

2014

## Associational Standing for Cities

Kaitlin Ainsworth Caruso

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[https://opencommons.uconn.edu/law\\_review/264](https://opencommons.uconn.edu/law_review/264)

# CONNECTICUT LAW REVIEW

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VOLUME 47

NOVEMBER 2014

NUMBER 1

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## Article

### Associational Standing for Cities

KAITLIN AINSWORTH CARUSO

*Both states and private associations have well-established standing to assert claims in federal court based on harm to their constituents. Cities, though they have much in common with both states and associations, are generally denied that very sort of representational standing. That denial unnecessarily squelches local engagement and cities' ability to address issues central to their and their constituents' well-being. This Article contends that denying representational standing to cities is not only unjustified, it is unnecessary—there is ample room for municipalities to sue under the existing doctrine of associational standing.*

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# Associational Standing for Cities

KAITLIN AINSWORTH CARUSO\*

## I. INTRODUCTION

As those mourning the recent fate of class-action litigation and arbitration are quick to point out, Americans are often exposed to substantial harms that they are unlikely or unable to fully remedy on their own.<sup>1</sup> Local governments are well situated to find and tackle some of those harms. The myriad ways in which municipal governments interact with their residents each day give them an excellent vantage point for recognizing patterns of harm affecting their communities. Simply by performing their ordinary functions—running a hospital or identifying blighted properties—cities become potent information aggregators. Moreover, because a city’s welfare is intimately intertwined with that of its residents, we might expect it to take remedial action, including suing to protect its residents from things like fraud, public nuisance, and infringement of their rights. And in fact, in recent years, cities have shown considerable interest in engaging on the large, thorny issues that impact their residents—like gun violence, climate change, and predatory lending. In many such cases, aggregate litigation is especially important, because the issue is of the sort that residents are unable or unlikely to litigate effectively on their own, as the harm may be moderate and widespread, or the expense of litigation too great.

There is a problem, however. Virtually no one would dispute that states typically have the right to sue on behalf of their residents in federal court. It seems beyond cavil, too, that private associations (often nonprofit organizations) can, and routinely do, bring federal suits to protect their

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\* Kaitlin Caruso is a former Fellow and Lecturer at Yale Law School. J.D. 2010, Yale Law School. The opinions in this Article should not be ascribed to any current or former employer. Many thanks to Amanda Andrade, Erin Bernstein, Joseph Blocher, Eric Brunstad, Heather Gerken, Kathleen Morris, the students of the San Francisco Affirmative Litigation Project, and the hardworking editors of the *Connecticut Law Review* for their helpful comments on this Article and for ongoing discussions of local government power and capacity. Above all, this Article would not exist without the help and support of my husband, Phil Caruso.

<sup>1</sup> See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 624–30 (2012) (noting the extensive history of private suits over public harms in America, the particular reliance on modern class action litigation, and the modest prospects for class action post-*Concepcion*); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770–71, 780, 794 (2012) (discussing the power of class actions to bring together the less powerful and *Concepcion*’s damage to it).

members' interests. But despite the fact that cities have much in common with both states on the one hand and associations on the other, standing for cities to litigate on behalf of their residents is "a quagmire"—especially so in federal court.<sup>2</sup> Because federal courts often do not know whether to treat cities like sovereigns or corporations, they treat them as neither, denying them standing and leaving them unable to speak for their residents who have suffered harm.<sup>3</sup>

From the perspective of the residents whose rights are at stake, cities may offer distinct advantages over the state attorneys general and private entities that often take up consumer protection and rights-based fights. Especially on sensitive or politically contentious issues, there may be a local consensus long before a statewide one, and so the city may be easier to mobilize to action than a state. And relative to litigating nonprofits or class-action counsel, cities may in some cases face a lower substantive burden (as in public nuisance), and may possess special expertise by virtue of their widely varying interactions with their residents.

Without standing to litigate on residents' behalf, many cities strain to identify harm to their own interests in order to bring a suit, only to find their efforts blocked by claims that the offensive conduct is too remote from the city's injury and the connection between the two is too tenuous.<sup>4</sup> Others may attempt non-litigation responses to the problem, but discover that they have far too few resources to clean up after bad conduct that they cannot sue to stop. Still others simply hope that someone else will take up the fight. This additional standing burden on cities is unjustified. Fortunately, it is also remediable under existing standing doctrine.

I have previously suggested that both cities and federal courts might benefit if the current common law concerning cities' (lack of) capacity were replaced with the ordinary law of corporations, and I offered associational standing as an example of what cities stand to gain by the

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<sup>2</sup> Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 389 (2006).

<sup>3</sup> See *Id.* at 370 ("Cities asserting standing in their quasi-sovereign or proprietary capacities face several potential hurdles. The most formidable is federal courts' refusal to confer quasi-sovereign standing on cities."). Throughout this Article, I generally refer to cities, local governments, and municipalities interchangeably. In doing so, I intend not to draw a distinction between, say, central cities and suburbs, but between general and special-purpose local governments (e.g. between townships and water districts). As discussed below, special-purpose governments present distinct questions for associational standing, and as such are largely beyond the scope of this Article.

<sup>4</sup> See *Camden Cnty. Bd. of Chosen Freeholders v. Berretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (discussing the long chain of events that led to the city's alleged injury); *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 WL 8652915, at \*1, \*4–5 (N.D. Ala. Aug. 19, 2009) (finding that where injuries to the City are "too tenuously connected," they are "not fairly traceable" to the misconduct); *James v. Arms Tech., Inc.*, 820 A.2d 27, 33–34 (N.J. Super. Ct. App. Div. 2003) (identifying similar cases in both state and federal court dismissed for these reasons, including *Camden County*).

change.<sup>5</sup> Here, I take up the work that that rough sketch left unfinished: a deeper analysis of the fit between cities and the doctrine of associational standing, and a close look at the costs and benefits municipal associational standing offers for cities, their residents, and the federal system as a whole.<sup>6</sup>

Certainly, cities differ in a number of respects from the trade associations and area-focused nonprofit corporations that often invoke the doctrine of associational standing. We do not typically think of city residents as city “members,” for starters. City residents do, however, have many of the “indicia of membership” developed in the case law, and where one lives may be just as salient to one’s identity as the groups to which one donates.<sup>7</sup> Cities may also serve a constituency that is more heterogeneous than that of other associations, and so could face internal disputes. This problem is not truly unique to cities, however, and local democratic processes, as well as the case-by-case assessment inherent in standing doctrine, can adequately protect possible dissenters. Finally, as a general-purpose government, a city may struggle to convince a court that a given case is germane to its core purposes (a necessary precursor to asserting associational standing). But especially when the harms leveled at city residents fall very close to the core competencies of local government, like health or property values, cities as natural information aggregators may be uniquely suited to effectively press such claims. Accordingly, I side with those courts that have concluded that, at least in some cases, cities can properly invoke associational standing on behalf of their residents.

## II. A BRIEF NOTE ON STANDING

Under the now-familiar tests of Article III standing, a plaintiff must as a constitutional matter establish that she has suffered an “injury in fact[,]” that is, “an invasion of a legally protected interest” which is both concrete and particularized and actual or imminent.<sup>8</sup> The injury must be “fairly traceable to the challenged action of the defendant” and it

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<sup>5</sup> Kaitlin A. Caruso, Colloquium, *The Municipal Corporation, Revisited: Rationalizing the Law of Cities After Hunter v. Pittsburgh*, 47 HARV. C.R.-C.L. L. REV. (2011), available at <http://harvardcrcl.org/cr-cl-presents-a-colloquium-the-case-for-local-constitutional-enforcement/>.

<sup>6</sup> Recently, the Supreme Court cast doubt on whether it will continue to treat questions of third-party standing as true questions of standing as opposed to, say, questions regarding the scope of a particular cause of action. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386, 1387 n.3 (2014). For present purposes, however, I continue to use the terminology of associational or organizational standing for clarity and consistency in light of the existing case law.

<sup>7</sup> See, e.g., *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 334 (1977) (laying out the indicia of membership, including electing the members of, financing, and serving on the commission at issue).

<sup>8</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

must be “likely, as opposed to merely speculative” that a favorable decision will redress the harm.<sup>9</sup>

Previously, a collection of doctrines referred to as “prudential standing” also generally required that plaintiffs: (1) assert their own rights, not those of third parties; (2) not seek redress for “generalized grievances” shared equally by many; and (3) fall within the “zone of interests” that the relevant statute was intended to benefit.<sup>10</sup> In March, 2014, the Supreme Court re-characterized some of these questions as not relating to standing at all.<sup>11</sup> In *Lexmark Int’l, Inc. v. Static Control Components, Inc.*,<sup>12</sup> the Court concluded that the “zone of interests” is really a question of the scope of the cause of action created by statute.<sup>13</sup> The Court also observed that it had already essentially reclassified the bar on generalized grievances as constitutional, rather than prudential.<sup>14</sup> Finally, the Court described third-party standing as “harder to classify”; although noting that third-party standing questions have occasionally been treated as “closely related to the question whether a person in the litigant’s position will have a right of action on the claim,” the Court declined to definitively resolve where third-party cases fall in the “standing firmament.”<sup>15</sup>

The Supreme Court and scholars have offered a number of justifications for standing limitations—that they assure concrete, adversarial litigation, guard against constitutionally impermissible advisory opinions, and, more broadly, further an appropriate separation of powers.<sup>16</sup> These standing restrictions, their justifications, and their relationship to Article III have been criticized and debated as a textual, historical, and practical matter.<sup>17</sup> They remain, nonetheless, the keys to the courthouse

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<sup>9</sup> *Id.*; see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan*, 504 U.S. at 560–61).

<sup>10</sup> Engel, *supra* note 2, at 369–70.

<sup>11</sup> *Lexmark Int’l, Inc.*, 134 S. Ct. at 1386.

<sup>12</sup> 134 S. Ct. 1377 (2014).

<sup>13</sup> *Id.* at 1387.

<sup>14</sup> *Id.* at 1387 n.3.

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., *id.* at 1386–87; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (discussing separation of powers); *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”); Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–92, 895–96 (1983) (arguing that standing serves separation of powers interests, but at best poorly furthers the adversary nature of the proceedings, as interest groups may be the best advocates but often lack standing); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 339–40 (1995) (arguing that limiting standing to unintentional plaintiffs helps delineate the lawmaking powers of the courts and Congress).

<sup>17</sup> See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461–65 (2008) (noting that standing is tasked to serve multiple separation of powers functions, and serves them fairly poorly); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276–78 (2008) (challenging the history and doctrinal soundness of requiring injury-in-fact in private rights cases); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An*

doors.

### III. QUASI-SOVEREIGN INTERESTS AND *PARENS PATRIAE* STANDING

#### A. *The Doctrine*

When a state sues in federal court, its interest in the suit is usually classified as sovereign, quasi-sovereign, or proprietary.<sup>18</sup> Sovereign interests include the right to create and enforce a legal code.<sup>19</sup> Proprietary interests are those that a state shares with any other litigant—they derive from its role as a landowner, say, or a party to a contract.<sup>20</sup> The quasi-sovereign interest, which gives rise to *parens patriae* standing,<sup>21</sup> is a “judicial construct that [does] not lend [itself] to a simple or exact definition”<sup>22</sup> but which implicates the state’s interest in the well-being of its residents and in maintaining its proper place in the federal system.<sup>23</sup> Courts have found quasi-sovereign interests in: “[I]nterstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state.”<sup>24</sup> The coherence of the quasi-sovereign interest, and the merits and pedigree of the *parens patriae* standing now based upon it, remain contested.<sup>25</sup>

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*Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594 (2010) (offering an empirical analysis of the historical evolution of standing doctrine); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 166 (1992) (challenging the injury-in-fact requirement as a doctrinal and historical matter); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–1409 (1988) (offering a historical account of standing-related concerns and the case or controversy requirement); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 690 (2004) (undertaking a limited historical defense of standing doctrine).

<sup>18</sup> See Alfred L. Snapp & Son, Inc., v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982) (discussing the different interests a state may have). Governments may also litigate solely on behalf of a private real party in interest, but such actions remain essentially private suits. *Id.* at 602.

<sup>19</sup> *Id.* at 600–01.

<sup>20</sup> *Id.* at 601–02.

<sup>21</sup> See generally Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2054–55 (2011) (exploring *parens patriae* standing and its relationship with quasi-sovereign interests).

<sup>22</sup> *Snapp*, 458 U.S. at 601.

<sup>23</sup> *Id.* at 601–02, 607.

<sup>24</sup> Jeffrey Baddeley, *Parens Patriae Suits by a State Under 42 U.S.C. § 1983*, 33 CASE W. RES. L. REV. 431, 446 (1983).

