note 10, at 13 (stating Confederate monuments “intimately and inextricably bound up with campaigns of racial intimidation and violence”); *Statement on Confederate Monuments*, NAT’L TR. FOR HIST. PRES. (June 18, 2020), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.Wjf4C1WnGUK> [<https://perma.cc/ES48-W8XW>] (declaring statues “glorify, promote, and reinforce white supremacy”); Mitch Landrieu, Mayor of New Orleans, Speech on the Removal of Confederate Monuments in New Orleans (May 19, 2017), *in* N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html> [<https://perma.cc/6A7H-Y56F>] (comparing Confederate statues to “burning cross on someone’s lawn”).

43. Frederick Douglass, *Monuments of Folly*, NEW NAT’L ERA, Dec. 1, 1870, at 3 (commenting on dedication of Robert E. Lee statue).

44. W.E.B. DuBois, *The Perfect Vacation*, *in* 38 CRISIS 279, 279 (1931) (calling monuments “awful things,” and describing Southern vacation replete with “every variety of ‘Jim-Crow’”).

45. See Bray, *supra* note 10, at 6-7 (reviewing history of Confederate monument protection laws).

46. See *id.* at 6 (describing “historical narratives that marginalize minority communities”); see also *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 5-6 (Ala. Cir. Ct. Jan. 14, 2019) https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (addressing pro-Confederacy message), *rev’d*, 299 So. 3d 220 (Ala. 2019). The United Daughters of the Confederacy, which commissioned and sought to protect monuments across the South, was dedicated to “Lost Cause” mythology that viewed the “War Between the States” as a valiant defense of states’ rights and the Southern way of life, rather than a conflict over slavery. See Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 636-37 (2019).

47. See Bray, *supra* note 10, at 7-8 (reviewing underlying causes of monument protection laws). Every state that enacted a monument protection law is majority white and has a state legislature that is at least 70% white, while many large cities—including Atlanta, Memphis, Montgomery, and Birmingham—are majority Black. See *State Legislator Demographics*, *supra* note 9 (listing demographics of state legislatures); *Race and Ethnicity in the South*, STAT. ATLAS (Sept. 4, 2018), <https://statisticalatlas.com/region/South/Race-and-Ethnicity> [<https://perma.cc/7QK2-5FS8>] (detailing Southern city and state demographics).

48. See Act of Feb. 19, 1904, ch. 29, 1904 Va. Acts 62 (establishing monument protection law); see also Bray, *supra* note 10, at 23-24 (noting earlier legislation protected specific Confederate monuments).

49. 1904 Va. Acts at 62.

50. *Id.* The Virginia state legislature amended the 1904 statute several times, and the law eventually encompassed memorials for the “War Between the States” and fourteen additional military conflicts. See Bray,

Nearly a century later, as citizens began to voice opposition to Confederate symbols, monument protection statutes arose from political compromise.⁵¹ In 2000, when South Carolina faced intense national pressure to remove the Confederate flag from its capitol dome, the state legislature agreed, but demanded a concession in response: a statute specifying that Civil War memorials on public property could not be “relocated, removed, disturbed, or altered.”⁵² Georgia reached a similar compromise in 2001, when its legislature agreed to remove the Confederate battle symbol from the state flag in exchange for a monument protection law.⁵³

The next wave of such laws was reactionary.⁵⁴ In 2015, a white supremacist and Confederate enthusiast murdered nine black churchgoers in Charleston, South Carolina.⁵⁵ Two years later, white supremacists rallied at the base of a Confederate monument in Charlottesville, Virginia.⁵⁶ These events galvanized public opposition to Confederate symbols in predominantly Black cities, and Southern state legislatures acted to protect the monuments.⁵⁷ In quick succession, North Carolina, Tennessee, and Alabama enacted so-called “heritage protection” laws.⁵⁸

supra note 10, at 23-25 (outlining legislative history); Act of Apr. 21, 2010, ch. 860, 2010 Va. Acts 1821, 1822 (codified as amended at VA. CODE ANN. § 15.2-1812 (2022)) (updating monument protection law).

51. See Bray, *supra* note 10, at 41 (discussing South Carolina legislative compromise).

52. See *id.*; David Firestone, *S. Carolina Senate Votes to Remove Confederate Flag*, N.Y. TIMES (Apr. 13, 2000), <https://www.nytimes.com/2000/05/19/us/south-carolina-votes-to-remove-confederate-flag-from-dome.html> [<https://perma.cc/ZFC2-NAG6>] (reporting on national boycott and eventual compromise); Act of May 23, 2000, No. 292, § 3, 2000 S.C. Acts 2069, 2071-72 (codified as amended at S.C. CODE ANN. § 10-1-165 (2021)) (protecting monuments and memorials). In September 2021, the South Carolina Supreme Court upheld the constitutionality of the law, although the court struck down a provision that required a supermajority to amend or repeal the law. See *Pinckney v. Peeler*, 862 S.E.2d 906, 920 (S.C. 2021).

53. See Bray, *supra* note 10, at 34 (explaining Georgia compromise); Act of Jan. 31, 2001, No. 1, § 1, 2001 Ga. Laws 1, 1-2 (codified as amended at GA. ANN. CODE § 50-3-1 (2020)) (regulating flags and monuments). The legislation specifically protects Stone Mountain—the massive “Confederate Mount Rushmore” and Ku Klux Klan rally site. See § 1, 2001 Ga. Laws at 2; Bray, *supra* note 10, at 35 (addressing Stone Mountain provision).

54. See *infra* note 58 and accompanying text (reviewing statutes and legislative impetus).

55. See *Whose Heritage?*, *supra* note 38 (explaining impact of Charleston massacre).

56. See *id.* (discussing white supremacist backlash to Confederate monument removals).

57. See *id.*; Bray, *supra* note 10, at 27, 32, 36 (discussing Tennessee, North Carolina, and Alabama statutes); see also SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 10 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/5QMF-AJBE>] (detailing Black population in Southern cities and counties).

58. See Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, 2015 N.C. Sess. Laws 435, 437-38 (codified as amended at N.C. GEN. STAT. § 100-2.1(b) (2020)); Bray, *supra* note 10, at 36 (explaining North Carolina officials feared for their statues); Tennessee Heritage Protection Act of 2013, 2013 Tenn. Pub. Acts 75 (codified as amended at TENN. CODE ANN. § 4-1-412 (2020)); Chuck Demastus, *Tennessee Passes Heritage Protection Act*, S. HERITAGE NEWS & VIEWS (May 11, 2013, 11:09 AM), <http://shnv.blogspot.com/2013/05/tennessee-passes-heritage-protection-act.html> [<http://perma.cc/FP6D-AUY7>] (recognizing Sons of Confederate Veterans leader for writing statute); Brief of Appellees, *supra* note 5, at 10-12 (outlining legislative background of Alabama statute). In addition, Georgia strengthened penalties for vandalizing Confederate monuments pursuant to its 2001 law. Act of Apr. 26, 2019, No. 57, § 1, 2019 Ga. Laws 268 (codified as amended at GA. ANN. CODE § 50-3-1(b) (2020)) (establishing liability, including treble and exemplary damages); Tyler Jett, *Without Once Mentioning the Civil War, Georgia Gov. Brian Kemp Signs Bill Protecting Confederate*

Still, public outcry against Confederate statues continued to intensify.⁵⁹ After weeks of unrest following George Floyd's killing in 2020, the Virginia legislature amended and effectively repealed its first-in-the-nation monument protection law.⁶⁰ Several other states, including Alabama, considered repeal.⁶¹

2. State v. City of Birmingham

Only three months after Alabama enacted its 2017 monument protection law—and three days after the “Unite the Right” rally in Charlottesville—the Birmingham municipal government erected plywood barriers to obstruct the public's view of the Confederate Soldiers and Sailors Monument.⁶² “It's a monument to segregation. It's a monument to human bondage,” the mayor declared.⁶³

Monuments, Other Memorials, CHATTANOOGA TIMES FREE PRESS (Apr. 26, 2019, 10:52 PM), <https://www.timesfreepress.com/news/politics/state/story/2019/apr/26/without-mentioning-civil-war-georgia-gov-brian-kemp-signs-bill-protecting-confederate-other-monuments/493534/> [<https://perma.cc/X7JW-MJA4>] (describing signing ceremony next to slave plantation).

59. See Tim Malloy & Doug Schwartz, *68% Say Discrimination Against Black Americans a “Serious Problem,” Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues*, QUINNIPIAC UNIV. POLL (June 17, 2020), https://poll.qu.edu/images/polling/us/us06172020_unob16.pdf [<https://perma.cc/L58H-NA6X>] (finding support for removing Confederate statues increased thirteen percentage points in three years); *Whose Heritage?*, *supra* note 38 (reviewing increasing opposition to Confederate symbols).

60. See Justin Mattingly, *Northam Signs Bills Giving Localities Authority over Confederate Monuments, Enshrining LGBTQ Protections*, RICHMOND TIMES-DISPATCH (Apr. 11, 2020), https://richmond.com/news/virginia/northam-signs-bills-giving-localities-authority-over-confederate-monuments-enshrining-lgbtq-protections/article_ff34cf40-ac74-5341-b556-31eb4a1393ca.html [<https://perma.cc/7LS8-P3FW>] (reporting on law allowing local governments to remove, relocate, or add context to Confederate monuments). The law merely requires localities to hold a hearing before removal. See Act of Apr. 10, 2020, 2020 Va. Acts 1100-01 (codified as amended at VA. CODE ANN. § 15.2-1812 (2022)) (changing law from “locality may not remove” monument to “locality may remove” monument after hearing). Prior to repeal, the City of Norfolk had sued Virginia to remove its Confederate monument, claiming that the monument protection law violated the City's First Amendment right to free speech. See *City of Norfolk v. Virginia*, No. 19-CV-436, 2020 WL 6323758, at *1 (E.D. Va. July 2, 2020). When the legislature repealed the law, the court dismissed the suit as moot. See *id.* at *3.

61. See Brian Lyman, *Alabama House Committee Punt Repeal of Confederate Monument Protections*, MONTGOMERY ADVERTISER (Feb. 10, 2021, 6:03 PM), <https://www.montgomeryadvertiser.com/story/news/2021/02/10/alabama-confederate-monument-protections-repeal-punted-in-legislature/4448273001/> [<https://perma.cc/V9XD-29XN>]; H.B. 8, 2021 Reg. Sess. (Ala. 2021) (proposing repeal of Alabama Memorial Protection Act); see also H.B. 237, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (prohibiting display of Confederate monuments except for museum or battlefields); H.B. 10, 154th Gen. Assemb., Reg. Sess. (N.C. 2019) (proposing repeal of monument protection act).

62. See *Birmingham Confederate Monument: City Leaders Weigh Steps to Remove Landmark*, BIRMINGHAM TIMES (Aug. 16, 2017), <https://www.birminghamtimes.com/2017/08/city-leaders-weigh-steps-to-remove-confederate-monuments/> [<https://perma.cc/3VDS-HV2N>] (reporting erection of plywood barriers and preparation for legal action); *Whose Heritage?*, *supra* note 38 (noting timing of Charlottesville rally).

