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Who and What Is a City "For"? Municipal Associational Standing Reexamined

Kaitlin Ainsworth Caruso

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ESSAY: WHO AND WHAT IS A CITY "FOR"? MUNICIPAL
ASSOCIATIONAL STANDING REEXAMINED

KAITLIN AINSWORTH CARUSO*

ABSTRACT

Cities nationwide increasingly engage in affirmative, plaintiff-side litigation to protect their residents. But despite this trend, standing remains a persistent challenge in municipal affirmative litigation—particularly in federal court, and particularly in impact litigation. I have previously proposed one way to give cities standing in federal court more in line with that of states, and with the role that cities play in their residents' lives: extending to municipalities the doctrine of associational standing, which nonprofits and associations use to speak for their members in court.

Recent works have both amplified and critiqued that initial proposal. With these additional considerations in hand, we are well positioned to briefly revisit whether cities should be able to rely on a theory of associational standing to protect their residents, and what that tells us about standing law and local power more broadly. I argue that associational standing should still be a viable option for municipal standing in federal court. More broadly, I contend that a stable, reliable form of standing for cities to represent the interests of their constituents in federal court would be good for both the doctrine and the cities.

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TABLE OF CONTENTS

INTRODUCTION	107
I. STANDING STANDARDS	109
A. <i>Article III Standing Basics</i>	109
B. <i>Parens Patriae Standing</i>	111
C. <i>Associational Standing</i>	114
II. MUNICIPAL ASSOCIATIONAL STANDING	115
A. <i>Where We Started</i>	115
B. <i>A City Is Not an All-Purpose Litigant</i>	116
1. <i>Membership: The Limits and Risks of Defining Who</i> <i>Belongs</i>	117
a. <i>Who Counts as a Member?</i>	117
i. <i>Better Together</i>	119
ii. <i>Leadership Participation, Selection and</i> <i>Guidance</i>	120
iii. <i>Financing City Activity</i>	120
iv. <i>Voluntary Association</i>	121
b. <i>How Many Members is Enough?</i>	123
2. <i>Municipal Purposes Have Meaning, and Limits</i>	124
a. <i>Municipal Purposes Are Set by State and Local</i> <i>Statutory, Regulatory, Constitutional, and</i> <i>Common Law</i>	124
C. <i>Municipal Associational Standing Is Manageable and</i> <i>Appropriate</i>	126
III. PATHWAYS TO CITY STANDING	127
A. <i>Statutory Enforcement Power</i>	128
B. <i>A Return to Parens Patriae</i>	129
C. <i>A Unified Theory of Standing for Organizations</i>	131
CONCLUSION	132

INTRODUCTION

Cities have been busy. They increasingly conduct affirmative, plaintiff-side litigation on a variety of issues affecting their residents, from the hyper-local to the national¹—part of what Professor Kathleen Morris called a “rising culture of engagement” at the municipal level.² I, like many others, have welcomed this trend as both an important development for effective civil law enforcement and a reflection of the key role that municipalities play in their residents’ lives.³

Many of us have observed, however, that standing remains a persistent challenge in municipal affirmative litigation—particularly in federal court,⁴ and particularly in impact litigation.⁵ States routinely pursue litigation to protect their citizens in federal court.⁶ Many have pointed out that cities have interests in the health and welfare of their residents very much like those of states.⁷ However, few federal courts seem willing to allow cities to invoke the special standing doctrine that states have to litigate those interests. As an alternative, I have argued that cities should be able to rely on the doctrine of associational standing,⁸ a similar concept that gives

1. See generally, e.g., Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in *HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY* 189 (Ray Brescia & John Travis Marshall eds., 2016).

2. Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY: PAPERS FROM THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE LAW SCHOOL* 51, 54 (2008), https://law.yale.edu/sites/default/files/documents/pdf/liman_whyTheLocalMatters.pdf [<https://perma.cc/5MEX-W6N8>].

3. Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 *CONN. L. REV.* 59, 61 (2014).