<sup>25</sup> Cf. George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?* 25 DEPAUL L. REV. 895, 896–98 (1976) (providing a review of early *parens patriae* cases rooted in “the royal prerogative,” which dealt largely with children, charities, and individuals not deemed competent to represent their own interests); Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1851 (2000) (“‘Quasi-sovereign’ is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility.”); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 303–04 (2007) (claiming that different interests in this category result in the courts implicitly applying different standing burdens);

In the leading modern *parens patriae* case, *Alfred L. Snapp & Son v. Puerto Rico ex rel Barez*,<sup>26</sup> Puerto Rico sued Virginia apple growers, alleging that they discriminated against hundreds of Puerto Rican citizens and thereby undermined a national unemployment program.<sup>27</sup> When suing as *parens patriae*, the Supreme Court noted, a state cannot merely step into the shoes of its residents, but must name a broader interest in the matter.<sup>28</sup> In concluding that Puerto Rico had standing to press its claims, the Court accepted as sufficient Puerto Rico's "legitimate concern" for its residents' unemployment rate, stigmatic harm, and ability to benefit from a federal unemployment law.<sup>29</sup> *Snapp* thus mandates that the wrongs a state seeks to remedy in a *parens patriae* suit must directly or indirectly affect a substantial portion of the state.<sup>30</sup> Interestingly, in his concurrence, Justice Brennan argued that states need broad *parens patriae* standing in the lower courts to be able to protect their constituents' interests, just as private entities and municipalities can.<sup>31</sup>

After *Snapp*, courts and scholars debated whether states suing as *parens patriae* also had to satisfy ordinary Article III standards.<sup>32</sup> In *Massachusetts v. EPA*,<sup>33</sup> the Supreme Court joined the debate. There, several states, municipalities,<sup>34</sup> and private entities challenged the EPA's decision not to regulate certain greenhouse gasses emitted by new motor

Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 397–434 (1995) (offering an alternative account of early cases, emphasizing their limitations on states' ability to litigate sovereign and public interests in federal court).

<sup>26</sup> 458 U.S. 592 (1982).

<sup>27</sup> *Id.* at 608. The Court was willing to treat Puerto Rico as equivalent to a state. *Id.* at 608 n.15.

<sup>28</sup> *Id.* at 607. Noting the awkward fact that states must vindicate their residents' interests, but not "merely adopt the interests of some subset of its citizens[.]" one critic has suggested resorting to the economic principles of public goods as a "neat" guide to this tension. Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 833 (2009).

<sup>29</sup> *Snapp*, 458 U.S. at 609–10.

<sup>30</sup> *Id.* at 607; see also Ratliff, *supra* note 25, at 1851 (discussing the necessary scope of the effect of wrongdoings); Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1070 (2008) ("In addition, courts have held that the more widely shared an injury is, the more likely it is to implicate a state's quasi-sovereign interest.").

<sup>31</sup> *Snapp*, 458 U.S. at 611 & n.2 (Brennan, J., concurring). In discussing municipal standing, Justice Brennan cited *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109–11 (1979), discussed at greater length below.

<sup>32</sup> See, e.g., *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335–36 (1st Cir. 2000) (denying *parens patriae* standing to Mexico; describing the doctrine after *Snapp* as a "narrowly construed" exception to normal standing rules and the question as one of prudential standing); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 304–06 (2005) (proposing that states should not need Article III standing to bring a public nuisance suit in their own courts, but should in federal court).

<sup>33</sup> 549 U.S. 497 (2007).

<sup>34</sup> Baltimore and New York City were plaintiffs, but their standing was not passed upon. *Id.* 504 n.3 (2007).

vehicles.<sup>35</sup> Writing for the five justice majority, Justice Stevens found that Massachusetts, at least, had standing.<sup>36</sup> The Court reasoned that a state's quasi-sovereign interests entitle it to "special solicitude" in the standing analysis, but failed to precisely identify the quasi-sovereign interest at stake, or explain how that solicitude operates.<sup>37</sup> Instead, the Court described Massachusetts' sovereign and proprietary interests, including its interest in the land it would lose to rising seas.<sup>38</sup> This shifting focus led some to object that *Massachusetts* is hardly a *parens patriae* case at all.<sup>39</sup>

In dissent, Chief Justice Roberts argued that states must identify a quasi-sovereign interest in addition to, not instead of, meeting the ordinary Article III standing test.<sup>40</sup> "Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements," he noted, "so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III."<sup>41</sup>

The point remains contentious. In 2011, an equally divided Supreme Court affirmed the standing decision of the Second Circuit in another global warming case.<sup>42</sup> The appellate court had declined to resolve whether states suing as *parens patriae* have to satisfy both *Snapp* and *Lujan*,<sup>43</sup> but rejected the notion that a state must show that its residents have Article III standing, reasoning that the idea improperly conflated *parens patriae* and associational standing.<sup>44</sup>

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<sup>35</sup> *Id.* at 504–07.

<sup>36</sup> *Id.* at 518. The Court was construing the Clean Air Act with its broad citizen-standing provisions. *Id.*

<sup>37</sup> *Id.* at 520–21. It also noted that, as in that case, claimed violations of procedural rights invoke relaxed immediacy and redressability hurdles. *Id.* at 515–17. Bradford Mank has suggested enshrining these relaxed immediacy and redressability requirements in the *parens patriae* doctrine as a reflection of states' historically unique litigation status. Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1775–80 (2008). Calvin Massey, however, argues that even those relaxed standards cannot account for the analysis in *Massachusetts*. Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 255–57 (2009).

<sup>38</sup> *Massachusetts v. EPA*, 549 U.S. at 522–23. Some have questioned the functional utility of the distinction between sovereign and quasi-sovereign interests. See Weinstock, *supra* note 28, at 828–29 (noting how the two concepts are often confused and arguing that they are not doctrinally distinct). *But cf.* Crocker, Note, *supra* note 21, at 2070–79 (2011) (arguing that the standing bar from *Massachusetts v. Mellon* applies to quasi-sovereign, but not sovereign, interests).

<sup>39</sup> Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1085–88 (2011).

<sup>40</sup> *Massachusetts*, 549 U.S. at 538 & n.1 (Roberts, C.J., dissenting). Chief Justice Roberts also objected that states usually cannot sue the federal government as *parens patriae*. *Id.* at 539.

<sup>41</sup> *Id.* at 538.

<sup>42</sup> *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

<sup>43</sup> *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 338 (2d Cir. 2009), *rev'd in part* 131 S. Ct. 2527 (2011).

<sup>44</sup> *Id.* at 339.

The precise relationship between *parens patriae* standing and other standing doctrines thus remains unclear.<sup>45</sup> We may content ourselves for now, however, with noting that states face an easier standing standard than other plaintiffs.<sup>46</sup> Therefore, although there are exceptions,<sup>47</sup> a state can sue most private parties<sup>48</sup> so long as it can “(1) demonstrate that [it has] a quasi-sovereign interest; (2) meet the numerosity test; (3) allege a distinct injury [from that of its constituents, i.e., not be a nominal party]; and (4)” demonstrate that it has a cause of action under the relevant statute, as appropriate.<sup>49</sup>

### B. (In-)Applicability to Local Governments

Even the briefest nationwide survey of municipal services seems to confirm then-Professor (now Judge) David Barron’s intuition that cities, “like higher-level governments,” “plainly have a ‘quasi-sovereign’ interest in protecting the well-being of their residents.”<sup>50</sup> After all, in many cases, a city plays a similar role to a state in the lives of its constituents,<sup>51</sup> even while struggling to cope with a sticky mix of state and federal programming, unfunded mandates, and the unmet needs of constituents.<sup>52</sup>

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<sup>45</sup> See Kathryn A. Watts & Amy J. Wildermuth, Colloquy, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1035–36 (2008) (concluding that the best reading of *Massachusetts* requires states to satisfy some form of the *Lujan* test, and criticizing the Court’s discussion of when states can sue the federal government in *parens patriae*).

<sup>46</sup> See Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 146 (2010) (explaining how the standing requirements are relaxed for sovereign entities); Wildermuth, *supra* note 25, at 320 (arguing that quasi-sovereign interests “are subject to a *Lujan*-lite analysis for which we use either a state’s proprietary interest or a resident’s interest”).

<sup>47</sup> See, e.g., *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972).

<sup>48</sup> There are limits on when a state can sue the federal government as *parens patriae*. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (discussing the difference between allowing a state to protect its citizens from federal statutes and allowing a state to assert its rights under federal law); *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923) (concluding that the plaintiffs could not bring suit against the federal government).

<sup>49</sup> Engel, *supra* note 2, at 368; see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88, n.3 (2014) (explaining that the zone-of-interest test is a measure of the cause of action, not a question of prudential standing).

<sup>50</sup> David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2243 (2006); see also Engel, *supra* note 2, at 371 (“These [economic well-being] injuries all invoke cities’ quasi-sovereign interests. In addition, as *parens patriae*, cities have an interest in protecting their residents from fraud and discrimination.”).

<sup>51</sup> See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256 (2004) (noting that while states formally control the provision of “most domestic public services,” localities “play the key role in actually delivering such basic services as policing, fire prevention, education, street and road maintenance, mass transit, and sanitation”).

<sup>52</sup> See David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J.L. & POL. 261, 275 (2005) (noting that local officials in Massachusetts reported having “no meaningful fiscal discretion” due to the constrained ability to raise funds and substantial unfunded demands from state programs and policies); Matthew J. Parlow, *Progressive Policy-Making on the*

Moreover, cities seem to agree with Barron. Given the chance to litigate (mostly in state court, under the guise of public nuisance or a statutory cause of action), Los Angeles sued its street gangs,<sup>53</sup> and many cities sought—with varying degrees of success—to sue the gun industry in an effort to stem the black market in firearms.<sup>54</sup>

Even so, federal courts have been fairly consistent in holding that cities cannot sue as *parens patriae*.<sup>55</sup> This must be so, most insist, because city power is only derivative of state power, and therefore lacks that residual

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*Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS L. REV. 371, 373 (2008) (“[L]ocal governments can be viewed as perhaps the most critical level of government in terms of responding—through regulation, goods, or services—to the needs and wants of its constituents.”); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2558 (2006) (“[C]entral governments are quick to intervene to counter local decisions they disagree with but slow to intervene to take on the responsibility for providing basic municipal services. Cities thus may have significant responsibilities but insufficient resources to meet them.”).

<sup>53</sup> *People v. Pantoja et al.*, No. BC403319 (L.A. Sup. Ct. Dec. 8, 2008), available at <http://online.wsj.com/public/resources/documents/18thstreet.pdf>; see also Richard Winton, *Gang Leaders’ Assets Sought in Civil Suit*, L.A. TIMES, Dec. 9, 2008, at B3 (describing L.A.’s suit against its gangs as a “first-of-a-kind lawsuit”).

<sup>54</sup> See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002) (rejecting the city’s public nuisance, negligence, and negligent entrustment claims against gun manufacturers); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 298 (E.D.N.Y. 2005), (denying a motion to dismiss), *rev’d in part without addressing standing*, 524 F.3d 384, 390 (2d Cir. 2008); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116, 1148 (Ill. 2004) (declining to find a public nuisance cause of action, and noting that recovery was barred by, inter alia, the municipal cost recovery rule); see generally Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7, 12–20 (2010) (describing firearms litigation); Jonathan L. Entin, *City Governments and Predatory Lending Revisited*, 40 FORDHAM URB. L.J. CITY SQUARE 108, 111–12 (2014) (recounting the less-than-fully-successful resolution to those cases). Cities have also filed suit in state or federal court on issues including air pollution, *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 124 (9th Cir. 1973), and lead paint abatement, *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005).

<sup>55</sup> See, e.g., *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197–98 (9th Cir. 2004) (“As a municipality, Sausalito may not simply assert the particularized injuries to the ‘concrete interests’ of its citizens on their behalf.”); *United States v. City of Pittsburgh*, 661 F.2d 783, 787 (9th Cir. 1981) (“Although cities may ‘sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants,’ only the states and the federal government may sue as *parens patriae*.”); *City of New York v. Heckler*, 578 F. Supp. 1109, 1123 (E.D.N.Y. 1984) (“A city generally does not have *parens patriae* standing.”); see also Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 764 (2007) (finding *parens patriae* standing for cities unlikely); Engel, *supra* note 2, at 368 (explaining that federal courts will not grant cities “quasi-sovereign standing” even if state standing rules would). *But cf.* *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 266–74 (E.D.N.Y. 2004), (discussing the law governing relative authority of governmental entities and finding legitimate *parens patriae* power), *rev’d in part on other grounds* at 524 F.3d 384, 390 (2d Cir. 2008); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 892–93 (E.D. Pa. 2000) (“[The city] has admitted that one of the bases for its negligence suit is its *parens patriae* power.”), *dismissal aff’d*, 277 F.3d 415, 420 n.4 (3d Cir. 2002) (noting that the City’s Article III standing was not questioned).

sovereignty that affords states special treatment in federal court.<sup>56</sup> This reasoning is quite consistently applied, despite the fact that the Supreme Court has arguably allowed a village to assert its residents' interests, at least alongside the village's own.<sup>57</sup> The best that a city can often hope for in federal court is that the judge will view the city's proprietary interests expansively,<sup>58</sup> or accept an innovative use of public nuisance law.<sup>59</sup>

This state of affairs seems intensely misguided. Many courts simply insist that a city is "derivative" of its state and a mere "creature of state law," unauthorized to speak for its residents—all without even asking whether that very state law gives the city an interest in its residents' wellbeing.<sup>60</sup> The idea that a state could delegate its sovereign interest, or

<sup>56</sup> *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("[P]olitical subdivisions . . . cannot sue as *parens patriae* because their power is derivative and not sovereign. Municipalities may, however, 'sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.'" (citations omitted); accord *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir.1973) ("[T]he federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae*" but that "[o]n the other hand, political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*, although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants."); *Bd. of Supervisors of Fairfax Cnty. v. United States*, 408 F. Supp. 556, 566 (E.D. Va. 1976) (suggesting that municipalities never have *parens patriae* standing, as a "derivative" of the state's sovereignty). *But see* Engel, *supra* note 2, at 355–56 ("[B]road grants of standing to cities to pursue claims against predatory lenders are necessary . . .").