63. Ian Stewart, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR (Jan. 15, 2019, 5:52 PM), <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [<https://perma.cc/S9S7-69TJ>] (providing background on Birmingham monument controversy). Birmingham was long known as “the most segregated city in America.” MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 175 (Clayborne Carson ed., 1998) (describing life in Jim Crow-era Birmingham). During King's Birmingham campaign of 1963, access to the Confederate monument was interrupted because the City closed the park to avoid complying with a federal court's desegregation order. See *id.* at 174.

Alabama promptly sued Birmingham for violating the Memorial Preservation Act.⁶⁴ The State demanded \$25,000 per day until the plywood came down.⁶⁵

Birmingham claimed a First Amendment right to free speech, and the Jefferson County Circuit Court agreed.⁶⁶ The court cited Supreme Court precedent that a city-owned monument speaks for the city.⁶⁷ And a city may say whatever it wants.⁶⁸

The court ruled that the Memorial Preservation Act compelled pro-Confederacy speech, and the State may not legally “commandeer the City’s property for the State’s preferred message.”⁶⁹ Likewise, Alabama violated the First Amendment by preventing “expressive disassociation” from a pro-Confederacy message—in other words, erecting a plywood barrier was itself constitutionally protected speech.⁷⁰ The court voided the Memorial Preservation Act.⁷¹

Alabama appealed, and its brief was blunt: Birmingham’s constitutional claims were “nonsensical and thus incapable of analysis.”⁷² Nevertheless, in *State v. City of Birmingham*, the Alabama Supreme Court analyzed more than a century of constitutional jurisprudence and based its decision on two doctrines.⁷³

64. See Daniel Jackson, *Alabama Sues Birmingham for Covering Confederate Statue*, COURTHOUSE NEWS SERV. (Aug. 17, 2017), <https://www.courthousenews.com/alabama-sues-birmingham-covering-confederate-statue/> [<https://perma.cc/DD8S-KPQL>] (reporting suit).

65. See *id.* (reporting State demanded \$25,000 for every day monument covered); ALA. CODE § 41-9-235(a)(2) (2021) (specifying penalties).

66. See *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 2-3, 7 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (ruling on “legally protected right” to free speech), *rev’d*, 299 So. 3d 220 (Ala. 2019). Birmingham also claimed a Fourteenth Amendment violation of due process. *Id.* at 7.

67. See *id.* at 3 (stating “monuments displayed on public property typically represent government speech”) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)); see also *supra* note 6 (reviewing *Summum*).

68. See *Birmingham*, slip op. at 4 (concluding “city has a right to speak for itself”). The court also relied heavily on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, which held that a government entity need not issue Confederate-themed license plates. See *id.* at 3, 6; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 203-04 (2015).

69. See *Birmingham*, slip op. at 5-6. The court’s statement recalled *West Virginia State Board of Education v. Barnette*, the seminal Supreme Court ruling on compelled speech, which held that students may not be forced to recite the Pledge of Allegiance: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. 624, 642 (1943). *Barnette* was central to Birmingham’s case on appeal. See Brief of Appellees, *supra* note 5, at 51 (citing *Barnette*).

70. See *Birmingham*, slip op. at 5 (rejecting State’s interest in penalizing this conduct).

71. See *id.* at 10 (nullifying law). The Jefferson County Circuit Court is located in downtown Birmingham, and nearly three-quarters of its judges are Black. See *Circuit Judges*, 10TH JUD. CIR. CT. OF ALA., <https://jefferson.alacourt.gov/circuit-judges/> [<https://perma.cc/8FM3-RKUP>] (listing judges); E-mail from Office of the Honorable Elisabeth French, Presiding J. for the Tenth Jud. Cir. of Alabama, to author (Mar. 4, 2021, 12:27 EST) (on file with author) [hereinafter French Letter] (confirming racial composition of judges).

72. See Appellant’s Reply Brief at 7, *State v. City of Birmingham*, 299 So. 3d 220 (Ala. 2019) (No. 1180342) (scoffing at Birmingham’s constitutional claims).

73. See *Birmingham*, 299 So. 3d at 228-35 (analyzing relevant case law regarding constitutional rights of cities). The decision did not cite any cases in which a municipality sued the state to secure First Amendment rights. See *id.*; see also *infra* Section II.B.2 (reviewing municipal First Amendment cases).

First, the *Williams* doctrine prevents a city from possessing constitutional rights.⁷⁴ Second, under the *CBS* principle, the government may not assert First Amendment protection.⁷⁵ The Alabama Supreme Court unanimously overturned the lower court ruling and reinstated the Memorial Preservation Act.⁷⁶

Six months later—amid escalating protests—Birmingham ignored the decision, tore down the monument, and paid the State a \$25,000 fine.⁷⁷ The Alabama Supreme Court could not save the monument, but *State v. City of Birmingham* highlighted the twin hurdles facing municipal free speech: *Williams* and *CBS*.⁷⁸

B. Municipal First Amendment Rights

1. The Williams Doctrine

Although American cities predate the United States by more than 150 years, the Constitution does not mention cities or grant them any rights.⁷⁹ The first modern case to address municipal constitutional rights was *Hunter v. City of Pittsburgh*⁸⁰ in 1907.⁸¹

74. See *Birmingham*, 229 So. 3d at 228, 232-35 (relying on *Williams* to deny City's constitutional rights).

75. See *id.* at 229 (holding Free Speech Clause does not regulate government speech). The court relied on *Sumnum*, which based its holding on *CBS*. See *id.* (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467 (2009) (citing *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring))).

76. See *id.* at 234 (concluding circuit court erred in determining City had right to free speech); see also Braktkton Booker, *Confederate Monument Law Upheld by Alabama Supreme Court*, NPR (Nov. 27, 2019, 6:30 PM), <https://www.npr.org/2019/11/27/783376085/confederate-monument-law-upheld-by-alabama-supreme-court> [<https://perma.cc/9T65-YHF7>] (quoting city official calling decision “less about the rule of law and more about politics”). The Alabama Supreme Court is all white. See *In State with 27% Black Population, All Alabama Appellate Judges Are White*, EQUAL JUST. INITIATIVE (Mar. 11, 2020), <https://eji.org/news/all-alabama-appellate-judges-are-white-in-state-with-27-percent-black-population/> [<https://perma.cc/FES8-K58J>]; see also *infra* Section III.B.3 (discussing racial dynamics of municipal free speech).

77. See Jay Reeves, *Confederate Monuments Coming Down Around South amid Protests*, ASSOCIATED PRESS (June 2, 2020), <https://apnews.com/article/810a6cb13ce6cbbde5b534661c5f2da6> [<https://perma.cc/W6ZC-XBJ5>] (reporting mayor decided to pay \$25,000 fine to avoid continued unrest). Other Alabama municipalities followed Birmingham's lead and decided to remove their monuments and pay the fine. See Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1454 (2020) (reviewing aftermath of court's decision).

78. See *State v. City of Birmingham*, 299 So. 3d 220, 228-29 (Ala. 2019) (relying on *Williams* doctrine and denying First Amendment protects government speech).

79. See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.—C.L. L. REV. 1, 30 (2012) (noting America had local governments long before states or colonies); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487 (1999) (introducing legal status of cities); e.g., WILLIAM FRANCIS GALVIN, SEC'Y OF THE COMMONWEALTH, MASSACHUSETTS FACTS: A REVIEW OF THE HISTORY, GOVERNMENT, AND SYMBOLS OF THE COMMONWEALTH 16-18 (2019), https://www.sec.state.ma.us/cis/cispdf/Mass_Facts.pdf [<https://perma.cc/26M4-8PX7>] (sketching history of Plymouth's founding prior to establishment of Massachusetts).

80. 207 U.S. 161 (1907).

81. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062-63 n.9 (1980) (noting *Hunter*'s role in establishing states' absolute control over cities). *Hunter* traces its roots to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which was the first major case to establish municipal law. Bendor, *supra* note 12, at 399-401 (tracing origins of *Hunter* to *Dartmouth*). In *Dartmouth*, Chief Justice Marshall wrote that local governments are controllable by the state legislature, unrestrained by any constitutional

The Commonwealth of Pennsylvania decided to redraw the boundaries of its municipalities; when legislators eliminated Allegheny from the map, the City claimed violations of the Contracts and Due Process Clauses.⁸² The Court was unpersuaded, holding that cities are merely “convenient agencies” of the state.⁸³ In sweeping dicta, the Court declared that states control cities “unconditionally, with or without the consent of the citizens, or even against their protest.”⁸⁴

The Court repeatedly upheld *Hunter* in the following decades, based on the premise that a city is “a creature of the state.”⁸⁵ In 1933, the Court made its broadest and most lasting statement regarding municipal constitutional rights in *Williams v. Mayor of Baltimore*.⁸⁶ The case arose from an arcane dispute: Baltimore claimed a state tax law violated the Equal Protection Clause because it disfavored certain railroads.⁸⁷

To adjudicate this narrow claim, Justice Cardozo articulated a sprawling doctrine: “A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.”⁸⁸ Not a single sentence of analysis, explanation, or qualification supports this categorical denial of all constitutional rights.⁸⁹

Courts have subsequently applied the *Williams* doctrine to reject municipal constitutional claims under the Equal Protection, Due Process, Contracts,

limitations. See 17 U.S. (4 Wheat.) at 638 (establishing constitutional status of public corporations and distinguishing them from private corporations).

82. See *Hunter*, 207 U.S. at 164-67 (outlining Allegheny’s claims); U.S. CONST. art. I, § 10, cl. 1 (declaring no state shall pass any law “impairing the Obligation of Contracts”); U.S. CONST. amend. V (stating “[n]o person shall . . . be deprived of life, liberty, or property, without due process”); U.S. CONST. amend. XIV, § 1 (prohibiting states from violating due process).

83. See *Hunter*, 207 U.S. at 178 (limiting municipal authority).

84. *Id.* at 178-79 (stating constitutional principle).

85. See Bendor, *supra* note 12, at 390 (explaining *Hunter*’s influence on municipal constitutional jurisprudence); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (holding cities “creature[s] of the state” with no rights under Contracts or Due Process Clauses); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (holding cities have no rights under Equal Protection Clause).

86. 289 U.S. 36, 40 (1933) (holding municipal claimants do not possess Fourteenth Amendment rights); see Bendor, *supra* note 12, at 390 (reviewing importance of *Williams*).

87. See *Williams*, 289 U.S. at 39 (outlining facts and claims); U.S. CONST. amend. XIV, § 1 (establishing equal protection). Baltimore argued that tax exemptions for specific railroads represented an “unreasonable classification” prohibited by the Fourteenth Amendment. Brief on Behalf of Respondent at 80, *Williams*, 289 U.S. 36 (No. 513) (stating constitutional claim). Maryland countered with a “conclusive demonstration that . . . municipalities may not invoke the protection of the Fourteenth Amendment on behalf of other taxpayers.” Brief for Petitioner at 13-16, *Williams*, 289 U.S. 36 (Nos. 513, 514) (presenting argument).