4. See, e.g., Sarah L. Swan, *Plaintiff Cities*, 71 *VAND. L. REV.* 1227, 1252-53 (2019) (“Standing presents the biggest doctrinal hurdle of legal legitimacy for plaintiff cities.”); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 *CONN. L. REV.* 355, 389-90 (2006).

5. Impact litigation “seek[s] to use the courts to effect widespread social changes.” PETER H. SCHUCK, *MEDITATIONS OF A MILITANT MODERATE: COOL VIEWS ON HOT TOPICS* 103 (2006).

6. That trend has not been universally welcomed. See generally, e.g., Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 *NOTRE DAME L. REV.* 2015 (2019).

7. Caruso, *supra* note 3, at 68-69, 68 nn. 50-52, 69 nn. 53-54.

8. “Associational standing” is sometimes called “organizational standing.” Both terms, confusingly, are sometimes used to describe the standing of an organization or association

standing to other public and private associations to litigate in the interests of their members.⁹

Several years on, the tide of local engagement has only continued to rise. Options for aggregate private litigation continue to narrow, and the federal government had (at least until quite recently) stepped back from enforcing many rights-protective laws on behalf of the public, increasing the need for local impact litigation.¹⁰ Thus, cities and counties¹¹ have recently brought or joined suits relating to alleged abuses in the pharmaceuticals industry,¹² predatory lending,¹³ environmental impact,¹⁴ and unlawful federal government conduct,¹⁵ among a myriad of other wrongs.¹⁶ In some cases, cities brought suit alongside their states; in others, they brought suit in spite of their state.¹⁷

both when it is directly injured and when it bases standing on the injury to one of its members. *See, e.g.*, Swan, *supra* note 4, at 1256 & n.182. This Essay concerns the latter, representational theory.

9. *See* Kaitlin A. Caruso, *The Municipal Corporation, Revisited: Rationalizing the Law of Cities After Hunter v. Pittsburgh*, HARV. C.R.-C.L. L. REV., nn.8-16 and accompanying text (July 11, 2012), <https://harvardcrcl.org/cr-cl-presents-a-colloquium-the-case-for-local-constitutional-enforcement/> [<https://perma.cc/5NQ2-T7UF>] (sketching the possibility of municipal associational standing); *accord* Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 420 & n.214 (2013).

10. *See generally* Jill E. Habig & Joanna Pearl, *Cities as Engines of Justice*, 45 FORDHAM URB. L.J. 1159, 1163-65 (2018); Morris, *supra* note 1, at 189-90.

11. In this Essay, I use "cities," "counties," and "municipalities" interchangeably; I focus on general-purpose municipal entities, as distinct from special-purpose sub-state entities like, say, a water district.

12. *See* Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1258-59 (2018). *See generally* Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation and the Opioid Crisis*, 50 URB. LAW. 87 (2019).

13. *See, e.g.*, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1300-01 (2017).

14. Nina A. Mendelson, *Tribes, Cities, and Children: Emerging Voices in Environmental Litigation*, 34 J. LAND USE & ENV'T L. 237, 243-44 (2019).

15. Dino Grandoni & Brady Dennis, *States and Cities Sue EPA Over Rollback of Climate Regulations Aimed at Coal Plants*, WASH. POST (Aug. 13, 2019, 3:14 PM), <https://www.washingtonpost.com/climate-environment/2019/08/13/states-cities-sue-trump-epa-over-rollback-climate-regulations-aimed-coal-plants/> [<https://perma.cc/6PQN-PTFD>]; *Chicago and 3 Other Cities Sue to Stop Spread of Ghost Guns*, ASSOCIATED PRESS WIRE SERV. (Aug. 26, 2020), <https://apnews.com/85899c2211b4082e1a6db13b697b3a51> [<https://perma.cc/WB2H-HVRF>].

16. *See* Morris, *supra* note 1, at 189; Swan, *supra* note 4, at 1230-31.