<sup>57</sup> In *Gladstone Realtors v. Village of Bellwood*, the Court allowed the Village to sue realtors who allegedly engaged in racial steering in violation of the Fair Housing Act. 441 U.S. 91 at 109–10 (1979). The Court reasoned that steering hurt the village financially, and suggested that it could challenge the "community" harms that flow from the loss of racial balance and stability. *Id.* at 110–11. The Court was not clear whether Bellwood could sue for the "community" absent a claimed proprietary harm. Notably, however, Justice Brennan cited *Bellwood* in his *Snapp* concurrence, arguing that Puerto Rico should have at least as much standing as cities. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring). *But cf.* *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (1 Pet.) 91, 99 (1838) (reasoning that a corporation did not have standing to vindicate the rights of the citizens of Georgetown).

<sup>58</sup> *See, e.g., City of Sausalito*, 386 F.3d at 1197–98 (noting that a municipality's "proprietary interests" include its ability to enforce land-use and health regulations, flex its taxation power, and protect its natural resources).

<sup>59</sup> *See, e.g., Jean Macchiaroli Eggen & John G. Culhane, Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J.L. REFORM 1, 42–43 (2004); Engel, *supra* note 2, at 385 (noting that it is unclear whether cities' public nuisance claims are proprietary (for expenses incurred in remedying nuisances), or quasi-sovereign (for *parens patriae* obligations regarding the health and safety of residents)). *But cf.* *Camden Cnty. Bd. v. Berretta, U.S.A. Corp.*, 273 F.3d 536, 539–41 (3d Cir. 2001) (expressing skepticism that New Jersey nuisance law encompassed Camden County's claim against the gun industry).

<sup>60</sup> Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 15–25 (2012). *But cf.* *Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011) (affirming the district court's reliance on state law to assess county district attorney's standing claim, and holding that statutory authority to sue to abate environmental nuisances was not a delegation of a state's sovereign authority to bring a Clean Water Act *parens patriae* suit); *Town of East Troy v. Soo*

that state law could create a particularized interest that in turn could confer *federal* standing, is hardly frivolous.<sup>61</sup> There is thus nothing inevitable about courts denying cities *parens patriae* standing in every case. Even so, the uncertainty alone discourages municipal public interest suits, reducing cities' incentives to invest in developing cases that could fail right out of the gate. And the sheer number of times that cities have been rebuffed suggests that a new approach may be in order.

#### IV. THE LAW OF ASSOCIATIONAL STANDING

In *Massachusetts*, Chief Justice Roberts essentially suggested a solution to this problem, pointing to the similarity between associational standing and his (more stringent) conception of *parens patriae* standing.<sup>62</sup> Practically speaking, cities may already be relying on associational standing when they partner with nonprofits to share litigation resources and assure that one party has standing.<sup>63</sup> If cities can practically achieve a voice in court by pairing with nonprofits, is it not preferable that they be able to litigate unassisted, speaking solely and fully for their constituents? I submit that they can, by directly invoking associational standing.<sup>64</sup>

##### A. *The Doctrine*

Since at least *NAACP v. Alabama ex rel. Patterson*,<sup>65</sup> the Supreme Court has permitted some associations to assert their members' rights, recognizing that an association is the medium through which members

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Line R.R. Co., 653 F.2d 1123, 1127–32 (7th Cir. 1980) (invoking *Erie* and examining Wisconsin law to conclude that a town had standing to bring a public nuisance claim for a chemical spill).

<sup>61</sup> Compare *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664–67 (2013), with *id.* at 2678–74 (Kennedy, J., dissenting) (debating this point). See also Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 571–72 (2012).

<sup>62</sup> *Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting).

<sup>63</sup> See, e.g., *Friends of the Earth, Inc. v. Watson*, No. C 02-4106 JSW, 2005 WL 2035596, at \*2 (N.D. Cal. Aug. 23, 2005) (explaining how several cities, including Boulder, Colorado, joined nonprofits to sue two federal agencies over climate change).

<sup>64</sup> Associational standing is not the only doctrine that allows a plaintiff to assert the rights of others. *Jus tertii* standing has allowed litigants to assert the constitutional rights of third parties with whom they share a “close relationship” so long as “the litigant is also injured, and the third party is hindered from bringing the suit on her own behalf.” Tacy F. Flint, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1037 (2003) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); see also Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 432–33 (1981) (distinguishing *jus tertii* from associational standing, despite their ‘superficial’ similarities). Evaluating *jus tertii* standing as applied to cities, however, lies beyond this Article’s scope. Moreover, *jus tertii* standing, at least as much as associational standing, may be subject to revision in light of the Supreme Court’s recent push to clarify the line between standing and merits, as evidenced by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 & n.3 (2014).

<sup>65</sup> 357 U.S. 449 (1958).

express their views.<sup>66</sup> The Court understood that certain rights cannot be vindicated except through a representative, and that an association can also suffer directly if its constituents' claims go unheard.<sup>67</sup>

In *Hunt v. Washington State Apple Advertising Commission*,<sup>68</sup> the Court explained that an association can sue on its members' behalf when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>69</sup>

The plaintiff in *Hunt* was a government-created commission with only state-mandated "members."<sup>70</sup> The Court found standing, however, because the Commission acted like a private trade association: it served a specialized segment of the community, and its constituents "possess[ed] all of the indicia of membership in an organization" because they alone elected Commission members, were eligible to serve as commissioners, and financed its activities through "levied assessments."<sup>71</sup> The Court emphasized that the Commission's constituents used it to express their views and protect their interests. Furthermore, the Commission itself would be affected by the litigation, ensuring that the suit would have "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."<sup>72</sup>

## B. *Cities and Associational Standing*

### 1. *Background*

*Will it be said, that the fifty odd thousand citizens in Delaware being associated under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal*

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<sup>66</sup> 357 U.S. 449, 459–60 (1958); *see also* *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (stating that the association may be an appropriate representative of its members and invoke the court's jurisdiction); *Nat'l Motor Freight Ass'n, Inc. v. United States*, 372 U.S. 246, 246 (1963) ("Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are proper representatives of the interests of their members, appellants have standing to challenge the validity of the Commission's order in the District Court.")

<sup>67</sup> *Alabama ex rel. Patterson*, 357 U.S. at 459–60.

<sup>68</sup> 432 U.S. 333 (1977).

<sup>69</sup> *Id.* at 343.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 344–45.

<sup>72</sup> *Id.* (quoting *Baker v. Carr*, 369 U.S. 156, 204 (1962)).

*footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former? . . . Such objections would not correspond with . . . that popular sovereignty in which every citizen partakes.*<sup>73</sup>

In 1838, the city of Georgetown, through its officials, sued the Alexandria Canal Company to enjoin construction in and around the Potomac River that it claimed was harming both the port and its residents.<sup>74</sup> The Supreme Court agreed with the Canal Company that Georgetown lacked the capacity to sue.<sup>75</sup> The Court stressed that Georgetown was a corporation, and neither its charter nor the general law of corporations gave it the authority “to take care of, protect, and vindicate, in a court of justice, the rights of the citizens of the town, in the enjoyment of their property, or in removing or preventing any annoyance to it.”<sup>76</sup> Therefore, Georgetown could not “upon any principle of law, be recognised as [a party] competent in court to represent the interests” of its citizens.<sup>77</sup> Nor did “associating” the plaintiffs with Georgetown residents fix the problem; in cases where a plaintiff could represent similarly situated individuals, the plaintiff, nonetheless, had to have an interest in the suit, and the Court found that Georgetown had not adequately alleged one.<sup>78</sup>

Notably, although the Court rejected Georgetown’s suit, its reasoning did not foreclose the possibility of standing for other cities, which might have mandates to “care [for], protect, and vindicate” residents’ rights.<sup>79</sup> Despite the heavy rhetoric, the Court essentially presaged the arrival of associational standing<sup>80</sup> and the idea that cities might fulfill that role.

<sup>73</sup> *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419, 472–73 (1793) (Jay, C.J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

<sup>74</sup> *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (1 Pet.) 91, 92 (1838).

<sup>75</sup> *Id.* at 99. I say “capacity” rather than “standing” as the case predates modern standing doctrine. The Court treated the problem as one of pleading, not jurisdiction, later citing *Georgetown* as a case in which relief was denied, but the “jurisdiction of the court was sustained.” *In re Debs*, 158 U.S. 564, 587 (1895).

<sup>76</sup> *Georgetown*, 37 U.S. at 99.

<sup>77</sup> *Id.* at 100.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 99; *see also, e.g.*, *Parish of Jefferson v. La. Dep’t. of Corr.*, 254 So. 2d 582, 593 (La. 1971) (Barham, J., dissenting) (citing *Georgetown* for the proposition that “[i]n the absence of [a] statutory provision or contractual right, a political subdivision is without power to maintain an action as the representative of the individual and private interests of its citizens”); *City and Cnty. of Honolulu v. Cavness*, 364 P.2d 646, 653 (Haw. 1961) (distinguishing *Georgetown* in part on the basis of the authority that Honolulu actually had). These cases are troubling in their own way; a federal common law of city incapacity is bad enough, but it is worse if it infects state courts. *Cf. Morris, The Case for Local Constitutional Enforcement*, *supra* note 60, at 18–20, 25–26 (objecting to a federal common law definition of city capacity).

<sup>80</sup> Interestingly, some lower courts have applied *Georgetown* to cases involving more traditional associations. *See Associated Press v. KVOS, Inc.*, 80 F.2d 575, 580 (9th Cir. 1935).

More than a century later, *Hunt* confirmed that a creature of state law may invoke associational standing, even if its members are not strictly voluntary, if:

- (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>81</sup>

Since then, other public bodies have successfully claimed such standing, although many were special rather than general-purpose government entities.<sup>82</sup> Even general-purpose municipalities, however, fit the framework fairly well. Like the Commission in *Hunt*, cities represent a specialized group—though geographically rather than (necessarily) ideologically or economically specialized. Cities can also readily demonstrate that their interests align with those of their residents, as harms to residents likely impact cities in any number of concrete, provable ways. However, the general-purpose nature of city governments and their residence-determined “members” do present a number of distinctive issues, explored at greater length below.

The case law explicitly considering whether cities can invoke associational standing is thinner than that dealing with cities suing as *parens patriae*, and the results are mixed.<sup>83</sup> The Seventh Circuit found no

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<sup>81</sup> *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343–45 (1977).

<sup>82</sup> See, e.g., *Ore. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110–11 (9th Cir. 2003) (granting a protection and advocacy organization associational standing, despite federal funding and lack of traditional members); *Westlands Water Dist. v. U.S. Dep't of the Interior*, 850 F. Supp. 1388, 1414 (E.D. Cal. 1994) (holding that water districts could exercise “association standing”); *Meek v. Martinez*, 724 F. Supp. 888, 901–02 (S.D. Fla. 1987) (noting that an advocacy organization evidently received both associational and proprietary standing); see also Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 252 (2008) (arguing in favor of standing for protection and advocacy agencies serving individuals with disabilities).

Judges tend to treat single-purpose governmental entities through “domain-centered” lenses, which likely facilitates a finding of associational standing. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 23–24 (2010). General purpose governments, like city and county governments, often lack such a narrow lens and so present special challenges in the context of associational standing. Of course, this distinction is far from tidy in some cases, but plumbing its depths is beyond the scope of this Article.

<sup>83</sup> Compare, e.g., *City of Stamps v. ALCOA, Inc.*, No. 05-1049, 2006 WL 2254406, at \*6 (W.D. Ark. Aug. 7, 2006) (applying *Hunt* to the City's claim under the Resource Conservation and Reclamation Act and allowing the claim to proceed), with *Bd. of Supervisors of Warren Cnty. v. Va. Dep't. of Soc. Servs.*, 731 F. Supp. 735, 741–42 (W.D. Va. 1990) (denying *parens patriae* and associational standing in a suit challenging the distribution of federal money under section 1983, as the plaintiff “political subdivisions and related agencies” were mere creatures of the state, with no special obligations to advocate for citizens in the claims at issue).

reason the doctrine could not apply to cities.<sup>84</sup> The D.C. Circuit strongly suggested the opposite, and effectively accused the city of trying to usurp *parens patriae* powers while discarding their limitations.<sup>85</sup> Although general purpose municipal governments undoubtedly pose some interesting conceptual challenges for associational standing which I explore in greater detail below, I suggest that the Seventh Circuit has the better of the argument.

## 2. One “Member” Has Standing.

### a. Member Injury

To invoke associational standing, an organization must show that at least one member has standing to sue.<sup>86</sup> Conceptually, this requirement limits a city’s possible claims by disallowing suits for purely collective harms.<sup>87</sup> However, even if no member fully “embodies the interest at stake,”<sup>88</sup> a city litigator can readily present the individual stories of multiple residents to show both the breadth of the harm and the concreteness of the injury. Although some critics suggest that associations should not have to identify affected members,<sup>89</sup> it is both doctrinally safer and narratively more compelling to do so. Indeed, Baltimore adopted this approach, in part, when it sued Wells Fargo for allegedly targeting African-American neighborhoods for subprime mortgages—highlighting

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<sup>84</sup> *City of Milwaukee v. Saxbe*, 546 F.2d 693, 697–99 (7th Cir. 1976).