88. See *Williams*, 289 U.S. at 40 (articulating *Williams* doctrine). Justice Cardozo’s premise—that a municipal corporation is “created by a state”—was not supported by the case before him: Baltimore was chartered in 1729, and Maryland did not become a constitutionally recognized state until 1789. See *id.*; *Maryland at a Glance: Historical Chronology*, MD. MANUAL ON-LINE, <https://msa.maryland.gov/msa/mdmanual/01glance/chr/chr.html/chron17.html> [<https://perma.cc/MS6H-R5L9>] (providing historical timeline).

89. See *Williams*, 289 U.S. at 40 (failing to explain doctrine).

Takings, and Dormant Commerce Clauses.⁹⁰ There are loopholes, however: Courts have allowed municipalities to bring “structural” constitutional claims under the Supremacy Clause to enforce federal statutes.⁹¹ Cities may also sue their parent states to protect the constitutional rights of individual citizens.⁹² Despite these exceptions, the Supreme Court has never allowed a city to assert its own substantive constitutional rights—including First Amendment rights—against a parent state.⁹³

2. *The CBS Principle*

The *CBS* principle arose independently of *Williams*.⁹⁴ In *CBS v. Democratic National Committee*, the Court held that private broadcasters have a First Amendment right to refuse advertisements.⁹⁵ Justice Stewart wrote a

90. See *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973) (denying City’s equal protection claim); *City of San Juan Capistrano v. Cal. Pub. Utils. Comm’n*, 937 F.3d 1278, 1280-81 (9th Cir. 2019) (rejecting due process claim); *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (rejecting claims under Contracts Clause and Fourteenth Amendment); *City of South Lake Tahoe v. Cal. Tahoe Reg’l Plan. Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (rejecting equal protection and takings claims); *City of Hugo v. Nichols*, 656 F.3d 1251, 1257-58 (10th Cir. 2011) (rejecting claim under Dormant Commerce Clause). Most of these cases occurred decades after *Williams*; Justice Cardozo himself only cited *Williams* to deny equal protection claims. See *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 537 (1934) (claiming violation of Equal Protection Clause); *id.* at 558 (Cardozo, J., dissenting in part) (citing *Williams* to argue state did not violate Equal Protection Clause).

91. See *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985) (holding county may challenge state law restricting use of federally earmarked funds); *Rogers v. Brockette*, 588 F.2d 1057, 1068, 1071 (5th Cir. 1979) (allowing school district to challenge state’s implementation of federal subsidized breakfast program); U.S. CONST. art. VI, cl. 2 (establishing “Laws of the United States . . . shall be the supreme law of the land”). In these cases, cities were not protecting their own constitutional rights, but rather seeking to secure the rights of the federal government. See *Hugo*, 656 F.3d at 1256 (distinguishing Supremacy Clause claims).

92. See, e.g., *Romer v. Evans*, 517 U.S. 620, 625-26 (1996) (permitting cities to sue Colorado over state amendment discriminating against gay, lesbian, and bisexual citizens); *Papasan v. Allain*, 478 U.S. 265, 267-68 (1986) (allowing local school district to sue state over distribution of public-school funds); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 459 (1982) (allowing school district to sue state over statute restricting local desegregation plan).

93. See *Hugo*, 656 F.3d at 1259 (rejecting municipal constitutional claims); Appellant’s Reply Brief, *supra* note 72, at 2 (arguing against municipal First Amendment rights). Nonetheless, scholars maintain that the Court reserves a “shadow doctrine” that provides cities distinct constitutional *recognition*—the ability to sue and be sued for constitutional violations—without granting them substantive individual *rights*. See *Morris*, *supra* note 79, at 3 n.5 (summarizing “shadow doctrine”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding local governments considered “persons” for Fourteenth Amendment claims); *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (holding constitutional remedy for school segregation based on local rather than state boundaries); *Bd. of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968) (allowing school board to sue state for injuries caused by violation of Establishment Clause); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (allowing City’s Commerce Clause claim); *Printz v. United States*, 521 U.S. 898, 919 (1997) (affirming county’s Tenth Amendment claim). The only instance in which the Court has explicitly granted a substantive individual constitutional right to a municipality was under the Takings Clause. See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (holding City must receive compensation for condemnation); U.S. CONST. amend. V (prohibiting taking of private property “for public use, without just compensation”); *Blank*, *supra* note 18, at 435-36 n.386.

94. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 121 (1973) (adjudicating case not involving municipal constitutional rights).

95. See *id.* (concluding broadcaster’s refusal to accept advertisements does not constitute governmental action violative of First Amendment).

concurrence to clarify that CBS was not a government actor, despite accepting public funds.⁹⁶ If CBS were a government actor, he reasoned, the company would forfeit its First Amendment rights.⁹⁷ After all, the First Amendment cannot protect the government from itself.⁹⁸

Hence the widely cited *CBS* principle: “The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.”⁹⁹

CBS is an odd case on which to build a doctrine.¹⁰⁰ The controversy did not directly concern government speech, and neither party argued the issue of government First Amendment rights.¹⁰¹ Moreover, Justice Stewart’s concurrence focused solely on constitutional protection for the *federal* government; he did not analyze whether state or local governments have First Amendment protection against higher levels of government.¹⁰² Nonetheless, many scholars and courts continue to cite the *CBS* principle as a “well-settled point of law.”¹⁰³ The Supreme Court, however, has never adopted it, nor has it been the dispositive factor in any holding.¹⁰⁴

3. *The Unsettled Case Law of Municipal Free Speech*

A plain reading of the *Williams* doctrine and *CBS* principle would doom municipal free speech.¹⁰⁵ Nevertheless, cities have brought First Amendment claims to the Supreme Court three times, and each time the Court has evaded a

96. See *id.* at 139 (Stewart, J., concurring) (arguing broadcaster action distinct from governmental action).

97. See *id.* (commenting this would “simply strip broadcasters of their own First Amendment rights”).

98. See *CBS*, 412 U.S. at 139 (explaining *CBS* principle).

99. See *id.*; see also Blank, *supra* note 18, at 423 (noting *CBS* held government not protected by First Amendment).

100. See De Stasio, *supra* note 39, at 983 (calling *CBS* oft-quoted but seldom-analyzed dicta).

101. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 121 (1973) (concluding broadcaster distinct from governmental actor). Although *CBS* concerned federal regulation of speech, the government was not a speaker. See Blank, *supra* note 18, at 423 (asserting *CBS* “hardly involved any government at all”).

102. See *CBS*, 412 U.S. at 139 (Stewart, J., concurring) (addressing federal regulation of broadcasting); Blank, *supra* note 18, at 423-24 (analyzing *CBS*’s focus on federal rather than local government issues).

103. See Fagundes, *supra* note 14, at 1643 (observing judges typically acknowledge Justice Stewart’s concurrence without critical reflection).

104. See De Stasio, *supra* note 39, at 984 (stating *CBS* unnecessary to any Court rulings and thus remains dicta).

105. See *supra* notes 88, 99 and accompanying text (articulating *Williams* doctrine and *CBS* principle).

clear ruling.¹⁰⁶ Proponents of municipal free speech claim this evasion provides an opening.¹⁰⁷ In other words, “you’re telling me there’s a chance.”¹⁰⁸

For instance, in 1976, the Court avoided saying “no” in *City of Madison v. Wisconsin Employment Relations Commission*.¹⁰⁹ Madison violated state labor laws by allowing a teacher at a public meeting to speak in opposition to his union.¹¹⁰ The City defended itself by asserting its First Amendment right to let the teacher speak.¹¹¹ In a succinct footnote, the Court sidestepped the City’s free speech claim and ruled on other grounds.¹¹²

Two years later, the Court considered *City of Boston v. Anderson*,¹¹³ in which Boston asserted a First Amendment right to spend city funds in support of a statewide ballot referendum.¹¹⁴ Professor Laurence Tribe and the Massachusetts Mayors’ Association filed briefs for the City.¹¹⁵ Justice Brennan agreed with Professor Tribe and the mayors, and stayed an injunction against the City; he emphasized that Boston provided a critical viewpoint to the broader state electorate.¹¹⁶ Justice Stevens penned a scathing dissent, calling the City’s First

106. See Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 84 (2017), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/10/70-Stan.-L.-Rev.-Online-82-Kovvali.pdf> [<https://perma.cc/X59V-NSRY>] (noting courts’ lack of clarity); Fagundes, *supra* note 14, at 1647 (calling jurisprudence ambivalent and nonbinding); Richard C. Schragger, *What Is “Government” “Speech”? The Case of Confederate Monuments*, 108 KY. L.J. 665, 682 (2020) (noting “Supreme Court has never definitively held that cities do not enjoy speech rights”). Perhaps the only federal court decision that directly affirmed municipal First Amendment rights was *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989), in which the court stated, “[a] municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.” See Fagundes, *supra* note 14, at 1643. The district court’s statement was not central to the case, however, and the appeals court did not even address the issue. See *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1302 (2d Cir. 1990) (outlining discussion of relevant issues), *aff’d* 710 F. Supp. 1387 (E.D.N.Y. 1989). The district court’s broad premise that a municipal corporation is “like any corporation” is unsupported by case law. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638 (1819) (establishing distinction between public and private corporations).

107. See Blank, *supra* note 18, at 420 (claiming Court has left open possibility of municipal First Amendment rights).

108. See DUMB AND DUMBER (New Line Cinema 1994) (highlighting chance of ultimately prevailing).

109. 429 U.S. 167, 175-76 (1976) (declining to determine whether city has First Amendment rights).

110. See *id.* at 169-73 (summarizing factual background).

111. See *id.* at 172-73 (documenting controversy).

112. See *id.* at 175 n.7 (determining it unnecessary to decide City’s First Amendment claim). The Court allowed the City to bring suit on behalf of the individual teacher, and the Court affirmed his right to speak. See *id.* at 175-76 (prohibiting discrimination on basis of speaker or content).

113. 439 U.S. 1389 (1978) (Brennan, J., in chambers).

114. See *id.* at 1389-90 (granting stay); Blank, *supra* note 18, at 421-22 (reviewing *Anderson*’s lack of clarity); Yudof, *supra* note 14, at 866 n.10 (detailing tangled procedural history).

115. Brief in Opposition to Appellees’ Motion to Dismiss at 3, *City of Boston v. Anderson*, 439 U.S. 951 (1978) (No. 78-649) (presenting Professor Tribe’s arguments for City); Motion for Leave to File and Brief of the Massachusetts Mayors’ Association as Amicus Curiae in Support of Appellants’ Jurisdictional Statement at 2-3, *Anderson*, 439 U.S. 951 (No. 78-649) (arguing on behalf of city governments).

116. See *Anderson*, 439 U.S. at 1390 (Brennan, J., in chambers) (supporting City’s “opportunity to finance communication to the statewide electorate of its views”). Justice Brennan was influenced by *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a progenitor of *Citizens United*, which held that the First Amendment does not allow political speech restrictions based on corporate identity. See *Anderson*, 439 U.S. at 1389-90 (Brennan, J., in chambers); *infra* note 144 (noting *Citizens United* affirmed *Bellotti*).