<sup>85</sup> *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267–68 (D.C. Cir. 2002) (“The City’s analogy of its representation of its citizens to a private organization’s representation of its members misconceives the very concept of associational standing. . . . The City does not have ‘members’ who have voluntarily associated, nor are the interests it seeks to assert here germane to its *purpose*. Rather the City is effectively attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*.”). In that case, however, the city did have standing to sue for its own injuries. *Id.* at 267; *see also* *Thiebaut v. Colo. Springs Utils.*, 455 F. App’x 795, 801 (10th Cir. 2011) (rejecting associational standing for a district attorney because, even if his office or district is a membership association, state law did not entrust him with protecting health and welfare by suing under the Clean Water Act, and so the suit was not germane to his office’s purpose).

<sup>86</sup> *Hunt*, 432 U.S. at 343. The fact that an association as large as some cities need only find one affected resident to establish standing is at most a mild check on a local executive’s ability to litigate her conception of the public interest. Even so, this requirement is arguably more stringent than that of *parens patriae* standing, at least as conceived by the *Massachusetts* majority. Professor Thomas Merrill has suggested that the same requirement should apply to states suing in *parens patriae* in any court other than their own. Merrill, *supra* note 32, at 305.

<sup>87</sup> *See* Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 734–35 (1988) (arguing that current standing doctrine cannot accommodate truly collective harms like environmental interests). Standing’s intense focus on individual injury could also undermine important values of self-governance and representation or community advocacy. *See, e.g.,* Winter, *supra* note 17, at 1507–08, 1515.

<sup>88</sup> Feldman, *supra* note 87, at 734.

<sup>89</sup> *See* Elliott, *The Functions of Standing*, *supra* note 17, at 511 (discussing how the Eleventh Circuit did not require affected members to be identified when the alleged harm is prospective).

harms to the City in part through the stories of its residents.<sup>90</sup> All of this raises the question, however, of whether residents are city “members,” or have the necessary “indicia of membership.”<sup>91</sup>

#### b. City Residents as “Members”

An association is essentially the “coming together of individuals for a common cause or based on common values or goals.”<sup>92</sup> In *Hunt*, apple industry participants had no choice in becoming Commission “members.”<sup>93</sup> Although the Supreme Court seemed relatively untroubled by that fact, cities have a stronger claim to voluntary constituency. A city can argue that its residents chose where to live, deciding to affiliate with, and to be represented by, that city.<sup>94</sup> Indeed, local government scholarship and even some case law has long—though not without controversy—relied in part on the idea that cities compete for capital and residents.<sup>95</sup>

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<sup>90</sup> *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 849 (D. Md. 2010).

<sup>91</sup> See *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267–68 (D.C. Cir. 2002) (rejecting the idea that cities have voluntary members, and asserting that the city was simply “attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*”); accord *Prince George’s Cnty. v. Levi*, 79 F.R.D. 1, 5 (D. Md. 1977) (rejecting the idea that residents are city “members”).

<sup>92</sup> Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 998 (2011). See also BLACK’S LAW DICTIONARY (6th ed. 1990) (defining “association” as, inter alia, the “act of a number of persons in uniting together for some special purpose or business.”); cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633 (1984) (O’Connor, J., concurring in part and concurring in judgment) (“Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”).

<sup>93</sup> *Hunt*, 432 U.S. at 334.

<sup>94</sup> See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 97–98 (1989) (arguing that more than a state or national government, residence in a locality presents a choice—to some extent, a reflection of one’s own needs and wants—linking cities with voluntary groups). Compare also Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 (1982) (arguing that the primary salient difference between cities and homeowners’ associations is the “imperfectly voluntary” nature of some cities’ membership), with Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1589–91 (1982) (disputing Ellickson’s voluntary/involuntary distinction).

<sup>95</sup> Compare, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973) (“Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.”), with Barron & Frug, *supra* note 52, at 265–66 (discussing the related debate over the nature and constraints on local power); GERALD FRUG, *CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS* 177 (2001) (discussing competition in city services and tax burdens); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 165 (2005); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418, 420 (1956) (positing a “consumer voter” who moves to a community whose local government best satisfies his set of preferences). Of course, whether that assumption is realistic, and whether it treats cities too much like private entities, is hotly disputed. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 408–09 (1990); Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843,

Many people emotionally affiliate with their city of residence (though admittedly not necessarily in the same way that they belong to, say, Greenpeace).<sup>96</sup> While not everyone is likely to move to a city *just* because it embraces their own stance on immigration or global warming, a few cities may become so identified with certain issues that such membership or identity interests can be significant.<sup>97</sup> Some local government activity is likely designed in part to elicit long-term loyalty precisely by responding to and reflecting residents' social, as well as economic, preferences.<sup>98</sup> In any event, people do often move to a given city with certain expectations—such as a safe environment or a health care safety net—and may expect cities to defend those expectations however necessary.<sup>99</sup> Those legitimate expectations reflect a different kind of identification between city and resident, but one that need not be ignored by the courts.

Some courts faced with associational standing cases have adopted a stringent definition of membership—officers and legal members count, but, for example, those who use the organization's services do not.<sup>100</sup> Such courts are unlikely to treat city residents as "members." Whether or not residents are truly "members," though, the city-resident relationship readily satisfies many of *Hunt*'s "indicia of membership."<sup>101</sup>

City residents constitute a "discrete, [relatively] stable group of

900–02 (1999); Gerald E. Frug, *Against Centralization*, 48 *BUFF. L. REV.* 31, 34 (2000) (criticizing the "privatized conception of city power").

<sup>96</sup> See Michael Sarbanes & Kathleen Skullney, *Taking Communities Seriously: Should Community Associations Have Standing in Maryland?*, 6 *MD. J. CONTEMP. LEGAL ISSUES* 283, 291 (1995) (arguing for abandoning a narrow associational standing rule under state law and defining communities, as sometimes distinct from local governments, as relatively small groups with some shared life and interests, an accepted identity, and people who identify as members of the group).

<sup>97</sup> Cf. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 605 (2008) (noting that cities with sanctuary laws are making expressive claims to "immigrant-friendly" identities and constitute "critical integration measures"); Schragger, *Can Strong Mayors Empower Weak Cities?*, *supra* note 52, at 2573 ("Charismatic leadership can generate collective feelings of ownership and belonging and can articulate a city's civic identity. Even the symbolic acts of a strong mayor can alter the popular perception of the city. To the extent that city residents begin to understand themselves as members of a unique polity, they are more likely to demand recognition as an identifiable political constituency.").

<sup>98</sup> For potential downsides to such signaling, see Joseph Blocher & Ilan Graff, *Colloquium, Constitutionalizing Local Politics*, *HARV. C.R.-C.L. L. REV.* (2011) available at <http://harvardcrcl.org/cr-cl-presents-a-colloquium-the-case-for-local-constitutional-enforcement/> (noting that cities taking controversial litigation stances might drive out dissenters).

<sup>99</sup> See David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 382 (2001) ("There is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make. The value inheres in the traditional advantages that attend decentralization. These include more participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny.").

<sup>100</sup> See *Hope, Inc. v. Cnty. of DuPage*, 738 F.2d 797, 813–16 (7th Cir. 1984) (dismissing *Hope Inc.*'s attempt to represent those who seek its services).

<sup>101</sup> *Hunt*, 432 U.S. at 344.

persons with a definable set of common interests.”<sup>102</sup> Often, city residents alone elect, comprise, and at least partially finance their local government. This gives city residents a better claim to “membership” than many members of litigating associations, who may donate to an organization but have no real further hand in its activities.<sup>103</sup> Certainly, if a city attorney is elected, her constituents have more sway over her than non-voting, non-profit “members” likely do over corporate decision makers.<sup>104</sup> And, for any case in which a city litigator has decided to invest in litigation, we might expect that the city could readily show that its own interests were also implicated in the suit.<sup>105</sup> There is therefore ample basis for a court to treat city residents as members of a municipal “association.”

### c. The Problem of Member Heterogeneity

If city residents *are* city members, however, different problems arise. Residents may have different interests in, and attitudes toward, a particular issue.<sup>106</sup> Thus, a city could face internal conflicts of interest that more philosophically homogenous interest groups may not, giving rise to a number of standing-related issues. For example, such internal conflicts could signal that the suit is not truly germane to the city’s “purpose,”<sup>107</sup>

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<sup>102</sup> *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (denying standing to a “watchdog group” who purported to represent all media viewers, and whose supporters did not govern or fund its activities, because it was not the “functional equivalent of a traditional membership organization”).

<sup>103</sup> *Cf. Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 27 (D.D.C. 1979) (denying nonprofits standing where they had no legal members; contributors and supporters had “absolutely no direct control over” them, and there was an insufficient connection between the policy-generalist parent organization (which received donations) and the subsidiary (whose focus was relevant to the suit, but which received no direct donations)). *See generally* Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 *SOUTHEASTERN ENVTL. L.J.* 47, 61 (2005) (noting inconsistencies in the structures of litigating environmental groups and the treatment they have received in federal courts).

<sup>104</sup> Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE L. SCH.: WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51, 63–64 (2008) (discussing the effects of wielding democratic power to pressure city attorneys); *cf.* Charles H. Steen & Michael B. Hopkins, *Corporate Governance Meets the Constitution: A Case Study of Nonprofit Membership Corporations and Their Associational Standing Under Article III*, 17 *REV. LITIG.* 209, 220–21 (1998) (arguing that nonprofits should have member-controlled boards to obtain associational standing).

<sup>105</sup> *Cf. Hunt*, 432 U.S. at 345 (“[T]he interests of the Commission itself may be adversely affected by the outcome of [the] litigation.”). The line between invoking one’s own rights and those of another party is often blurry in the third party standing cases. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 243–47 (1988).

<sup>106</sup> *See* Donald F. Simone, Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 *B.U. L. REV.* 174, 195–96 (1981) (arguing that courts should consider member homogeneity as part of a due process analysis of the adequacy of representational suits).

<sup>107</sup> *See* Nathaniel B. Edmonds, Comment, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 *U. CHI. L. REV.* 351, 353 (2002) (“[U]nder the germaneness prong, a court

lead individual residents to intervene to protect their interests, or discourage the city from pursuing the case with the vigor that the Supreme Court so values in associational standing.<sup>108</sup> In this regard, cities might almost be seen as prey to their own visibility. For example, city suits may make a greater local “media splash” than suits of nonprofits, and therefore be more likely to come to the attention of residents, prompting more internal dissenters to speak out.<sup>109</sup>

Nonetheless, the problem of dissenters need not be fatal.<sup>110</sup> The more heterogeneous population may make more dissenters feel free to speak out; they may also be more able to organize and effectively make themselves heard than dissenters in some private associations. Thus, it is possible that city dissenters are actually better off than dissenting members of traditional associations. Furthermore, the very salience, localness, and democratic accountability that make internal dissent less worrisome also makes deeply divisive cases less likely; politically savvy attorneys will tend to choose cases that are important to, and popular with, most constituents.

Even if a city does bring a controversial suit, it is not consistent with either established *parens patriae* or associational standing doctrine to require perfect consensus. In *parens patriae* suits, a problem need only impact a “substantial portion” of a state’s population, and an attorney general need not have anyone in particular’s blessing to sue.<sup>111</sup> Similarly, in associational standing, there are safeguards in place for dissenters. One critic has suggested a framework for evaluating organizational conflicts of interest:

The solution would require, as a first step, heightened scrutiny of organizations with certain types of “profound”

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should reject standing whenever a profound conflict negates the adversity required by the Case or Controversy Clause of Article III of the Constitution.”).

<sup>108</sup> Cf. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 512–18 (2012) (arguing that attorneys general suing in *parens patriae* often insufficiently represent the interests of affected individuals in part due to their electoral accountability to people outside the affected group). For a thoughtful critique of Lemos’s position, see generally Prentiss Cox, *Public Enforcement Compensation and Private Rights*. Minn. Legal Studies Research Paper No. 14-36 (forthcoming 2015), available at <http://ssrn.com/abstract=2503999> (October 1, 2014).

<sup>109</sup> Cf. Simone, *supra* note 106, at 191–95 (arguing that a court should examine whether notice was provided to represented association members in determining whether they received adequate representation).

<sup>110</sup> See, e.g., Feldman, *supra* note 87, at 739 (“[P]ossible diversity of members’ interests at an atomistic level does not negate the possibility of an associational commitment to the protection of one another’s interests.”).

<sup>111</sup> Although this state of affairs has been criticized as perhaps underserving the individuals on whose behalf the suit is theoretically brought—in part because attorneys general are accountable to those outside, as well as inside, the *parens patriae* group—this issue seems better resolved by an analysis of when such suits should preclude private litigation, rather than by barring them altogether. Cf. Lemos, *supra* note 108, at 512–18; Cox, *supra* note 108, at 25–34.

conflicts. Then, in an examination under the germaneness prong, a court should reject standing whenever a profound conflict negates the adversity required by the Case or Controversy Clause of Article III of the Constitution. However, a court should grant associational standing if the organization can show that the litigation was adequately authorized by its members because such a showing suffices to demonstrate sufficient adversity.<sup>112</sup>

Thus, a city's democratic character weighs strongly in favor of associational standing. Especially where the city council or an independently-elected city attorney authorizes a suit, the presence of some internal dissent should not normally bar litigation.

### 3. *Individual Participation is Unnecessary*

For obvious reasons, member heterogeneity also poses a problem under the rule that associational standing is not appropriate if individual participation will be necessary. If a locally controversial case prods local dissenters to intervene, it would seem to violate this third prong.<sup>113</sup> As discussed above, in such cases, courts would need to closely examine the effect on dissenters and whether their involvement would undermine judicial efficiency—a key strength of associational standing.<sup>114</sup> However, the rule is somewhat more porous than it initially appears. Some courts will accept limited individual participation in associational standing cases.<sup>115</sup> The Supreme Court once classified the individual-participation bar as a “prudential” rather than constitutional limit on associational standing, suggesting that (however it may be classified in the future) this principle may be subject to a somewhat more flexible application.<sup>116</sup> In the end, to maintain an action over the dissent of some of its residents, a city should simply have to show that the suit is properly authorized, dissenters

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<sup>112</sup> Edmonds, *supra* note 107, at 353. “Profound” conflicts are those in which, for example, an association sues a member or did not follow its own internal process to authorize a suit which will concretely harm some members. *Id.* at 367.

<sup>113</sup> *Id.* at 363–64.

<sup>114</sup> *Id.* at 372–74.

<sup>115</sup> Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1498 (2005) (discussing, inter alia, the Third Circuit's decision in *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278 (3d Cir. 2002)).

<sup>116</sup> *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554–55 (1996). Of course, whether it should be treated as an issue of standing at all is open to question in light of *Lexmark*. If the Supreme Court is inclined, however, to treat questions of third-party standing as issues of the existence *vel non* of a cause of action, it would seem that the question of dissenters is subject to a nuanced analysis as a question of fact, and only severe conflicts should suffice to push a city out of court.

will not undo the efficiency gains that associational standing affords, and that proceeding otherwise does not violate the important policy considerations behind associational standing.<sup>117</sup>

This prong poses one more problem. In many cases, the primary effect of the “individual participation” bar is not to wipe out the claim, but to bar any individual assessment of damages.<sup>118</sup> Moreover, under the “fireman’s rule,” cities often cannot recover their own public-service related expenses; these restrictions together create a major disincentive for cash-strapped cities to bring associational cases.<sup>119</sup> Nonetheless, some issues so powerfully affect both residents and cities that cities may still choose to litigate—aided in some cases, of course, by statutes that shift costs and allow the recovery of attorney’s fees.

#### 4. *Germaneness to the Organization’s Purpose*

Even if it can adequately address any internal dissent, how does a city show that a suit is germane to its purpose? *Hunt* demands germaneness to assure that the litigating party is truly a “natural adversary” to the defendants.<sup>120</sup> With an organization as complex and multifaceted as city government, however, determining “purpose” can be challenging.<sup>121</sup> Furthermore, unlike in *Hunt*, cities may not benefit by pointing to a non-governmental analog; large, multi-purpose associations have similarly struggled to satisfy this prong.<sup>122</sup>

Cities might meet this challenge in several ways. First, cities can

<sup>117</sup> See Edmonds, *supra* note 107, at 356.

<sup>118</sup> See, e.g., Warth v. Seldin, 422 U.S. 490, 514–16 (1975) (“[T]o obtain relief in damages, each member . . . must be a party to the suit, and [the association] has no standing to claim damages on [an individual’s] behalf.”); see also Simone, *supra* note 106, at 184–85 (criticizing applications of this prong that focus only on the requested relief).

<sup>119</sup> See, e.g., City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323–24 (9th Cir. 1983) (applying Arizona law to deny recovery); see also Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521, 1525–26 (2000) (discussing how municipal plaintiffs have dealt with the *City of Flagstaff* framework in suits against the gun industry). *But cf.* White v. Smith & Wesson, 97 F. Supp. 2d 816, 822 (N.D. Ohio 2000) (rejecting the firearms industry’s contention that an “amplification” of Ohio fireman’s rule should bar gun liability suits).

<sup>120</sup> *United Food & Commercial Workers Union Local 751*, 517 U.S. at 555–56.

<sup>121</sup> This prong critically distinguishes cities from states on the one hand and private actors or limited-purpose governments on the other: Cities are not considered sovereign, but they also lack the single focus that most special-purpose governments and nonprofits have. See Gerken, *supra* note 82, at 26–28 (noting that localist scholarship, especially that extending federalism to cities, essentially stops at cities because they are the only sub-state entities that look or act like states). This may account for the success that some limited purpose entities have had in obtaining associational standing.

<sup>122</sup> See, e.g., Health Research Grp. v. Kennedy, 82 F.R.D. 21, 27–28 (D.D.C. 1979) (denying nonprofits standing where, among other issues, there was insufficient connection between the parent organization (that received donations, but whose “purposes” were broad and general) and the subsidiary (whose purpose the suit related to, but which did not receive contributions)).

identify, in detail, the powers and responsibilities delegated to them by state law, including home rule powers. Courts will often find that cities must protect the “health and welfare” of their residents,<sup>123</sup> but also have a host of more detailed, specific powers and obligations. Even a broad “health and welfare” delegation should suffice to support standing in at least some cases. After all city residents’ welfare may be harmed in a way that is specific to, or amplified by, the place in which they live—precisely the sort of local harm that states often give cities the power to address. Not all courts, however, have taken a broad view of a government entity’s delegated authority.<sup>124</sup>

In any event, city litigators may confront a court in search of a limiting principle, or one inclined to define a municipal entity’s purpose narrowly. In such cases, the city could show that it has suffered some loss or expended resources in response to the problem—not to show independent standing, but to demonstrate how the alleged harm is germane to the city’s ordinary functions. If a noxious incident increases the amount that the county hospital spends as a health center of last resort, for example, it shows that part of what that county is *for* is caring for the indigent sick. Cities often operate in the interstices—creating rules and programs in the gaps left between state and federal actions.<sup>125</sup> Showing that the city has committed its limited resources to aiding its residents a particular matter may help assure the courts that standing is proper, even in the absence of formal statutory or constitutional delegation of a narrowly pertinent power.

Similarly, showing that the suit was properly authorized by the city council or a duly-elected city attorney would help to demonstrate the nexus between the suit and the city’s purpose. This inquiry and proof overlaps substantially with that for showing a lack of profound conflict—for, as one critic has noted, if a group has a profound conflict over a particular litigation, it seems unlikely that the litigation is close to the central purpose

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<sup>123</sup> See *City of Stamps v. ALCOA, Inc.*, No. CIV. 05-1049, 2006 WL 2254406, at \*4–8 (W.D. Ark. Aug. 7, 2006) (finding that a city satisfied the organizational standing requirements and that a suit for site cleanup was germane to the city’s purpose, “which is, at least in part, to provide for the welfare of its citizens under its police powers”); see also ILL. CONST. art. VII, § 6 (“[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . .”). Although the Illinois Constitution refers to regulating rather than litigating in the public interest, the provision still illuminates the “purpose” of a city.

<sup>124</sup> See *Thiebaut v. Colo. Springs Utils.*, 455 F. App’x 795, 801–02 (10th Cir. 2011) (rejecting associational standing for a district attorney because, even if his office or district is a membership association, state law did not entrust him with protecting health and welfare by suing under the Clean Water Act, and so the suit was not germane to his office).

<sup>125</sup> *But cf.* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. STATE L.J. 1431, 1483–84 (2012) (arguing that, in the immigration context, “issue entrepreneurs” have stalled federal reform, in effect, to foster a space for restrictive immigration policies at the state, and particularly local, levels).

of the organization.<sup>126</sup>

Overall, showing that litigation is germane to a city's purpose is challenging not because cities are likely to bring suits that are irrelevant to their residents, but because cities may have so many purposes; courts may be reluctant to give cities what looks like an unlimited pass into federal court. However, insofar as the germaneness prong really reflects, as the cases have suggested, concerns about alignment of interest and how vigorously an organization will pursue a case,<sup>127</sup> cities have more than sufficient tools at their disposal to prevail.

### V. SHOULD CITIES GET STANDING?

At this juncture, it is worth pausing to consider the objection that cities should not be able to use associational standing to compensate for their lack of *parens patriae* standing, or to avoid the limits on *parens patriae* standing.<sup>128</sup> It is in some sense obviously true that cities use associational standing as a work-around for the unavailability of *parens patriae* standing. In reality, though, it is no more of a work-around for a city than it is for any other association that would otherwise lack standing to sue on behalf of its members. It merely seems more like a “cheat” because we perceive cities to be more state-like than, say, Defenders of Wildlife.<sup>129</sup> The cases accusing cities of subterfuge, therefore, impose a special burden on them—rendering municipal corporations worse off than private associations specifically because state governments have *empowered* cities with additional rights and responsibilities for their residents.<sup>130</sup>

I readily concede that municipal corporations are hard to categorize. Every day, they interact with their residents in myriad ways—as service providers, informational resources, formal and informal advocates,

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<sup>126</sup> Edmonds, *supra* note 107, at 358–60.

<sup>127</sup> *But cf.* Stearns, *supra* note 16, at 423–32 (discussing associational standing cases, and arguing that the general prohibition on third-party standing helps keep interested parties from manipulating the path-dependent nature of adjudication, rendering “dubious” “bad poetry” the idea that courts are just seeking sufficiently zealous advocacy).

<sup>128</sup> See Prince George's Cnty., Md. v. Levi, 79 F.R.D. 1, 5 (1977) (“[A city cannot] simply restate the concept of standing as *parens patriae* in a way that avoided its limitations . . .”).

<sup>129</sup> While it might be argued that membership in an association implicates the First Amendment in a way that residence in a particular city typically does not, many state constitutions contain fairly robust protections for self-government and the self-determination that comes with it. See, e.g., CAL. CONST. art. XI (laying out the division of counties and local governments).

<sup>130</sup> There has long been debate over whether and how cities are disadvantaged relative to private corporations and associations. Compare Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980), with Ellickson, *supra* note 94. I do not fully wade into that debate here, but offer the more limited suggestion that this particular disconnect is unjustified. Although Professor Ellickson makes the fair point that some seemingly unjustified disadvantages may fairly compensate for other advantages given to cities, Ellickson, *supra* note 94, at 1577, it is difficult to see how the sorts of advantages that he identifies (e.g., special tax status) are sufficiently related to the issues identified here to be fairly characterized as offsetting.

regulators and behavior “nudgers” (as with recent calorie disclosure laws), market participants, and even outright adversaries (as in the ever-present property tax litigation). Moreover, these roles are interdependent—being a tax collector may be precisely what enables the city to provide benefits to others. Given that cities do so much, it is sometimes daunting to assess which hat a city is wearing in a particular dispute, and tempting to penalize it for resembling other multipurpose governments. But cities’ shape-shifting nature, and the variations in municipal entities across the country, are all the more reason to avoid making sweeping statements—and deciding cases—on generic instincts about what cities are and do. In a given case, the question should not be what cities do but what is *this* city doing? Whose interests is it representing, and from where does it derive the authority or obligation to do so? It is that locus of authority, and not some creeping common-law of aggregated intuition, that should define (and in appropriate cases, limit) a city’s ability to speak for its residents in federal court.<sup>131</sup>

Plaintiffs bear the burden of explaining why they belong in federal court. It will therefore fall to the city to credibly show that in a given case, despite its institutional complexity, it is acting essentially the way a more typical association would and that it otherwise satisfies the associational standing test. If it can do so, it should (at least as a doctrinal matter) be allowed to litigate unimpeded and should not be held to a higher standard simply because it cannot invoke *parens patriae* standing.

Of course, even if cities can plausibly claim associational standing as a doctrinal matter, one might fairly ask if we think it is a good idea—or whether the task is better left to attorneys general, class action counsel, specialized agencies, or litigating nonprofits. After all, the local government scholarship is replete with reasons to be skeptical of increasing local government autonomy or capacity: industry capture and economic protectionism,<sup>132</sup> cronyism, segregation and exclusion,<sup>133</sup> majoritarian

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<sup>131</sup> See Morris, *The Case for Local Constitutional Enforcement*, *supra* note 60, at 15–25.

<sup>132</sup> See, e.g., CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* 69–82 (2004) (arguing that local and state governments undermine residents’ economic freedoms to serve the interests of existing businesses).