Amendment argument “frivolous.”¹¹⁷ Ultimately, the Court dismissed the entire controversy as moot.¹¹⁸

In 2003, the Court had its clearest opportunity to address municipal free speech in *United States v. American Library Ass’n*.¹¹⁹ Local libraries, which are instrumentalities of cities and therefore legally equivalent, claimed that a federal law requiring internet filters violated the libraries’ First Amendment rights.¹²⁰ Because the district court had indicated its openness to the libraries’ constitutional claim, both sides thoroughly briefed the issue on appeal.¹²¹ The Court explicitly considered the *CBS* principle but declined to adopt it.¹²² Instead, *American Library* circumvented the issue altogether by holding that a First Amendment claim would have failed on the merits.¹²³

In a curious coda, Justice Stevens—a quarter-century after calling municipal First Amendment rights “frivolous” in *Anderson*—switched sides.¹²⁴ His *American Library* dissent argued for municipal libraries’ entitlement to First Amendment protection.¹²⁵

The Court’s most recent statement on municipal free speech did not involve a municipal claimant at all.¹²⁶ In *Yursa v. Pocatello Education Ass’n*, the Court ruled that Idaho could prohibit a teachers union from using a city’s payroll

117. See *Anderson*, 439 U.S. at 952 (Stevens, J., dissenting) (stating Court has no power to grant rights to “political subdivision of the state”). The dissent’s argument effectively relied on the *Williams* doctrine via *Hunter v. City of Pittsburgh*, a progenitor of *Williams*. See *id.* at 951; see also *supra* notes 80-84 and accompanying text (discussing legacy of *Hunter* and *Williams*).

118. See *City of Boston v. Anderson*, 439 U.S. 1060, 1060 (1979) (mem.) (dismissing case); Blank, *supra* note 18, at 422 (explaining Court denied certiorari based on mootness rather than merits); De Stasio, *supra* note 39, at 1008 (emphasizing limited fact-specific holding of case).

119. 539 U.S. 194, 214 (2003) (discussing libraries’ First Amendment claim).

120. See Brief of Appellees American Library Association at 46, *Am. Libr. Ass’n*, 539 U.S. 194 (No. 02-361) (relying on “constitutional text, analogous case law, and fundamental free speech and federalism principles”).

121. See *Am. Libr. Ass’n v. United States*, 201 F. Supp. 2d 401, 490-94 n.36 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003) (addressing libraries’ First Amendment claims). In a footnote stretching nearly twenty paragraphs, the district court mused, “[T]he notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct.” *Id.* (analyzing jurisprudence regarding municipal First Amendment rights); see De Stasio, *supra* note 39, at 982 (noting both parties fully briefed Court).

122. See *Am. Libr. Ass’n*, 539 U.S. at 210-11 (addressing parties’ claims).

123. See *id.* at 211 (stating “[w]e need not decide this question”).

124. Compare *id.* at 226-27 (Stevens, J., dissenting) (supporting First Amendment rights for libraries), with *City of Boston v. Anderson*, 439 U.S. 951, 952 (1978) (Stevens, J., dissenting). The fact that *Anderson* concerned censorship by a state government, while *American Library* concerned censorship by the federal government, might explain Justice Stevens’s inconsistency. Cf. Volokh, *supra* note 14 (explaining constitutional issues for government speech). Justice Stevens, of course, would later pen yet another important dissent in *Citizens United*. See *Citizens United v. FEC*, 558 U.S. 310, 429 (2010) (Stevens, J., concurring in part and dissenting in part).

125. See *United States v. Am. Libr. Ass’n*, 539 U.S. 194, 226-27 (2003) (Stevens, J., dissenting) (stating “First Amendment protects libraries from being denied funds”).

126. *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009) (adjudicating controversy between labor union and state government).

deduction to fund political speech.¹²⁷ The Court reasoned that state governments retain control over local payroll plans.¹²⁸ Yet Chief Justice Roberts's decision went much further, citing *Williams* to declare that the City of Pocatello had no constitutional right to free speech that would allow it to facilitate the union's speech.¹²⁹ This holding was peculiar: Pocatello did not claim any such constitutional right, the City was not a party to the controversy, and nobody had briefed the issue.¹³⁰ The Court's First Amendment analysis, consisting of three brief paragraphs, did not cite a single municipal First Amendment case.¹³¹

Supreme Court authority may be scant, but in 1996 the Seventh Circuit offered a distinctive perspective on municipal free speech in *Creek v. Village of Westhaven*.¹³² The case—a civil rights dispute over subsidized housing—ultimately did not turn on the issue of municipal First Amendment rights.¹³³ Yet Judge Posner's dictum is widely cited: “[A] municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible”¹³⁴ He suggested that censoring a city violates the collective First Amendment rights of residents.¹³⁵ Judge Posner's observation foreshadowed the legal rationale of *Citizens United*.¹³⁶

127. *See id.* (stating union's First Amendment claim).

128. *See id.* at 362 (citing *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)) (rejecting union's claim).

129. *See id.* at 363 (citing *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40, 53 (1933)) (analyzing municipal constitutional rights).

130. *See Blank*, *supra* note 18, at 449 (calling *Ysursa* decision problematic); *Bendor*, *supra* note 12, at 391 (calling *Ysursa* “sweeping dicta”); *De Stasio*, *supra* note 39, at 1010 (noting neither side briefed issue of municipal First Amendment rights).

131. *See Ysursa*, 555 U.S. at 363-64 (denying municipal First Amendment rights). In his decision, Chief Justice Roberts relied solely on *Williams*, *Trenton*, and *Bellotti*. *See id.*; *see also infra* note 144 (noting *Citizens United* affirmed *Bellotti*). The State of Idaho did not cite any of these cases in its filings. *See* Brief for Petitioners at iv-vii, *Ysursa*, 555 U.S. 353 (No. 07-869) (listing authorities); Reply Brief for Petitioners at ii-iv, *Ysursa*, 555 U.S. 353 (No. 07-869) (listing authorities).

132. 80 F.3d 186, 192-94 (7th Cir. 1996) (addressing First Amendment issues).

133. *See id.* at 188, 193 (stating facts and declining to rule on First Amendment issue). *Creek* concerned an all-white village that blocked a developer from building subsidized units attractive to Black renters. *See id.* at 188-89 (noting developer responded by filing civil rights action). The village claimed a First Amendment right to lobby state and federal officials and sue the Department of Housing and Urban Development. *See id.* at 192. The court did not find it necessary to rule on this claim, but provided lengthy commentary nonetheless. *See id.* at 192-94.

134. *Id.* at 193. Judge Posner's language echoes *Village of Euclid v. Ambler Realty Co.*, in which the Court affirmed local “governing authorities, presumably representing a majority of its inhabitants and voicing their will.” *See* 272 U.S. 365, 389 (1926); *see also Fagundes*, *supra* note 14, at 1643-44 (noting Judge Posner's suggestion municipal speech rights may derive from aggregated voice of constituents); *Wiseman*, *supra* note 21, at 594-95 (asserting cities enhance power of individual voices).

135. *See Creek*, 80 F.3d at 193 (considering curtailment of residents' First Amendment rights).

136. *Compare id.* (stating “a municipality is the voice of its residents”), *with Citizens United v. FEC*, 558 U.S. 310, 392 n.7 (2010) (Scalia, J., concurring) (stating “a corporation . . . speaks on behalf of the human beings who have formed that association”).

C. Citizens United v. FEC

Citizens United is perhaps the most important First Amendment case of this century.¹³⁷ Although the case does not directly address municipal rights, the Court outlines a general theory of collective free speech.¹³⁸ Where previous cases sowed confusion about cities' First Amendment rights, *Citizens United* provides a coherent analytical foundation.¹³⁹

1. Corporate Free Speech

In 2008, a nonprofit corporation called Citizens United produced *Hillary: The Movie*.¹⁴⁰ The documentary was—to say the least—unflattering in its portrayal of presidential candidate Hillary Clinton.¹⁴¹ Citizens United sought distribution via video-on-demand and intended to run advertisements to promote the film.¹⁴²

These actions would have violated the Bipartisan Campaign Reform Act of 2002, which prohibited corporate expenditures advocating for or against a candidate and expressly forbade “election communication” close to a primary or general election.¹⁴³ In a much-debated decision, the Court struck down the law, holding that the First Amendment prohibits government from restricting corporate expenditures for political speech.¹⁴⁴

The Court also held that the government may not discriminate among different types of speakers, and therefore may not favor natural persons over corporations.¹⁴⁵ As the Court noted, the Free Speech Clause—unlike most constitutional provisions—does not specify or limit *who* enjoys its protection.¹⁴⁶ The text does

137. See *Citizens United*, 558 U.S. at 365 (majority opinion) (holding government may not suppress political speech on basis of speaker's corporate identity); Macey & Strine, *supra* note 25, at 451 (highlighting importance of *Citizens United*).

138. See *Citizens United*, 558 U.S. at 349 (affirming First Amendment rights for associations of citizens).

139. See *infra* Section II.C.2 (examining “associations of citizens” theory).

140. See *Citizens United*, 558 U.S. at 319 (documenting \$12 million budget).

141. See *id.* at 319-20 (noting Clinton's candidacy in 2008 presidential primary elections).

142. See *Citizens United v. FEC*, 558 U.S. 310, 320 (2010) (explaining controversy).

143. See *id.* at 320-21; Bipartisan Campaign Reform Act of 2002 § 441b, 2 U.S.C. § 441b (establishing statutory limits on corporate speech), *invalidated by Citizens United*, 558 U.S. 310.

144. See *Citizens United*, 558 U.S. at 365-66 (summarizing decision). *Citizens United* overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which held that government could ban political speech based on the speaker's corporate identity, and *McConnell v. FEC*, 540 U.S. 93 (2003), which limited electioneering communication. See *Citizens United*, 558 U.S. at 319, 365-66. The Court affirmed *Bellotti*, which held that the First Amendment does not allow political speech restrictions based on corporate identity. See *id.* at 365-66.

145. See *Citizens United*, 558 U.S. at 340-41 (noting speaker-based discrimination deprives disadvantaged speakers respect).