<sup>133</sup> In *Milliken v. Bradley*, the Supreme Court majority relied in part on the importance of local control over schools to argue that a district court could not impose a metropolitan area-wide solution for segregated schooling in the Detroit school district. 418 U.S. 717, 741–45 (1974). The dissents, in contrast, argued *inter alia* that Michigan had a fairly centralized school system, with little local control, making a broader geographic remedy appropriate. See *id.* at 768–72 (White, J., dissenting); see also *James v. Valtierra*, 402 U.S. 137, 138–43 (1971) (upholding a California constitutional amendment that prohibited the development of any low-rent housing project unless approved in a local election); cf. Sarbanes & Skullney, *supra* note 96, at 296–97 (citing exclusion as an inherent risk of community identity).

disregard for personal and property rights,<sup>134</sup> financial externalities, and the list goes on. Even the Federalist 10 warns of local mischief, and that the sometimes-intractability of higher-level governments can be protective, and not merely a hurdle to overcome.<sup>135</sup>

Whether or not one wholly believes these accounts of the dangers of localism, we should nonetheless strive to structure local government authority to keep localism's vices in check while maximizing the upsides of a fine-grained, responsive, and accessible government.<sup>136</sup> Often this goal leaves us inclined to calibrate issue-by-issue how much to centralize government power—but that is exceedingly difficult to do without implicitly factoring in which level of government we think will adopt our own normative position on a particular issue.<sup>137</sup>

The question of how much power we want to give localities is particularly complex when we consider municipal standing in court, because standing is something of a blunt instrument. Without modifying standing by statute or (less commonly) narrowing it in a particular area through case law, one cannot readily and coherently change the demands of standing depending on how comfortable one is with local action on a particular topic. Two points bear noting, however. First, associational standing would not give cities standing to sue at all times over all things; the need for a city to show that the suit is germane to its purpose injects a modicum of issue-based calibration into the standing inquiry. Second, by its very nature, standing gives us a different sort of assurance; cities cannot simply impose their policy preferences on others, but must justify their arguments to a neutral magistrate and have a sufficient basis in existing law to withstand the rigors of litigation.

With these caveats in mind, there are several reasons to think that allowing cities to reliably invoke associational standing would be a positive development. First, from the perspective of their residents, cities have distinct advantages in litigation over both nonprofits and non-municipal government actors. (Indeed, the changing role of cities in contemporary America suggests that cities will be at least as well suited to the task as states have ever been.) Second, cities are already engaging with many of the same large, thorny issues through local legislation and policy; barring them from using litigation where it would be a more efficient tool serves little purpose. Third, strengthening cities' standing may also have

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<sup>134</sup> See, e.g., BOLICK, *supra* note 132, at 83–94 (arguing that local governments abuse and override individual property rights, often for only nominally public purposes).

<sup>135</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>136</sup> See Briffault, *Home Rule for the Twenty-First Century*, *supra* note 51, at 263–72 (suggesting re-structuring home rule to minimize the negative consequences of local authority and maximizing its benefits).

<sup>137</sup> See Frank Michelman, *The Rhetoric and Substance of Self-Government*, 4 CORNELL J.L. & PUB. POL'Y 510, 511–14 (1995).

positive broader effects on cities and their constituents.

### A. *Cities' Advantages in Litigation*

#### 1. *Advantages Relative to States and Federal Agencies*

Looking at federal and state court dockets, one might think that there is no shortage of governmental suits to protect consumers. When a person's claimed harm relates to a controversial, politically sensitive, or heavily lobbied issue, however, she may have a greater chance of mobilizing a city to defend her interests than she would a central government.

It is hardly novel to note that there may be consensus on a contentious issue at the local level (where the harm may be particularly concentrated) despite a political stalemate at higher levels of government.<sup>138</sup> A city's view of, and willingness to act on, a particular issue may diverge widely from that of the state as a whole.<sup>139</sup> If higher-level government action is not forthcoming and an issue affects a substantial number of city residents, a local government may feel that it has little choice but to address the problem somehow.<sup>140</sup> If a city is prepared to invest the resources and political capital to speak on its residents' behalf in the face of a stalemate or opposition at a higher level of government, there seems little justification to shutting the courthouse doors to the local perspective.<sup>141</sup>

Moreover, as the role cities play in their residents' lives continues to

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<sup>138</sup> Cf. Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 212–14 (2010) (arguing, in response to criticisms of concurrent state-federal enforcement, that the relevant political forces are different at the state and federal level, and so concurrent enforcement might help guard against federal under-enforcement and create a “productive [state-federal] tension” resulting in robust consumer protection).

<sup>139</sup> See, e.g., Richard Schragger, *The Progressive City*, 44–46, in THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE L. SCH.: WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY (2008), available at <http://www.law.yale.edu/Schragger.pdf> (arguing that cities' interests are often at odds with those of the suburban or rural majorities at the state level, and that cities are frequently the origination point for progressive innovation, in part due to demographic differences); cf. Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENVER U. L. REV. 1061, 1071–72 (2007) (arguing for a narrow view of preemption of local immigration legislation, noting that “different states and local governments are affected in drastically different manners—positively and negatively—by illegal immigration”).

<sup>140</sup> Cf. Briffault, *Home Rule for the Twenty-First Century*, *supra* note 51, at 260 (“[R]ecent home rule cases . . . provide[] striking evidence of the local willingness to experiment with new policies concerning public health and safety, individual rights, social welfare, political reform, and the private provision of public services.” (internal citations omitted)); Karla Mari McKanders, *Welcome to Hazleton! ‘Illegal’ Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOYOLA U. CHI. L.J. 1, 4–7 (2007) (noting that some state and local immigration regulation arose as a result of the failure of the federal government to enact comprehensive immigration reform).

<sup>141</sup> Cf. Rodríguez, *supra* note 97, at 617 (“[T]he ‘one voice’ rationale for the federal exclusivity principle sets too high a decision-making hurdle on the immigration issue, whose manifestations are extraordinarily varied and whose practical consequences local communities must face every day.”).

evolve, city standing in federal courts reflects a stylized and limited view of what local governments are and do. The forces of globalization and continued urbanization have changed understandings about which level of government represents residents' interests, and have undermined the rationale for a strictly two-tier model of federalism.<sup>142</sup> Just as many states now have more people than the entire union did at the founding, many modern cities have as many or more people than the largest states did then.<sup>143</sup> At the same time, the states' role as our most salient community has decreased.<sup>144</sup> Therefore, although many modern cities are wildly more diverse than the founding-era states, giving lower-level governments a stronger voice may be key to preserving some of the democratic benefits that the founders saw in the two-tier federalist model.<sup>145</sup> Giving only state and federal governments preferential standing treatment, therefore, preserves a dual model that at best incompletely describes current governance in the United States.<sup>146</sup>

Finally, many state and federal programs are actually administered through local government. Indeed, many of the functions that courts and scholars associate with states are quintessentially local.<sup>147</sup> This boots-on-the-ground role gives cities a unique perspective and useful expertise on how certain conduct impacts individuals and the community as a whole.<sup>148</sup>

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<sup>142</sup> See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 213–17 (1996) (proposing a new paradigmatic approach to federalism).

<sup>143</sup> See Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 529–30 (2010) (“[M]ost states became larger than what the entire union was a hundred years ago.”); Gordon, *supra* note 142, at 209 (“In 1790, the largest population of any state was Virginia’s 692,000. Today, fourteen cities and sixty counties are that large.”).

<sup>144</sup> See Gordon, *supra* note 142, at 209–11 (“[T]he states no longer play the role in today’s polity that they did at the time of the Founders.”).

<sup>145</sup> Cf. *id.* at 218 (acknowledging that cities now play many of the roles that states played at the time of the founding).

<sup>146</sup> Blank, *supra* note 143, at 549–51.

<sup>147</sup> See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 1, 6–10 (1988); cf. also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (discussing the values of local control in the context of Texas’ system of educational funding, noting that individual localities could tailor programming to “local needs” and that pluralism promoted innovation and “healthy competition[.] An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’”) (footnote omitted).

<sup>148</sup> Cf. *Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986) (noting that a particular advantage of associational standing is that people join organizations precisely to pool resources and vindicate their shared interests, and so associations have a pool of specialized capital and expertise to bring to litigation); Blank, *supra* note 143, at 553 (“[Cities] are physically closer to the controlled assets, provide services, govern citizens, and can thus collect more easily and efficiently the relevant information and knowledge before making decisions regarding

Increased standing for cities would help to bring the expertise of program administrators to bear, and bring the law of standing in line with the modern practice of governance.<sup>149</sup>

## 2. *Advantages Relative to Private Actors*

If cities are easier to prod into action on controversial issues than states or the federal government, one might view private actors as still more accessible. If one knows how to find them, it seems that there is a nonprofit or class-action counsel interested in litigating every side of every major issue. Holding aside the question of whether disadvantaged populations have equal access to these resources and the stress placed on class litigation by recent Supreme Court jurisprudence, there are substantive reasons to prefer cities to nonprofits or private counsel. In some cases, private litigants may face additional hurdles or burdens of proof inapplicable to government litigants—such as in pressing public nuisance claims.<sup>150</sup> In the late 1990s and early 2000s, for example, New York City, New York State, and the NAACP each sued members of the gun industry who they claimed facilitated a black market for guns.<sup>151</sup> The State's case was dismissed on the pleadings, and the City's suit evidently stalled temporarily in the wake of September 11, 2001.<sup>152</sup> The NAACP proceeded to trial (in which the City and State participated as observers) and proved that the industry created a nuisance.<sup>153</sup> Even so, the judge dismissed the case because the NAACP, as a private plaintiff, had to

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the assets, services, or citizens.”); Sarbanes & Skullney, *supra* note 96, at 312 (making a related point about community associations). Many thanks to Erin Bernstein for pressing me on this point.

<sup>149</sup> Cf. Blank, *supra* note 143, at 555 (arguing that cities need standing in international organizations, including international courts and tribunals, to represent their interests).

<sup>150</sup> Cf. Sarbanes & Skullney, *supra* note 96, at 306–07 (arguing for expanded standing for community associations in state court by pointing out the practical difficulties of class litigation and the inability to capture complicated community interests without creating unmanageable sub-classes and complex litigation structures). It is not clear whether a city would be entitled to be treated as a public rather than private entity for the purposes of public nuisance litigation if it proceeded solely on associational standing—that is, solely as a representative of its residents. Cities' ability to combine multiple avenues of relief in one suit, on behalf of itself *and* residents, however, remains a substantive advantage for cities.

<sup>151</sup> See Megan O'Keefe, Note, *NAACP v. AcuSport: A Call for Change to Public Nuisance Law*, 70 BROOK. L. REV. 1079, 1106–07 (2005) (arguing that the City of New York had the best chance of prevailing in the gun litigation, as a public entity not subject to the requirement of proving “special injury” in the context of public nuisance litigation, and suggesting that the state was unlikely to endeavor to revive its dismissed claim).

<sup>152</sup> See *City of New York v. Beretta, U.S.A. Corp.*, 315 F. Supp. 2d 256, 262, 285 (E.D.N.Y. 2004).

<sup>153</sup> See *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 446, 455 (E.D.N.Y. 2003) (“The evidence presented at trial demonstrated that defendants are responsible for the creation of a public nuisance . . .”). The 220-page opinion was so damning that the gun manufacturers appealed, despite having won. Notice of Appeal, *NAACP v. Acusport Inc.*, No. 99-CIV-07037 (E.D.N.Y. Dec. 19, 2003).

show that its members suffered harm different in kind, not just in degree, from the public at large—a requirement, the court noted, that would not apply to the government observers.<sup>154</sup>

As noted above, cities may have unique expertise and perhaps a broader perspective than more narrowly focused private associations. The wide variety of ways in which cities interact with their residents will often give a municipality particular insight into the pervasiveness or impact of wrongdoing. Cities may already have in-house experts who have studied an issue, or even developed programs to cope with its effects.<sup>155</sup> For example, a county that provides the health care of last resort for its residents is well positioned to speak to the effects of a health-related harm, and a municipality that tracks land values as part of its taxation system has valuable insight into the harms of predatory lending. In short, because of the many ways in which these polities affect the lives of their residents, they can act as valuable information aggregators regarding a wide variety of harms suffered by their residents.<sup>156</sup>

### 3. *Objections*

None of this is to say that associational standing, or more standing for cities in general, is a perfect solution. Indeed, there are very real reasons for concern. On balance, though, I conclude that the current state of affairs is unwarranted.

#### a. Adequate Representation

One might worry that because cities are political creatures, and may directly suffer harm as well, they may privilege their own needs and inadequately represent their constituents.<sup>157</sup> Viewed against the status quo, which is dominated by states and private actors, this objection takes on a different cast. After all, a similar critique has been lodged against attorneys

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<sup>154</sup> *NAACP*, 271 F. Supp. 2d at 449, 455; cf. Eggen & Culhane, *supra* note 59, at 43–45 (“In sum, *Acusport* reads like a municipal suit for public nuisance brought by the wrong entity.”).

<sup>155</sup> Even Congress has from time to time acknowledged that certain local government entities are “specially qualified and knowledgeable” on certain topics. Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 *YALE L. & POL’Y REV.* 321, 343–44 (2012) (noting that Congress has, in some cases, predicated state action on consultation with relevant local authorities and that these instances represent a Congressional judgment of local competence and a recognition of state and local differences).

<sup>156</sup> Of course, litigating associations that specialize in a particular issue or area may also have relevant expertise. I do not suggest that cities should supplant all such litigating entities, but cities certainly can serve as a useful complement.

<sup>157</sup> Cf. Lemos, *supra* note 108, at 512–18 (arguing that Attorneys General suing in *parens patriae*, because they represent both individual rights and the public interest, are often inadequate representatives in litigation). For a rigorous and thoughtful response to these concerns in the context of public compensation, see Prentiss Cox, *supra* note 108, at 34–38.

general<sup>158</sup> and leveled at litigating associations.<sup>159</sup> In that light, the critique hardly seems to justify specially limiting cities' standing, when they are often accountable to a smaller, narrower "public interest" than attorneys general. Furthermore, relatively democratically accountable,<sup>160</sup> resource-constrained city attorneys seem unlikely to turn out many frivolous suits or engage in half-hearted litigation. Their accountability mechanisms—and their experience in allocating prized enforcement resources—should lessen any concern that cities might disserve their constituents or abuse the broad "prosecutorial discretion" that comes with representing the interests of a sometimes vast number of "members."<sup>161</sup>

On the other hand, one might ask why we should give a city the power to override its residents' decision not to litigate a particular injury.<sup>162</sup> While it seems fairly uncontroversial that individuals are unlikely to sue where, for example, the harms are relatively small and diffuse, one might expect residents to seek relief by class action in such cases.<sup>163</sup> Of course, similar objections can be leveled at *parens patriae* standing,<sup>164</sup> but have not been enough to limit that doctrine. Furthermore, one can fairly question the frequency with which a resident's inaction will be the product of a deliberate choice to sit on her rights, as opposed to a lack of information about what to do or even who harmed her. Even if a significant number of city residents truly did wish to let the issue go, as noted above, they may be able to voice their objections and, if there are enough objectors, defeat associational standing altogether. Therefore, even though it is far from

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<sup>158</sup> Lemos, *supra* note 108, at 512–18.

<sup>159</sup> See generally Simone, *supra* note 106, at 176–87 (“[D]ecisions made by an association’s leadership do not necessarily reflect the views of its constituency.”).

<sup>160</sup> Not all are directly elected, but most have some mechanism of accountability that is at least equivalent to the minimal control that donors have over some associations. Cf. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *supra* note 104, at 61–62 (noting that cities are no less legitimate representatives than litigating nonprofits, and democratic accountability provides an additional representational check on cities).

<sup>161</sup> See, e.g., Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50, at 2234 (arguing that citizens can more easily challenge decisions made by cities than decisions made by states); cf. Tara Leigh Grove, *Standing as an Article III Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 812, 827 (2009) (arguing that associations with many members effectively exercise substantial prosecutorial discretion); Mank, *supra* note 37, at 1783–85 (2008) (arguing that decisions of state attorneys general to sue will be constrained by negative political consequences and Rule 11 of the Federal Rules of Civil Procedure).

<sup>162</sup> Cf. Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1699–1707, 1724–25 (2007) (arguing that broad standing rules for constitutional violations can result in significant inefficiencies because it allows one individual who wishes to assert a right or challenge a collective harm to trump the rights of others who have chosen not to object, amounting to a class action with none of its protections).

<sup>163</sup> *Id.* at 1724–25.

<sup>164</sup> See Wildermuth, *supra* note 25, at 306–07 (raising similar objections in relation to the exercise of *parens patriae* standing by states).

clear that a city's action would necessarily bind its residents,<sup>165</sup> associational standing has a sort of opt-out mechanism that gives residents more influence than they might have in a *parens patriae* suit.

b. Agenda Setting and Constraining Other Localities

Then-professor David Barron argued that if a city succeeds in changing state or federal law on a particular point, it necessarily keeps cities holding the opposite view from vindicating their policy preferences even at the local level.<sup>166</sup> By going to court, he argues, a city may reduce local autonomy as a whole.<sup>167</sup> Again, however, where nonprofits and other private entities can litigate under precisely the same framework and obtain much the same result, having an entity sensitive to local autonomy driving the litigation would seem to be an improvement over the status quo. In fact, if we allow a city to bring a suit on behalf of its residents (and expressly not based on its own rights or interests), there may be *less* of a risk to collateral local autonomy concerns, because the suit is not about cities *qua* cities.

Still, suits let cities push the public agenda by doing more than leading by example. Win or lose, affirmative lawsuits empower cities to set or force agendas far more than municipal legislation typically does. When cities take local legislative action, they may explain their decision by reference to other laws and even constitutional norms. Doing so, however, does not bind others to the same view of those norms.<sup>168</sup> By the very act of appealing to some external law in bringing litigation—be it the constitutional guarantee of equal protection or even the common law—cities press a very public debate on the legal status of the defendants' conduct. Arguably, if we place that agenda setting power into the hands of so many localities, certain politically or socially sensitive issues may be pushed too hard, too soon, prompting backlash and ultimately harming not

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<sup>165</sup> See generally Prentiss Cox, *supra* note 108. Cf. Sarbanes & Skullney, *supra* note 96, at 312 (raising this question in the context of arguing for greater standing for community associations in state court).

<sup>166</sup> Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50, at 2222; see also Blocher & Graff, *supra* note 98; Claire McCusker, Comment, *The Federalism Challenges of Impact Litigation by State and Local Government Actors*, 118 YALE L.J. 1557, 1561–67 (2009) (discussing how local impact litigation creates tension in the federal system).

<sup>167</sup> Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50, at 2246–50.

<sup>168</sup> Professor Morris has argued that local executive action such as lawsuits should not be viewed as antithetical to local autonomy, but instead as local executive autonomy (as distinct from local legislative autonomy). Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L. J. 1903, 1924–25 (2014). Presumably, other local executives could counter this just the way that, for example, competing state attorneys general do in federal litigation by seeking to intervene or participate in litigation. Therefore, even if litigation could reduce local autonomy by establishing a uniform rule of law, it would do so in ways that are consistent with the current federalist dynamic.

only the people the city hoped to help, but also similarly situated people nationwide.<sup>169</sup> This is no minor objection. Again, however, we should consider the idea of city standing not as an idealized independent regime, but in relation to the current state of affairs, in which the policy expert associations may control an issue agenda to some degree, but private plaintiffs already have precisely this sort of power. While cities have their own base of support, and might be somewhat less responsive than some other litigants are to the preferences of these specialist nonprofits, the city will be accountable to its residents if it takes ill-advised action that ultimately damages those interests. Therefore, extending representational status to cities is unlikely to worsen things, and may even offer gains in accountability.

### B. *Cities' Current Engagement*

Despite the common—though not uncontroverted<sup>170</sup>—refrain that cities are mere “creatures of their states[,]” “no city is as thoroughly under the thumb of the state as a matter of state law as the state creature metaphor suggests.”<sup>171</sup> Many have noted (with varying degrees of enthusiasm) cities’ increased visibility and proactive legal engagement on what we tend to think of as national and even international issues.<sup>172</sup> Much of the debate about local engagement has revolved around areas of

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<sup>169</sup> See generally Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50.

<sup>170</sup> The dissenting tradition maintains that local governance is an important right, and that some city power originates from residents, not states. See, e.g., Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50, at 2239; Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900) (discussing the history of local government); Morris, *The Case for Local Constitutional Enforcement*, *supra* note 60; Jake Sullivan, Comment, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935 (2003) (arguing that the people have a Constitutional right to “choose and define their local government”).

<sup>171</sup> Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, *supra* note 50, at 2220, 2243. Professor Barron has identified three ways in which state laws, despite their ostensible control over local governments, create apparent local autonomy: first, by allowing municipalities to tax property within their borders; second, through the exercise of local police powers, such as land use regulation; and third, by way of the definitions of local governments themselves. See Barron, *A Localist Critique of the New Federalism*, *supra* note 99, at 393–97 (noting that each of these can also be viewed as constraining local autonomy in the sense of limiting options of neighboring cities that experience externalities); see also Schragger, *Can Strong Mayors Empower Weak Cities?*, *supra* note 52, at 2556 (noting a city’s contradictory existence as “an administrative unit as well as a mini-sovereign”).

<sup>172</sup> See Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *supra* note 104, at 55 (“[T]he City Attorney’s Office has filed cases that ask such nationally resonant questions as whether the state may exclude same-sex couples from civil marriage [and] whether a state may terminate the Medicaid benefits of juveniles in detention centers . . . .”); cf. McKanders, *supra* note 140, at 38 (arguing that local governments’ immigration-related regulations are constitutionally preempted and bad policy); Robert A. Schapiro, *In the Twilight of the Nation-State: Subnational Constitutions in the New World Order*, 39 RUTGERS L.J. 801, 815–16 (noting the increasing profile of some cities on international issues).

booming local legislation—issues like health care, climate change,<sup>173</sup> immigration,<sup>174</sup> LGBTQ rights,<sup>175</sup> and gun control.<sup>176</sup> Although many local efforts are legislative, not litigious, each reflects a “rising culture of [municipal] engagement” with major issues that concretely affect their residents,<sup>177</sup> in an effort to protect them by whatever means are available. Artificially limiting cities to legislative efforts may, in some cases, accomplish little more than forced inefficiencies. For example, a city may not have the resources to directly improve the situation of every homeowner allegedly hurt by predatory lending, or address the influx of black-market guns. Absent standing to hold the relevant private parties responsible, the city that feels compelled to act may expend resources in a futile effort to clean up a problem rather than stemming it at its source—almost invariably to find its efforts challenged as *ultra vires* or preempted by state law.<sup>178</sup>

One might object that we should limit cities to local legislation in order to confine their attention to truly local problems and reduce externalities. However, many issues are more local than they first appear.<sup>179</sup> Where a

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<sup>173</sup> See Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409, 410–11 (2008) (noting that municipalities often serve as the “front line” in the regulation of emissions and other climate change related measures).

<sup>174</sup> See Rodríguez, *supra* note 97, at 569 (noting that one of “the most notable regulatory trends” of late has been “the rise of state and local efforts designed to control immigrant movement, define immigrant access to government, and regulate the practices of those with whom immigrants associate in the private sphere . . .”).

<sup>175</sup> See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 30 (2006) (noting cases in which cities’ extension of health benefits to same-sex partners were upheld on home rule grounds).

<sup>176</sup> See Joseph Blocher, *Firearm Localism*, 123 YALE L. J. 82, 98, 108 (2013) (noting that the “vast majority” of gun control regulations in America are local measures, and that the practice has deep historical roots).

<sup>177</sup> Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *supra* note 104, at 51; see also Briffault, *Home Rule for the Twenty-First Century*, *supra* note 51, at 254–55 (discussing the role of municipalities in addressing everything from firearm regulation to LGBTQ rights); Schragger, *The Progressive City*, *supra* note 139, at 39–44 (observing that this engagement, especially on progressive issues, is more resurgent than new, as many of the progressive reforms of the early twentieth century occurred at the state and local level).

Of course, I do not claim that cities should always litigate rather than legislate. I would note, however, that the fact that many municipalities have chosen to address important issues through legislation may not reflect a preference for that route, as standing, especially in federal court, is often uncertain. That is to say, we should not justify the current state of affairs by reference to the product of the current system.

<sup>178</sup> See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1113–15 (2007) (describing challenges to local laws).

<sup>179</sup> Critics of dual federalism have long argued that there has been little success in creating bright line rules about what is or should be truly national vs. “truly local.” See, e.g., Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2133–35 (2006) (noting that establishing this boundary is a “recurrent problem”); see also Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 556 (1987) (noting that most major issues are “mixed questions” in terms of what level of government should and must be involved in their resolution).

particular issue is important and controversial enough to deadlock state or federal governments, cities can be nimbler,<sup>180</sup> and may bear uniquely local burdens which push them to try innovative responses.<sup>181</sup> Furthermore, many state legislatures or constitutions have already endeavored to identify issues appropriate for local control.<sup>182</sup> Some cities can even adopt laws contrary to general state law, if the laws implicate “local” or “municipal” matters.<sup>183</sup> When a city has validly adopted an ordinance on a particular subject, a suit related to that ordinance *is* a suit to protect both local norms and city powers.<sup>184</sup> What is “local” should be assessed by the impact of local action, not by whether it addresses an issue that will arise elsewhere.<sup>185</sup>

Certainly, cities’ actions can impose real burdens on the communities around them—both in terms of the specific policy adopted, and in terms of the exercise of local autonomy more generally. Litigation may impose externalities in the classic way that we think of them at the local level—it might, for example, force a polluting company out of town and into an adjoining community. It may also create policy externalities, however. Although the literal terms of a judgment might only govern conduct within city limits—say, prohibiting reverse redlining in Baltimore—judgments have persuasive force in other courts. Moreover, national actors may set their policies at a state, regional, or even national level. Therefore, a judgment’s terms could be imposed on many other communities, including

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<sup>180</sup> See, e.g., Parlow, *Progressive Policy-Making on the Local Level*, *supra* note 52, at 375 (noting that local governments have led the way, or tried to, on a number of controversial issues where larger government structures have been unable to reach agreement).

<sup>181</sup> See *id.* at 377–80 (discussing local immigration regulation and living wage laws); David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. F. 21, 25–26 (2010) (noting the damaging impact of the foreclosure crisis on individuals and the additional costs to cities). *But cf.* Ramakrishnan & Gulasekaram, *supra* note 125, at 1436–41 (2012) (challenging empirically the claim that federal inaction and rapid demographic shifts account for local restrictive immigration policy activity).

<sup>182</sup> See, e.g., COLO. CONST. art. XX, § 6 (describing home rule provisions for certain cities, and identifying certain matters as particularly suited to local control).