146. See *id.* at 392 (Scalia, J., concurring) (noting First Amendment written in terms of speech, not speakers); U.S. CONST. amend. I (prohibiting laws “abridging the freedom of speech”). Conversely, other constitutional provisions apply, for example, to “the people,” “the press,” “the accused,” “states,” “persons born or naturalized in the United States,” “male inhabitants . . . twenty-one years of age,” and “citizens of the United States.” U.S. CONST. amends. I, VI, X, XIV, XV; see Fagundes, *supra* note 14, at 1648-49 (demonstrating uniqueness of Free Speech clause).

not allow the government to pick and choose which kinds of speakers to censor.¹⁴⁷

In his dissent, Justice Stevens argued corporations should be subject to discriminatory treatment because they are “mere creature[s] of the law,” and therefore subject to state control.¹⁴⁸ The Court rejected this argument, holding that a state may not discriminate even against entities it has created.¹⁴⁹

2. “Associations of Citizens”

Most fundamentally, the Court identified the *source* of corporate First Amendment rights: Corporations are “associations of citizens.”¹⁵⁰ Because individual American citizens possess First Amendment rights, the government may not censor citizens when they join together.¹⁵¹ Free speech includes the right to speak in association with other individuals.¹⁵²

Under this theory, a corporate entity derives First Amendment rights from the aggregated rights of individuals.¹⁵³ Despite popular folklore, *Citizens United* never asserted that corporations are people; the Court did not rely on the notion that corporations have constitutional rights distinct from their shareholders.¹⁵⁴ Instead, the Court viewed corporations as groups of people—joined together in association—to assert their collective individual constitutional rights.¹⁵⁵ *Citizens United* celebrated and affirmed the First Amendment rights of Americans “who have associated in a common cause,” giving leaders the right to speak on their behalf.¹⁵⁶

147. See *Citizens United*, 558 U.S. at 341 (summarizing nondiscrimination principle). Justice Scalia suggested there are no exclusions for *any* category of speaker. See *id.* at 392-93 (Scalia, J., concurring). Nonetheless, Justice Stevens’s dissent noted that the majority’s sweeping statements ignore the fact that government routinely censors “students, prisoners, members of the Armed Forces, foreigners, and its own employees.” See *id.* at 420 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

148. See *Citizens United v. FEC*, 558 U.S. 310, 428-29 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)) (arguing government may comprehensively regulate corporations).

149. See *id.* at 365 (majority opinion) (stating comprehensive regulation of corporate speech too restrictive).

150. See *id.* at 349 (prohibiting Congress from punishing associations of citizens for engaging in political speech).

151. See *id.* (summarizing Court’s rationale).

152. See *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring) (explaining rationale for corporate First Amendment rights).

153. See Blair & Pollman, *supra* note 25, at 1734 (discussing *Citizens United*’s recognition of derivative rights for corporations); Wiseman, *supra* note 21, at 646-47 (analyzing *Citizens United*’s shifting views on derivative rights); Dan-Cohen, *supra* note 21, at 1230-31 (outlining theory of collective speech).

154. See Macey & Strine, *supra* note 25, at 462 (noting Court does not rely on theory of independent corporate rights).

155. See Blair & Pollman, *supra* note 25, at 1734 (asserting Court appropriately recognized rights of individuals joined together for speech-related purpose). *But see* Wiseman, *supra* note 21, at 646-47 (observing *Citizens United* decision occasionally suggests distinct corporate entity rights).

156. See *Citizens United v. FEC*, 558 U.S. 310, 392-93 (2010) (Scalia, J., concurring) (denying government may censor any category of speaker or association).

The majority opinion in *Citizens United* refers to “associations” seven times without offering a precise definition.¹⁵⁷ In his concurrence, Justice Scalia provided some examples—and specifically mentioned cities and towns.¹⁵⁸ His opinion is pregnant with the possibility that municipalities are associations of citizens and therefore deserve constitutional rights.¹⁵⁹

III. ANALYSIS

When the Court first granted private corporations a First Amendment right to free speech, some city leaders jumped to a hasty conclusion.¹⁶⁰ They posited that since cities are “municipal corporations,” then cities should—by definition—enjoy the same rights as any other corporation: Q.E.D.¹⁶¹ This simple syllogism, alas, is unpersuasive.¹⁶² Private corporations and cities are legally distinct.¹⁶³

Rather than merely asserting that cities deserve First Amendment rights because they are “municipal corporations,” this Note takes a more fundamental position: Cities deserve free speech because they are “associations of citizens.”¹⁶⁴ The Roberts Court, and especially Justice Scalia, articulated a profound theory

157. See *id.* at 343, 349, 354, 356, 358, 362 (majority opinion) (mentioning “associations” without definition).

158. See *id.* at 388 (Scalia, J., concurring) (defending rights of associations of citizens). Justice Scalia took a broad view of corporations that might deserve First Amendment rights, including colleges, towns and cities, religious institutions, and guilds. See *id.* Despite his vigorous argument in favor of corporate free speech in *Citizens United*, Justice Scalia took an arguably contradictory view two years earlier, when he wrote that First Amendment freedoms apply only to groups engaged in expressive association—and corporations do not qualify. See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) (holding state primary system did not violate political parties’ associational right).

159. See *infra* Section III.A.1 (analyzing cities like associations of citizens).

160. See *Blank*, *supra* note 18, at 425 (describing aftermath of *Bellotti*).

161. See *id.* (recounting false promise of *Bellotti*); see also *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (granting municipal free speech). According to one district court, “A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.” *Long Island Lighting*, 710 F. Supp. at 1390; see *supra* note 106 (analyzing weak authority of *Long Island Lighting*). When *Bellotti* initially recognized corporate First Amendment rights in 1978, Boston’s mayor was enthusiastic because “cities were corporations, too.” See *Blank*, *supra* note 18, at 425. His hopes would be dashed. See *City of Boston v. Anderson*, 439 U.S. 1060, 1060 (1979) (mem.) (dismissing Boston’s claim for First Amendment rights). Decades later, the City of Birmingham would use this same logic. See *State v. City of Birmingham*, 299 So. 3d 220, 231 (Ala. 2019) (equating municipal corporations to private corporations). “We recognize that the United States Supreme Court has held that ‘First Amendment protection extends to corporations,’ and that the City is a municipal corporation.” *Id.* (citations omitted) (quoting *Citizens United*, 558 U.S. at 342). The Alabama Supreme Court rejected this syllogism. See *id.* (rejecting analogy of municipalities to private corporations for free-speech purposes).

162. See *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 363 (2009) (holding private corporations enjoy constitutional protections, but municipalities do not).

163. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638 (1819) (establishing constitutional status of public corporations, and distinguishing them from private corporations); *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (distinguishing between public and private corporations); see also *Dan-Cohen*, *supra* note 21, at 1261 (rejecting corporation-municipality analogy in favor of more robust argument for collective speech rights).

164. See *infra* Section III.A.1 (analyzing cities like associations of citizens).

of associational rights.¹⁶⁵ Critics of *Citizens United* may dispute whether corporations actually fit the definition of “associations” that the Court espoused.¹⁶⁶ Cities, however, fulfill the Court’s paradigm and thereby deserve First Amendment rights.¹⁶⁷

A. Doctrinal Argument for Municipal Free Speech

1. Cities Deserve First Amendment Protection Because They Are Associations of Citizens

Citizens United identifies four animating characteristics for “associations of citizens”: (1) they are comprised of citizens with individual rights, (2) these citizens have “associated” for a common cause, (3) they give leaders the right to speak on their behalf, and (4) their speech is political.¹⁶⁸ Comparing corporations to Birmingham on each of these traits reveals that cities—perhaps more than corporations—qualify.¹⁶⁹

First, associations of citizens are, by definition, comprised of “citizens.”¹⁷⁰ *Citizens United* protects the constitutional rights of people, not corporate entities.¹⁷¹ Birmingham qualifies: Its population includes more than 200,000 American citizens, each possessing individual constitutional rights.¹⁷²

165. See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (protecting “citizens, or associations of citizens”); *id.* at 392-93 (Scalia, J., concurring) (outlining theory of associational speech rights).

166. See Macey & Strine, *supra* note 25, at 453 (denying corporations constitute associations of citizens).

167. See *infra* Section III.A.1 (concluding cities have stronger claim to free speech).

168. See *Citizens United*, 558 U.S. at 343, 349 (stating associations engage in political speech, and protecting “citizens, or associations of citizens”); *id.* at 392 (Scalia, J., concurring) (stating citizens associate in common cause and choose speakers).

169. See Bendor, *supra* note 12, at 426 (suggesting, without analyzing, associational attributes of cities).

170. See *Citizens United*, 558 U.S. at 349 (establishing free speech for “citizens, or associations of citizens”). The Court specified that a corporation’s “citizens” are its shareholders. See *id.* at 361-62 (calling shareholders corporate speakers); see also Macey & Strine, *supra* note 25, at 455 (noting *Citizens United* considers corporations “merely an extension of its shareholders”). Critics have noted, however, that not all shareholders are actually United States citizens—foreigners may own U.S. companies—and the Court utterly ignored the fact that *institutions*, not *people*, are the primary shareholders of large corporations. See *Citizens United*, 558 U.S. at 362 (acknowledging foreign ownership of corporations); Macey & Strine, *supra* note 25, at 499 (explaining institutions own approximately 80% of public corporations).

171. See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (concluding “civic discourse belongs to the people” in corporate form). The dissent emphasized that when the Framers wrote the First Amendment, “it was the free speech of *individual Americans* that they had in mind.” *Id.* at 428 (Stevens, J., concurring in part and dissenting in part) (emphasis added). Justice Scalia mockingly agreed: “All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears.” *Id.* at 391-92 (Scalia, J., concurring). In sum, the Court focused primarily on collective individual rights rather than the rights of distinct corporate “persons.” See Macey & Strine, *supra* note 25, at 462 (noting Court does not rely on theory of independent corporate rights).

172. See *About Birmingham*, *supra* note 3 (providing overview of Birmingham).

Second, citizens have “associated in common cause.”¹⁷³ Associations need not be incorporated, but they require shared purpose.¹⁷⁴ In Birmingham, citizens are “associated” both legally and literally.¹⁷⁵ The city charter defines the *legal* association, in which the municipal corporation is designed to “preserve order, to enforce the laws,” and “to make all by-laws and ordinances of whatever kind and upon whatever subject to them may seem right and proper.”¹⁷⁶ The citizens of Birmingham also *literally* associate with one another in the common cause of civic life.¹⁷⁷ Neighbors engage in cultural organizations, nonprofits, sporting events, political campaigns, and civic improvement initiatives.¹⁷⁸ Birmingham residents also associate in common political causes, such as their overwhelming appeal to reject the Confederate Soldiers and Sailors Monument.¹⁷⁹

Third, associations of citizens give leaders the right to speak on their behalf.¹⁸⁰ *Citizens United* does not require associations to have a single, monolithic viewpoint, but rather relies on companies to utilize “corporate democracy” to choose

173. See *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring) (explaining rationale for associational speech).

174. See *id.* at 356 (majority opinion) (indicating associations not limited to corporate entities); *id.* at 392-93 (Scalia, J., concurring) (reviewing types of incorporated and unincorporated organizations with constitutionally protected free speech). Both the majority and Justice Scalia’s concurrence indicate that associations pursue “objectives” and “common cause.” See *id.* at 354-55 (majority opinion) (describing distinct viewpoints of “factions”); *id.* at 386, 392 (Scalia, J., concurring) (emphasizing corporations may only pursue objectives set forth in their charters). Critics have asserted, however, that large modern corporations are “associated in common cause” merely in a formalistic sense. See Macey & Strine, *supra* note 25, at 455-56 (asserting Court wrongly considered corporations to have common political or social viewpoints). Shareholders rarely associate with one another. See *id.* at 454, 466, 495 (describing nature of modern corporations). Most buy and sell shares rapidly without any emotional connection to the firm. See Blair & Pollman, *supra* note 25, at 1722, 1734, 1743 (criticizing derivative rights for large publicly traded corporations). The shareholders’ only common cause is profit. See Macey & Strine, *supra* note 25, at 496 (asserting no empirical basis for common shareholder interests beyond profit).