<sup>183</sup> See, e.g., Briffault, *Home Rule and Local Political Innovation*, *supra* note 175, at 17–27 (noting a number of cases in which local laws have triumphed over conflicting state law when pertaining to local political processes and interests); *cf.* Parlow, *Progressive Policy-Making on the Local Level*, *supra* note 52, at 373 (arguing for a broader reading of localities’ home-rule powers, noting that home rule laws were intended as “mini Tenth Amendments” but have been restrictively interpreted). *But cf.* *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 130 (Conn. 2001) (noting that home rule was designed to give cities control over their own affairs “to the fullest possible extent . . . upon the principle that the municipality itself knew better what it wanted and needed than did the state at large” but finding that home rule did not override the general requirement of standing); Barron & Frug, *supra* note 52, at 271–72 (discussing the broad state law preemption provision in Massachusetts’ home rule amendment).

<sup>184</sup> *Cf.* *Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (noting that a quasi-sovereign interest is often one that a state would address, if it could, through its sovereign lawmaking powers).

<sup>185</sup> See Briffault, *Home Rule for the Twenty-First Century*, *supra* note 51, at 264.

those who had no objection to the underlying conduct. Unlike with legislation, though, a litigation judgment presupposes that a neutral arbiter has found a significant violation of the plaintiff's rights. Furthermore, unlike with local legislation, there is a formal mechanism for adjoining communities to make themselves heard in litigation—intervention or participation as amici. Accordingly, although courts can and should look closely at the local interest in a particular suit, litigation may sometimes offer a more efficient way to address a problem and allow all affected parties to be heard.

### C. City-Citizen relations

The relative power (or powerlessness) of cities remains much debated in the local government scholarship,<sup>186</sup> and that debate covers many different definitions of local power or authority. It seems well understood, however, that people are more likely to participate in and engage with their local government if that government has the ability to influence matters important to them.<sup>187</sup> Therefore, reliably giving cities standing to bring affirmative suits on behalf of their residents may increase residents' incentive to interact with their local government. And if residents find local government to be responsive and effective, it may even further their commitment to stay put.

One can fairly worry that focusing local politics and action on local officials' vision of consumer protection or constitutional rights might lead voters to choose their municipal leaders for their constitutional or social visions over their bureaucratic competence, harming city functioning overall.<sup>188</sup> The vision of local government as primarily neutrally bureaucratic rather than actively political, however, is normatively loaded.<sup>189</sup> Furthermore, if technocratic competence is critical to residents, no matter how much they approve of a city's affirmative litigation they will not long tolerate officials who undertake such suits at substantial cost

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<sup>186</sup> See, e.g., Barron & Frug, *supra* note 52, at 267–69 (discussing the debate over local autonomy and the ways in which it varies when talking about central cities or suburbs).

<sup>187</sup> See Briffault, *Home Rule for the Twenty-First Century*, *supra* note 51, at 258 (noting the unique opportunity local government provides citizens to participate in decision-making).

<sup>188</sup> See, e.g., Blocher & Graff, *supra* note 98 (“Perhaps if local government were allowed to engage in constitutional enforcement, more local government officials would be subject to election. And more city attorneys might start taking public positions on substantive constitutional issues like prayer in local schools or free speech in municipal parks. But there are reasons to doubt that the constitutionalization of local politics would be a good thing. It could lead to significant mission creep, distracting local government officials from traditional and vital functions like the nitty-gritty operations of schools and parks themselves.”).

<sup>189</sup> See Schragger, *Can Strong Mayors Empower Weak Cities?*, *supra* note 52, at 2546 (arguing that the current weakened state of the mayoralty reflects, in part, a skepticism of democracy—and in particular urban democratic power—and a belief in the ability of technocratic skill to correct for political failures).

to key municipal services.<sup>190</sup> And if we truly wish to respect the experimental values of federalism, we may have to let some cities make non-optimal resource allocations.<sup>191</sup> Finally, we already expect city lawyers to be experts in many of the areas of law that would likely be at play in associational litigation—for example, civil rights—simply from the defense perspective, such that cities can only be heard to deny, rather than support, the rights and interests of their residents.<sup>192</sup> Associational standing would allow cities to use that expertise both offensively and defensively.

Some have also worried that engaging in controversial actions like affirmative litigation can act as a signaling device to current and prospective city residents, undermining solidarity, driving out dissenters, and ultimately increasing homogenization in cities.<sup>193</sup> This is undoubtedly a significant concern. The well-rehearsed downsides of the risk of local parochialism are real,<sup>194</sup> and could readily apply to local policies evidenced through litigation. I pause to make two observations. First, such signaling already goes on—and not just at the local level. Nearly all socially controversial government actions can be interpreted as partially motivated to assure some particular group that the government has their interests in mind. The controversy over cities adopting ordinances on both sides of the immigration debate, for example, comes to mind.<sup>195</sup> (The same objection readily applies to policies and litigation at the state level, where leaving a hostile community may be even less feasible.<sup>196</sup>) Second, while the downsides are substantial, there may be a small silver lining: insofar as we endorse a “sorting” theory of local government, it may be possible for cities to use stances on controversial social issues to increase residents’ solidarity with their hometown, improving the “stickiness” of its human

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<sup>190</sup> See Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *supra* note 104, at 62 (“[W]asting public funds creates bad publicity, to say the least, and leads to a decline in political support.”).

<sup>191</sup> See Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, *supra* note 139, at 1072–73 (highlighting local decision-making issues in the enforcement of immigration laws).

<sup>192</sup> Morris, *The Case for Local Constitutional Enforcement*, *supra* note 60, at 39–42 (making this point in the specific context of constitutional rights and constitutional litigation).

<sup>193</sup> See Blank, *supra* note 143, at 557 (noting the potential “loss of solidarity”); Blocher & Graff, *supra* note 98 (describing the mechanics of a constitutional “signaling device”); Rose, *supra* note 94, at 97 (noting that due to the relative option of choice in localities, cities must be careful of the reputations they develop and not “frighten away desired citizens”).

<sup>194</sup> Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1023–24 (2007) (noting that the downsides of local autonomy as established in the literature include “that such autonomy in practice risks exacerbating economic, racial, ethnic, and cultural divisions that local fragmentation engenders, can threaten individual liberties, and may generate significant externalities on neighboring communities”).

<sup>195</sup> Cf. Parlow, *Progressive Policy-Making on the Local Level*, *supra* note 52, at 377–78.

<sup>196</sup> See Rose, *supra* note 94, at 100–02 (“[S]ome residents may indeed be ‘stuck,’ unable to either exit or to be heard . . .”).

capital and the corresponding financial resources.<sup>197</sup>

Finally, Ann Woolhandler and Michael Collins have argued that *parens patriae* standing in federal court should be substantially curtailed to preserve the line between the government and individual rights, furthering federalism values and accountability by redirecting states to sue in their own courts.<sup>198</sup> As to the first point, they contend that *parens patriae* cases refashion public interests into a government “right” to curb or regulate certain conduct on behalf of the political majority.<sup>199</sup> This is a dangerous shift, they suggest, from the framework in which only individuals have rights, as *against* the government.<sup>200</sup> Although not eliminating them altogether, municipal associational standing would seem to reduce such concerns—after all, it is the concrete, individualized injury of city *residents* (and not a generalized public interest) which lies at the heart of the associational standing inquiry.

One might also argue, following Woolhandler and Collins’ line of thought,<sup>201</sup> that limiting cities to suing on residents’ behalf in state court would increase accountability. This is particularly so because state courts and legislatures are the primary identifiers of local government authority. If a city goes too far in state court, both the state courts and the state legislature can readily discipline it. This rationale, however, places unnecessary substantive limits on the claims that cities can pursue. Moreover, under the current state of affairs, many impact and consumer protection suits are brought by democratically unaccountable private associations or class counsel. It thus seems likely that strengthening cities’ standing in federal court will improve, rather than dilute, accountability on balance.<sup>202</sup> Finally, allowing cities to sue in federal court might actually

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<sup>197</sup> Cf. Davidson, *supra* note 194, at 1013 (noting, in the context of federal-local cooperative regulation, that “[f]ederal empowerment—again, often seen as destructive to local identity—can in fact provide a means for local communities to retain, sharpen, and bolster that identity”).

<sup>198</sup> Woolhandler & Collins, *supra* note 25, at 443, 510–13; *see also* Merrill, *supra* note 32, at 304 (arguing that *parens patriae* suits should be exempt from ordinary standing rules when a sovereign sues in its own courts, but not in those of other sovereigns).

<sup>199</sup> Woolhandler & Collins, *supra* note 25, at 445.

<sup>200</sup> *Id.* at 444–45 (describing the disadvantages for defendants).

<sup>201</sup> *Id.* at 443, 510–13.

<sup>202</sup> Cf. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *supra* note 104, at 62 (“Constituents should not have to choose between a governmental structure that respects local prerogatives and one that permits their local law office to vindicate their rights under state and federal law.”).

There may be reasons to think that a different alternative to both *parens patriae* and associational standing might more optimally serve the interests of those persons on whose behalf each of these institutions litigate. Nonetheless, I posit that for present purposes, it is important to compare the possible outcomes of cities engaging in more representational litigation to the current system, rather than to some idealized but as-yet-unidentified and untested system. Cf. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (critiquing the “*nirvana*” approach to

reinforce and strengthen their identities as distinct political communities, diffusing power more effectively through the multi-tiered government system.<sup>203</sup> Almost certainly, it would improve residents' perceptions of the city's capacity to represent them and protect their interests—a sense of authority that is hardly prevalent in the dominant narrative of local governments.

#### D. *Can Cities Sue Higher-Level Governments?*

What happens when a city seeks to sue either its state or the federal government—both of which also may speak on behalf of the very residents the city is suing to protect? Fully addressing, for example, the possible Eleventh Amendment and immunity problems is beyond the scope of this Article. I will, however, note that there are at least two possible approaches to the problem, and offer my perspective on the scope of the issue.

First, courts might conclude that, when a city sues under the rubric of associational standing, it does not claim a sovereign interest in the matter that conflicts with the *parens patriae* powers of the state or federal government. Under that theory, municipalities could sue like any other private association.

Alternatively, courts could place special restrictions on cities' ability to sue higher-level governments, acknowledging the close overlap between other governments' *parens patriae* authority and the role that a city plays when it sues on behalf of its residents. When states sue as *parens patriae*, they cannot always sue the federal government.<sup>204</sup> When a city sues its state, courts could consider whether a similar case would be allowed to proceed in state court according to the ordinary Eleventh Amendment analysis. In other words, the court would assess what components of state

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economic analysis, which often presents “the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement”).

<sup>203</sup> Cf. Massey, *supra* note 37, at 275–76 (arguing that allowing Congress to grant states standing to litigate generalized quasi-sovereign interests furthers the separation of powers by allowing federalism to act as an additional check on the executive branch).

<sup>204</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520–21 n.17 (2007); Elliott, *Standing Lessons*, *supra* note 61, at 579–81 (“[I]t has long been settled that states may *not* sue the federal government *in parens patriae* . . . .”); Mank, *supra* note 37, at 1737, 1770 (discussing the majority opinion in *Massachusetts v. EPA*); Wildermuth, *supra* note 25, at 317 (arguing that the requirement from *Massachusetts v. EPA* that exempted certain claims from the bar of *Massachusetts v. Mellon* was based on a misreading of *Snapp*); see also, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (“Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government . . . .”); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) (“It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”). Interestingly, in 1985, then-Judge Scalia concluded that this limitation was “prudential,” and could be waived by Congress. *Md. People’s Counsel v. Fed. Energy Regulatory Comm’n*, 760 F.2d 318, 321–22 (D.C. Cir. 1985) (treating the *parens patriae* power in that suit as having been delegated to the state agency by Congress’ recognition of municipal interests in underlying statute).

sovereignty may have been properly delegated to a municipality as a matter of state law.<sup>205</sup>

No matter how the issue is resolved, however, the substantial majority of the suits brought based on associational standing will likely be against private entities. This problem of governments suing governments, then, should not drive the entirety of the doctrine.

## VI. CONCLUSION

Federal courts should willingly apply the doctrine of associational standing to cities. To do so would improve transparency in the nature of the rights and interests at stake in municipal litigation.<sup>206</sup> Allowing cities better access to courts would help fill in the enforcement gap between the relief available to private associations and state actors' willingness to take on contentious issues that impact city residents. Perhaps just as importantly, it would rationalize an important corner of the law of representational litigation. Allowing cities to regularly use associational standing to sue on behalf of residents would correct the unique disadvantage at which they have been placed with respect both to states and to private, democratically unaccountable corporations.

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<sup>205</sup> See, e.g., *City of New York v. New York*, 655 N.E.2d 649, 651–52 (N.Y. 1995); *Bergen Cnty. v. Port of N.Y. Auth.*, 160 A.2d, 811, 817 (N.J. 1960) (collecting cases wherein cities cannot represent residents in actions against states or state agencies, but not ruling out cities' ability to represent their residents in some other circumstances); Cami Fraser, *Protecting Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665, 692–93 (2000) (noting that Tribes' *parens patriae* standing does not automatically circumvent sovereign immunity).

<sup>206</sup> Cf. Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived from Any Angle*, 32 CONN. L. REV. 1277, 1285 (2000) (noting that it is “beyond rational dispute” that municipal firearm litigation actually rested on harm to municipal residents).