175. See Act of Dec. 19, 1871, 1871 Ala. Laws 229 (chartering Birmingham); *About Birmingham*, *supra* note 3 (highlighting community engagement).

176. See 1871 Ala. Laws at 230 (establishing municipal corporation’s responsibilities). Hannah Wiseman aptly describes the legal underpinnings of a city, which “retains its status as a singular, legally recognized entity even as inhabitants move in and out and are born or die, and as the people occupying the positions of city councilmembers and mayor change.” Wiseman, *supra* note 21, at 619.

177. See May, *supra* note 21, at 2 (describing cities’ shared values and unique characters).

178. See *About Birmingham*, *supra* note 3 (portraying community’s “devotion to social justice”).

179. See *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 3 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (describing sentiment of city residents), *rev’d*, 299 So. 3d 220 (Ala. 2019).

180. See *Citizens United v. FEC*, 558 U.S. 310, 392 (2010) (Scalia, J., concurring) (stating associations choose speakers).

their leaders and speech.¹⁸¹ Birmingham relies on *actual* democracy.¹⁸² City residents choose leaders through a transparent, democratic process; when city hall speaks, it represents the majority of voters, all of whom agree to be governed by popular will.¹⁸³ City speech is therefore directly accountable to voters.¹⁸⁴ In Birmingham, citizens spoke through their elected leaders to demand the Confederate monument's removal.¹⁸⁵

Fourth, associations of citizens engage in *political* speech, which is “indispensable to decisionmaking in a democracy.”¹⁸⁶ Local governments are, by their nature, political entities; they excel at political speech.¹⁸⁷ In 1905, Birmingham spoke through its Confederate monument—to glorify the race of men who fought

181. See *id.* at 361-62 (majority opinion) (stating “corporate democracy” equates to check on unrepresentative speech). Critics have found the Court’s description of corporate democracy to be naïve. See Blair & Pollman, *supra* note 25, at 1722 (discussing weak democracy of modern corporations); Macey & Strine, *supra* note 25, at 476-77 (discussing problems of corporate democracy); Wiseman, *supra* note 21, at 648 (comparing corporate democracy unfavorably to municipal democracy). Justice Scalia’s notion that a corporate spokesman speaks “on behalf of the human beings who have formed that association” ignores the fact that most shareholders, particularly institutions, play no role whatsoever in selecting the speaker or their speech. See *Citizens United*, 558 U.S. at 392 n.7 (Scalia, J., concurring) (advocating for corporate First Amendment rights); Macey & Strine, *supra* note 25, at 476-77 (examining limited corporate democracy). In *Citizens United*, the Court seemed to be describing small partnerships rather than large modern corporations. See Macey & Strine, *supra* note 25, at 455 (noting Court’s mischaracterization).

182. See *About Birmingham*, *supra* note 3 (providing links to elected officials).

183. See *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (suggesting municipal First Amendment rights). Some critics of municipal free speech have raised the problem of consensus: Should a city be allowed to “speak” if not everyone agrees? See, e.g., Fagundes, *supra* note 14, at 1665 (discussing problem of consensus); Dan-Cohen, *supra* note 21, at 1261-62 (discussing issues of dissenting views); *Anderson v. City of Boston*, 380 N.E.2d 628, 639 (Mass. 1978) (holding state has compelling interest in restricting non-unanimous speech). The answer for cities is the same as the answer for corporations: democracy. See *Citizens United*, 558 U.S. at 361-62 (noting democracy can resolve non-unanimous corporate speech).

184. See *About Birmingham*, *supra* note 3 (providing links to elected officials); see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (describing local “governing authorities, presumably representing a majority of its inhabitants and voicing their will”); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (noting electoral process provides check on government speech); *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468-69 (2009) (noting local governments accountable to electorate).

185. See Brief of Appellees, *supra* note 5, at 8 (stating Birmingham citizens decided, through elected officials, to reject monument).

186. See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)) (emphasizing centrality of political speech). Critics contend that corporations are not intrinsically political entities, and political speech is not a basic corporate function. See Macey & Strine, *supra* note 25, at 497 (asserting “no corporate law scholars or practitioners” believe shareholders invest for expressive purposes); Blair & Pollman, *supra* note 25, at 1734 (explaining shareholders do not associate for purpose of expressing themselves politically); *Bellotti*, 435 U.S. at 805 (White, J., dissenting) (stating most shareholders have not invested their money to advance political causes). As Justice Scalia himself noted only two years before *Citizens United*, “The Campbell Soup Company does not exist to promote a message.” See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) (arguing state primary system did not violate political parties’ associational rights).

187. See Blank, *supra* note 18, at 368 (noting “[c]ities are structured, legally and politically, to excel at speech”).

to protect slavery.¹⁸⁸ Birmingham subsequently became known as “the most segregated city in America”; it is where Bull Connor turned the firehoses on peaceful protesters and white supremacists bombed a church, killing four Black girls.¹⁸⁹ In this city, removing the Confederate Soldiers and Sailors Monument was an intensely political act.¹⁹⁰

Citizens United created a legal doctrine based on the idea that associations of citizens deserve constitutional rights because associations embody their members’ collective rights.¹⁹¹ The Court inadvertently described cities like Birmingham.¹⁹²

2. *The Williams Doctrine Does Not Apply to the First Amendment*

For cities to gain free speech, they must also repel *Williams*’s sweeping denial of municipal constitutional rights.¹⁹³ The *Williams* doctrine is unconstrained dicta that strayed far from its source.¹⁹⁴ The doctrine should return to its original Fourteenth Amendment scope rather than threaten the First Amendment rights of associations of citizens.¹⁹⁵

The *Williams* doctrine relies on a dubious premise: Cities are merely “creatures,” “subdivisions,” “agencies,” or “department[s]” of the state.¹⁹⁶ States created cities, and that ends the matter.¹⁹⁷ This crude logic obscures the rich reality

188. See *Sumnum*, 555 U.S. at 472 (declaring monuments in city park constitute government speech); *History of the Confederate Monument*, *supra* note 4 (quoting speech at cornerstone dedication glorifying “the seed of such a race”).

189. See KING, *supra* note 63, at 175, 227, 349 (describing brutal segregation in Birmingham).

190. See Brief of Appellees, *supra* note 5, at 8 (describing political nature of monument removal).

191. See *Citizens United*, 558 U.S. at 349 (holding First Amendment prohibits censorship of “citizens, or associations of citizens, for simply engaging in political speech”); *id.* at 392-93 (Scalia, J., concurring) (summarizing rationale for corporate First Amendment rights).

192. See *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Scalia, J., concurring) (suggesting cities may, in fact, possess First Amendment rights).

193. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (establishing doctrine); see also *State v. City of Birmingham*, 299 So. 3d 220, 228 (Ala. 2019) (relying on “well established general rule” of *Williams*); *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 363-64 (2009) (citing *Williams* to reject municipal free speech).

194. See Bendor, *supra* note 12, at 390-91 (calling *Williams* and similar cases “sweeping dicta rather than analysis”).

195. See *supra* note 87 and accompanying text (describing narrow Fourteenth Amendment claim in *Williams*).

196. See *Williams*, 289 U.S. at 40, 47 (stating cities “created by a state” and constitute “geographical subdivisions”); e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (calling cities “political subdivisions of the state”); *City of Trenton v. New Jersey*, 262 U.S. 182, 187, 191 (1923) (calling city “department” and “agent” of state); *Yursa*, 555 U.S. at 365 (Breyer, J., concurring in part and dissenting in part) (calling municipalities “creatures”). To emphasize the point, courts generally used the words “mere” or “merely.” See, e.g., *Birmingham*, 299 So. 3d at 234 (stating city “merely” political subdivision of state); *Trenton*, 262 U.S. at 187 (stating city “merely a department”); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (stating municipality “mere creature” of state).

197. See, e.g., *Williams*, 289 U.S. at 40 (stating doctrine); *Trenton*, 262 U.S. at 187 (denying City constitutional rights). As Alabama wrote, “The State’s response to the City’s constitutional defenses begins and ends with the well-established legal principle that a municipality cannot assert federal constitutional rights against its parent State.” Appellant’s Reply Brief, *supra* note 72, at 8.

of city life and instead provides an analytical shortcut.¹⁹⁸ Indeed, courts have repeatedly recognized that cities are constitutionally distinct from states in a wide range of contexts, including school desegregation enforcement, Fourteenth Amendment immunity, liability for judgments, and Sherman Act enforcement.¹⁹⁹ Moreover, being a “creature of the state” is not legally dispositive; if it were, corporations themselves would not have constitutional rights.²⁰⁰

A flawed premise led to an overbroad decision.²⁰¹ The *Williams* Court faced a narrow and obscure Equal Protection claim based on Baltimore’s desire to eliminate a railroad tax exemption.²⁰² Neither the City nor the State even briefed the issue of municipal constitutional rights.²⁰³ Yet the Court proclaimed that Maryland “created” Baltimore—which is factually untrue, since Baltimore predates Maryland—and deduced a one-sentence blanket denial of all municipal constitutional rights.²⁰⁴ The Court offered no analysis of the First Amendment or any other constitutional clause.²⁰⁵

The *Williams* doctrine should permit municipal free speech for the same reason *Citizens United* enshrined corporate free speech: The First Amendment protects the rights of “associations of citizens.”²⁰⁶ The rights of *people*, not entities, are at stake.²⁰⁷ Justice Cardozo may have been correct that a municipal entity is

198. See *May*, *supra* note 21, at 2 (describing cities’ “unique local culture and hometown pride”); *Barron*, *supra* note 79, at 487-90 (rejecting conception of “administrative agents of the state”); *Bendor*, *supra* note 12, at 391 (disputing equivalency of local governments and state department of motor vehicles); *Morris*, *supra* note 79, at 25, 29-30 (criticizing concept of “creatures of the state”).

199. See *supra* note 93 (discussing unique constitutional recognition of cities).

200. See *Kovvali*, *supra* note 106, at 84 (noting corporations also “creatures of the state”). Justice Stevens’s dissent in *Citizens United* explicitly made the argument that corporations may be censored because they are creatures of the state; the majority rejected the argument. See *Citizens United v. FEC*, 558 U.S. 310, 428-29 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Dartmouth*, 17 U.S. (4 Wheat.) at 636); *id.* at 369 (majority opinion) (rejecting analogy).

201. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (stating premise and conclusion in one sentence).

202. See *id.* at 39 (stating constitutional claim); Brief on Behalf of Respondent, *supra* note 87, at 80-81 (arguing for equal protection rights of corporations).

203. See Brief on Behalf of Respondent, *supra* note 87, at 80 (arguing “unreasonable discrimination in favor of one corporation” violates Fourteenth Amendment); Brief for Petitioner, *supra* note 87, at 13-16 (presenting arguments against equal protection claim by City “on behalf of other taxpayers”).

204. See *Williams*, 289 U.S. at 40 (proclaiming doctrine); *Maryland at a Glance: Historical Chronology*, *supra* note 88 (providing Maryland’s statehood came fifty-nine years after Baltimore incorporated). The United States had local governments long before state governments; for example, this Note was written in Plymouth, Massachusetts—founded 10 years before Massachusetts became a colony, and 168 years before there was a state government. See *Morris*, *supra* note 79, at 30-31 (noting municipalities not always “creatures of the state”); *GALVIN*, *supra* note 79, at 16-18.

205. See *Williams*, 289 U.S. at 40 (prohibiting constitutional rights without analyzing specific constitutional clauses).

206. See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (affirming First Amendment rights for associations of citizens).

207. See *id.* at 391-92 (Scalia, J., concurring) (upholding “rights of individual men and women”).

not a “person” for Fourteenth Amendment purposes.²⁰⁸ But *Williams* ignores the argument that individual men and women, expressing themselves collectively through local government, deserve First Amendment protection.²⁰⁹

Free speech for cities does not require overruling *Williams*—merely limiting its reach to the issues at stake in the original controversy.²¹⁰ An all-or-nothing approach to municipal constitutional rights is unnecessary.²¹¹ Corporations and states, after all, have some constitutional rights but not others.²¹² The *Williams* doctrine should be restored to its original Fourteenth Amendment scope and allow cities First Amendment rights.²¹³

3. *The CBS Principle Applies to the Federal Government—Not to Cities*

The central argument of this Note—cities are associations of citizens with First Amendment rights—does not directly conflict with the *CBS* principle.²¹⁴ In *CBS*, Justice Stewart opined solely on the constitutional rights of the federal government.²¹⁵ His dictum that the First Amendment does not protect government speech did not address the constitutional rights of cities.²¹⁶

Municipal and federal governments are in fundamentally different postures.²¹⁷ The federal government—unlike cities—does not *need* the First Amendment to

208. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 39-40 (1933) (disallowing Fourteenth Amendment claim); U.S. CONST. amend. XIV, § 1 (establishing equal protection for “any person”).

209. See *Williams*, 289 U.S. at 40 (1933) (stating doctrine).

210. See *id.* at 39-40 (denying equal protection claim). The modern Court generally claims to decide only on the issues before it. See *Citizens United*, 558 U.S. at 374 (Roberts, C.J., concurring) (claiming judicial modesty).

211. See *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (distinguishing between constitutional issues). Judge Posner wrote, “[I]t is one thing to hold that a municipality cannot interpose the Fourteenth Amendment between itself and the state of which it is the creature . . . and another to hold that a municipality has no rights against the federal government or another state.” *Id.* (citations omitted).

212. See Blair & Pollman, *supra* note 25, at 1716-17 (analyzing lack of corporate Fifth Amendment right against self-incrimination); Wiseman, *supra* note 21, at 607 (reviewing corporate constitutional rights); Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2d Cir. 1973) (noting states not covered by Due Process Clause of Fifth Amendment).

213. See *Williams*, 289 U.S. at 40 (denying equal protection claim). During the remainder of Justice Cardozo’s tenure on the Court (until his death in 1938), the only Supreme Court case that substantively cited *Williams* applied to a Fourteenth Amendment claim. See, e.g., *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 537 (1934) (claiming violation of Equal Protection Clause); *id.* at 558 (Cardozo, J., dissenting in part) (citing *Williams* to argue State did not violate Equal Protection Clause). The Court did not interpret *Williams* to deny all constitutional claims until 1980. See *City of South Lake Tahoe v. Cal. Tahoe Reg’l Plan. Agency*, 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting).

214. See Blank, *supra* note 18, at 423 (reasoning municipal speech not bound by *CBS*); see also *supra* Section III.A.1 (arguing cities equate to associations of citizens).

215. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 138-40 (1973) (Stewart, J., concurring) (focusing on Federal Communications Commission and “broadcasting system established by Congress”).

216. See Blank, *supra* note 18, at 423-24 (analyzing *CBS*’s focus on federal rather than local government issues).

217. See *id.* at 419 (distinguishing cities from federal and state government); see also Frug, *supra* note 81, at 1062-63 (describing legal status of cities).

protect itself from government censorship.²¹⁸ After all, there is no higher government authority.²¹⁹ In that sense, Justice Stewart's statement is merely an andyne observation—the federal government does not possess constitutional protection against itself—rather than a legal directive.²²⁰ Conversely, cities are subject to censorship by state and federal authorities.²²¹ City governments require constitutional protection in order to control their own speech.²²²

Were *Citizens United* to establish such protection, *CBS* would provide little resistance.²²³ The *CBS* principle is pure dicta.²²⁴ It has never been the dispositive element of a United States Supreme Court holding.²²⁵ *CBS* would wither under the authority of *Citizens United*.²²⁶

B. Policy Arguments for Municipal Free Speech

1. Cities Must Communicate Freely to Their Citizens

Local governments are vital speakers.²²⁷ They provide essential information, such as health guidelines and updates on governmental actions.²²⁸ Cities also

218. See *CBS*, 412 U.S. at 139 n.7 (Stewart, J., concurring) (stating “[g]overnment is not restrained by the First Amendment from controlling its own expression”). As David Fagundes wrote, “Justice Stewart suggested only that, just as an individual speaker is free to keep her mouth shut, so the [federal] government, as speaker, may do likewise.” Fagundes, *supra* note 14, at 1642.

219. See U.S. CONST. art. VI, cl. 2 (establishing “laws of the United States . . . shall be the supreme law of the land”).

220. See *CBS*, 412 U.S. at 139 n.7 (Stewart, J., concurring) (observing federal government controls its own expression); Fagundes, *supra* note 14, at 1642 (noting federal government’s self-censorship “plainly unconstitutional” if applied to other entities).

221. See, e.g., *State v. City of Birmingham*, 299 So. 3d 220, 228 (Ala. 2019) (asserting municipality has no constitutional right to free speech).

222. See Brief of Appellees, *supra* note 5, at 15-16 (outlining First Amendment argument).

223. See Fagundes, *supra* note 14, at 1643 (describing weakness of *CBS* precedent).

224. See De Stasio, *supra* note 39, at 983-84 (calling *CBS* dicta).

225. See Blank, *supra* note 18, at 424-25 (asserting *CBS* has rarely been justified or analyzed); Fagundes, *supra* note 14, at 1643 (stating courts have rarely examined *CBS*); see also *supra* Section II.B.3 (describing Court’s reluctance to adopt *CBS* principle).

226. See Fagundes, *supra* note 14, at 1643 (examining weakness of *CBS*). Fagundes also notes that, ironically, *CBS* typically ends up “vindicating, rather than restricting, the government’s prerogative to speak.” *Id.* Courts have used Justice Stewart’s claim that “[g]overnment is not restrained by the First Amendment from controlling its own expression” to immunize government speech from the First Amendment objections of individual citizens, and thereby increase the freedom of governments to speak freely. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (relying on *CBS* to allow government to speak freely). In fact, Justice Stewart’s interpretation of government speech eventually found its way into Birmingham’s argument *in favor* of municipal free speech. See Brief of Appellees, *supra* note 5, at 15 (relying on *Summum* for First Amendment claim).

227. See Blank, *supra* note 18, at 388 (asserting city speech promotes localism, federalism, and First Amendment values).

228. See *id.* at 367-68 (describing functions of city speech); *About Birmingham*, *supra* note 3 (providing essential information for residents).

seek to persuade by advocating on behalf of political issues ranging from business taxes to racial justice.²²⁹

To govern, a government needs to speak.²³⁰ Democracy requires informed citizens and a robust marketplace of ideas.²³¹ Nonetheless, states increasingly censor cities.²³² For example, Florida barred cities from speaking in favor of gun control.²³³ Texas prohibited cities from endorsing sanctuary for undocumented immigrants.²³⁴ Many states prevent local police departments from releasing bodycam footage to inform public debate about police conduct.²³⁵

When states censor cities, they do not merely impede free speech—they pervert democracy by compelling cities to adopt objectionable or unrepresentative viewpoints.²³⁶ Cities that unwillingly endorse the Confederacy mislead constituents and undermine the cities’ own legitimacy.²³⁷ Conversely, liberating municipalities from compelled speech allows new forms of expression to flourish; for example, in DeKalb County, Georgia, the local government is replacing a Confederate monument with a statue of civil rights leader John Lewis.²³⁸

Finally, municipal speech promotes transparency and accountability during the present era of fake news.²³⁹ Cities communicate information from readily identifiable government agencies and officials.²⁴⁰ Of course, local governments

229. See Blank, *supra* note 18, at 367-68; *About Birmingham*, *supra* note 3 (claiming Birmingham has “progressive business climate and a devotion to social justice”).

230. See *Sumnum*, 555 U.S. at 467-68 (advocating for marketplace of ideas).

231. See Wiseman, *supra* note 21, at 595 (arguing municipalities contribute to marketplace of ideas); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (noting speech essential to democracy); *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 6 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (celebrating cities’ role in marketplace of ideas), *rev’d*, 299 So. 3d 220 (Ala. 2019).

232. See Blank, *supra* note 18, at 368-69 (asserting cities increasingly need permission from states to speak).

233. See Holder, *supra* note 39 (reporting on state law banning cities from discussing local gun ordinances).

234. See TEX. GOV’T CODE ANN. § 752.053 (West 2022) (banning municipalities from “endors[ing]” limited enforcement of immigration laws). The City of El Cenizo sued Texas, and the Fifth Circuit held that the state may endorse a specific viewpoint and require cities to do the same. See *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018) (upholding statute’s application to city employees); see also May, *supra* note 21, at 22-23 (noting “endorsement” might include public speeches or dinner party conversation).

235. See De Stasio, *supra* note 39, at 963 (analyzing state law prohibiting cities from releasing bodycam footage).

236. See Blank, *supra* note 18, at 403 (asserting “republican defense of free speech”).

237. See *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 3-4 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (declaring “overwhelming majority of the body politic of the City is repulsed by the monument”), *rev’d*, 299 So. 3d 220 (Ala. 2019).

238. See Morava & Ahmed, *supra* note 38 (reporting removal of Confederate monument based on threat to public safety).

239. See Blank, *supra* note 18, at 402-03 (arguing for municipal free speech); see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (describing local “governing authorities, presumably representing a majority of its inhabitants and voicing their will”).

240. See, e.g., *About Birmingham*, *supra* note 3 (identifying city agencies and related organizations).

are not always the “good guys.”²⁴¹ But city officials whose speech runs counter to the will of local citizens will suffer the wrath of voters.²⁴²

2. *Cities Represent the Unique Perspectives of Urban Communities*

Cities not only communicate *to* their citizens—they amplify the voices *of* their citizens.²⁴³ As Judge Posner wrote, a city is “a megaphone [for] voices that might not otherwise be audible.”²⁴⁴ City governments, not state legislatures, speak for the unique circumstances and perspectives of local residents.²⁴⁵

Municipal speech is more reflective of individual voices than states could ever be.²⁴⁶ First, individual voices are louder: Local governments represent fewer people and experience higher levels of political participation.²⁴⁷ In Birmingham, for example, city councilors speak on behalf of neighborhoods with fewer than 25,000 residents, while Alabama’s Governor speaks for nearly five million.²⁴⁸ Second, cities reflect partisan sorting: Most large cities are strongly Democratic, while most rural municipalities and state governments skew Republican.²⁴⁹ Local voices are therefore less likely to be drowned out by the inverse political demands of distant regions.²⁵⁰ Third, cities have constitutionally recognized authority to protect local citizens from state overreach in areas ranging from school desegregation to gay rights.²⁵¹ Cities promote equality at the local level.²⁵²

241. See Briffault, *supra* note 14, at 2021 (listing local government abuses); *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (stating municipal free speech does not permit racial discrimination); Blank, *supra* note 18, at 417 (worrying about discriminatory expressions of municipal speech); Bray, *supra* note 10, at 6 (describing rural communities with strong support of Confederate monuments).

242. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (noting electoral process provides most important check on government speech); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468-69 (2009) (noting local government accountable to electorate).

243. See *Creek*, 80 F.3d at 193 (stating “a municipality is the voice of its residents”).

244. *Id.*

245. See Blank, *supra* note 18, at 389-90 (asserting local governments make residents “masters of their own fate”).

246. See *infra* text accompanying notes 247-51 (reviewing numerical, political, and legal responsiveness of cities).

247. See Barron, *supra* note 79, at 517 (asserting local government provides opportunity to practice democracy in “direct and immediate way”); Frug, *supra* note 81, at 1069 (arguing popular involvement in decision making only possible at local level).

248. See *About Birmingham*, *supra* note 3 (stating population of 209,880); *Race and Ethnicity in the South*, *supra* note 47 (providing Alabama demographics).

249. See May, *supra* note 21, at 3 (describing geographically like-minded communities); Briffault, *supra* note 14, at 1997-98 (analyzing preponderance of Republican-dominated state governments and Democratic-led cities).

250. See Briffault, *supra* note 14, at 2027 (asserting local autonomy avoids large numbers of aggrieved citizens); Bray, *supra* note 10, at 6-8 (describing rural-urban split). Americans feel increasingly estranged from fellow citizens with different views on issues like Confederate statues, leading to “toxic” disputes. See Bray, *supra* note 10, at 7.

251. See Barron, *supra* note 79, at 577-78, 604-05 (noting *Milliken* directed localities to enforce desegregation and *Romer* continued local protections against private discrimination).

252. See *id.* at 604-05 (assessing role of local governments in enforcing equal protection). *But see supra* note 241 (reviewing local government abuses of citizen rights).

Of course, allowing cities to speak in defiance of the state presents governance risks.²⁵³ Some scholars worry about a slippery slope: Could a municipality claim that enacting a local ordinance to contravene state law is protected “speech”?²⁵⁴ Much broader issues of home rule and state preemption would arise.²⁵⁵ A workable municipal free speech policy must be limited to purely expressive activities, which are at the heart of First Amendment protection.²⁵⁶

Can those expressive activities include donations to preferred political candidates?²⁵⁷ After all, that is precisely the kind of speech that *Citizens United* protects.²⁵⁸ Yet such activities would be anathema to a healthy democracy.²⁵⁹ The Court allowed for reasonable regulation of free speech in *Citizens United*—and prohibiting municipal contributions to candidates is sound public policy.²⁶⁰

There is also the question of competing speech claims.²⁶¹ What if the State of Alabama claims a First Amendment right to speak by *erecting* Confederate monuments, and Birmingham claims a constitutional right to *remove* them?²⁶² In that case, only one side can “speak.”²⁶³ The resolution is a simple calculus: Whoever owns the land wins.²⁶⁴

Cities are the most responsive level of government for local citizens and provide the best opportunity to amplify urban voices.²⁶⁵ That responsiveness is especially true for communities of color.²⁶⁶

253. See *infra* text accompanying notes 254-56 (analyzing preemption issues raised by municipal free speech).

254. See May, *supra* note 21, at 23, 31 (assessing enactment of law versus protected speech).

255. See Briffault, *supra* note 14, at 1997 (analyzing “new and aggressive form of state preemption of local government action”).

256. See May, *supra* note 21, at 23 (noting First Amendment applies to laws burdening “pure expression”).

257. See *infra* text accompanying notes 258-60 (assessing political contributions).

258. See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (stating First Amendment has fullest and most urgent application to campaigns for political office).

259. See Blank, *supra* note 18, at 409 (reviewing dangers of political speech serving entrenched powers).

260. See *Citizens United*, 558 U.S. at 319 (allowing for regulation of corporate speech); Blank, *supra* note 18, at 409 (warning of government power influencing political process).

261. See *infra* text accompanying notes 262-64 (addressing issue of irreconcilable differences).

262. See Volokh, *supra* note 14 (discussing state First Amendment rights); see also *supra* Section II.A.2 (recounting state-city conflict over Confederate statues).

263. See *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 6 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (describing “impossible” situation), *rev’d*, 299 So. 3d 220 (Ala. 2019).

264. See *id.* at 5-6 (stating “City’s ownership of the park all but determines that the City is the speaker”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) (stating parks closely identified with government unit owning land). Of course, a state could simply seize the land. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (proclaiming state authority to redraw boundaries). Nonetheless, the mere *threat* of confiscation is insufficient to establish authority. See *Rogers v. Brockett*, 588 F.2d 1057, 1063-64 (5th Cir. 1979) (holding state’s authority to abolish school district does not confer authority to control it).

265. See Blank, *supra* note 18, at 389-90 (advocating for municipal free speech).

266. See *infra* Section III.B.3 (analyzing racial politics of municipal free speech).

3. Cities Provide a Voice for Nonwhite Citizens

Ignoring the racial politics of municipal censorship requires willful blindness.²⁶⁷ The ten largest cities in this country are majority nonwhite.²⁶⁸ Birmingham is the fourth-Blackest city in America.²⁶⁹ Many municipalities with divisive Confederate statues—including New Orleans, Memphis, and DeKalb County, Georgia—are majority Black.²⁷⁰ City halls across the nation represent the most important political power base for Black citizens.²⁷¹ And city hall is where citizens may express themselves through proclamations, position papers, monuments, flags, and other forms of city speech.²⁷²

Conversely, every state legislature in the United States, except for Hawaii's, is majority white.²⁷³ Forty-four state legislatures—including all states with monument protection laws—are more than 70% white.²⁷⁴ The Alabama Senate's final vote for the Memorial Preservation Act was twenty-three white senators in favor, and all six Black senators opposed.²⁷⁵ To put it bluntly: When states censor cities, white citizens are censoring nonwhite citizens.²⁷⁶

Racial undercurrents also seep into the judiciary.²⁷⁷ When the Jefferson County Circuit Court initially struck down Alabama's Memorial Preservation Act, the court forthrightly addressed the influence of race in its decision.²⁷⁸ The court relied heavily on the fact that Birmingham is overwhelmingly Black—and

267. See, e.g., Blank, *supra* note 18, at 395-96 (discussing racial dynamics of municipal speech); Bray, *supra* note 10, at 5-6 (summarizing racial tensions regarding Confederate monuments).

268. See PERRY, *supra* note 36, at 21 (detailing demographics of major cities).

269. See RASTOGI ET AL., *supra* note 57, at 15 tbl.7 (detailing Black population of major cities); see also Brief of Appellees, *supra* note 5, at 16-17 (noting Black citizens elected Black local officials to speak on their behalf).

270. *Race and Ethnicity in the South*, *supra* note 47 (detailing demographics of Southern cities and counties); Landrieu, *supra* note 42 (defending New Orleans monument removal); Sons of Confederate Veterans v. City of Memphis, No. M2018-01096-COA-R3CV, 2019 WL 2355332, at *9 (Tenn. Ct. App. June 4, 2019) (upholding City's sale of park with Confederate statues to private group, which removed them); Morava & Ahmed, *supra* note 38 (reporting removal of DeKalb monument).

271. See Blank, *supra* note 18, at 394 (highlighting municipal political power of Black residents); see also State v. City of Birmingham, No. 01-CV-2017-903426.00, slip op. at 3 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (describing how Birmingham's majority Black population elected Black political leadership), *rev'd*, 299 So. 3d 220 (Ala. 2019).

272. See Blank, *supra* note 18, at 367-68 (describing city speech); Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) (championing "voices that might not otherwise be audible").

273. See *State Legislator Demographics*, *supra* note 9 (listing demographics of every state legislature).

274. See *id.* (noting Alabama legislature 75% white).

275. See *Roll Call: AL SB60 | 2017 | Regular Session*, *supra* note 9 (detailing state senate vote).

276. See Briffault, *supra* note 14, at 2009 (discussing racial implications of state preemption); see also Brief of Appellees, *supra* note 5, at 31 (explaining legislature's action "strategically tailored to nullify" will of African-American voters).

277. See *infra* text accompanying notes 278-82 (reviewing racial dynamics of *State v. City of Birmingham*).

278. See State v. City of Birmingham, No. 01-CV-2017-903426.00, slip op. at 3 (Ala. Cir. Ct. Jan. 14, 2019), https://www.splcenter.org/sites/default/files/circuit_court_decision_0.pdf [<https://perma.cc/WWZ4-A9CA>] (addressing racial dynamics of case), *rev'd*, 299 So. 3d 220 (Ala. 2019).

Black citizens found the monument repulsive.²⁷⁹ In the Jefferson County Circuit Court, more than 70% of the judges are Black—a proportion almost perfectly reflecting Birmingham’s demographics.²⁸⁰

Conversely, when the Alabama Supreme Court considered the issue on appeal, its nineteen-page decision never mentioned the race of Birmingham’s citizens or political leadership.²⁸¹ Not coincidentally, all nine justices of the Alabama Supreme Court are white.²⁸²

IV. CONCLUSION

Citizens United is widely reviled, and for good reason. The unlimited flow of money into politics has done substantial damage to American democracy.

Nonetheless, the Court’s constitutional theory—that associations of citizens have a First Amendment right to free speech—is not only correct, but inspiring. The *application* of this theory to corporations is spurious. Most public corporations are not associations of citizens: Their largest shareholders are institutions that rarely associate with one another.

Cities, on the other hand, fulfill the Court’s ideal. Birmingham citizens spoke through their elected leaders and exercised their collective First Amendment rights to remove the Confederate Soldier and Sailors Monument. When the overwhelmingly white state legislature silenced these citizens, there was outrage. When an all-white state court justified censorship, there was bewilderment. *Citizens United* can establish justice and clarity for urban citizens expressing themselves in common cause.

The challenges of racial polarization, political disenfranchisement, and judicial bias are monumentally difficult to solve. But allowing urban communities to speak freely would be a good start.

279. See *id.* (stating “overwhelming majority of the body politic . . . is repulsed by the Monument”).

280. See French Letter, *supra* note 71; *Circuit Judges*, *supra* note 71 (displaying photos of Jefferson County judges); *Race and Ethnicity in the South*, *supra* note 47 (showing racial demographics of Birmingham).

281. See *Birmingham*, 299 So. 3d at 220-38 (ignoring race).

282. See *In State with 27% Black Population, All Alabama Appellate Judges Are White*, *supra* note 76 (addressing issue of elected judges).