17. *Compare* Grandoni & Dennis, *supra* note 15, with Swan, *supra* note 12, at 1258-59, and Daniel Fisher, *Cities vs. States: A Looming Battle for Control of High-Stakes Opioid Litigation*, FORBES (Mar. 28, 2018, 10:30 AM), <https://www.forbes.com/sites/legalnewsline/2018/03/28/cities-vs-states-a-looming-battle-for-control-of-high-stakes-opioid-litigation/#2fd305db4b5d> [<https://perma.cc/8LD2-8UDQ>].

As cities have continued (or tried) to tackle crucial issues through affirmative litigation, scholarly and critical attention to the trend has likewise increased.¹⁸ We are now well positioned to briefly revisit whether cities should be able to rely on a theory of associational standing to protect their residents, and what that tells us about standing law and local power more broadly. I argue that associational standing should still be a viable option for municipal standing in federal court. More broadly, I identify several paths to standing and contend that a stable, reliable form of standing for cities to represent the interests of their constituents in federal court would be good for both the doctrine and the cities.

Part II of this Essay provides a very brief refresher on key doctrines—standing generally, and *parens patriae* and associational standing in particular. Part III revisits parts of the analysis of whether cities can or should invoke the doctrine of associational standing in light of new developments and critiques. I conclude that cities still should, both doctrinally and normatively, be able to do so. Part IV then assesses what other changes could supplement cities' representational standing in federal court. Part V briefly concludes.

I. STANDING STANDARDS

A. Article III Standing Basics

Article III of the Constitution provides that the federal judicial power extends to deciding “cases” and “controversies.”¹⁹ Ostensibly to stay within that constitutional role, federal courts require plaintiffs to show that they have standing to bring a claim, generally by demonstrating that they “have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and

18. See, e.g., Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329 (2020); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581 (2019); Swan, *supra* note 4; Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1908 (2013) [hereinafter Morris, *Expanding Local Enforcement*]; Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 4-5 (2012) [hereinafter Morris, *Local Constitutional Enforcement*]; Engel, *supra* note 4, at 389; Claire McCusker, Comment, *The Federalism Challenges of Impact Litigation by State and Local Government Actors*, 118 YALE L.J. 1557 (2009).

19. U.S. CONST. art. III, § 2.

particularized, and (b) ‘actual or imminent.’”²⁰ The injury must be “fairly ... trace[able] to the challenged action of the defendant” and “‘likely,’ as opposed to merely ‘speculative,’” to be redressable “‘by a favorable decision.’”²¹

The Supreme Court also has long used “prudential standing” rules—“judicially self-imposed limits on the exercise of federal jurisdiction.”²² Prudential standing limits have required that plaintiffs assert their own rights, not those of third parties; that the complaint falls within the “zone of interests” protected by the relevant statute; and that plaintiffs not seek redress for “generalized grievances” shared by many.²³ In 2014, in *Lexmark International, Inc. v. Static Control Components, Inc.*,²⁴ however, the Supreme Court reclassified the “zone of interests” question as one of the scope of the cause of action, and the bar on generalized grievances as a constitutional requirement.²⁵ It found the resistance to third-party standing “harder to classify,” and so it did not classify it.²⁶ Again in 2018, the Court declined to further specify the relationship between Article III and third-party standing.²⁷

The Court also recently considered city standing—specifically, to sue for Fair Housing Act (FHA) violations visited upon city residents.²⁸ In *Bank of America Corp. v. City of Miami*, Miami sued banks that it claimed engaged in predatory lending, hurting (particularly) minority residents and, in turn, the City.²⁹ The Supreme Court concluded that the City could be a “person aggrieved” with a

20. *United States v. Windsor*, 570 U.S. 744, 757 (2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (requiring harm to be both concrete and particularized).

21. *Windsor*, 570 U.S. at 757 (alteration in original) (quoting *Lujan*, 504 U.S. at 560-61); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

22. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

23. *Engel*, *supra* note 4, at 369-70.

24. 134 S. Ct. 1377 (2014).

25. *Id.* at 1386-87, 1387 n.3.

26. *Id.* at 1387 n.3. One view, however, is that third-party standing issues can now “be handled as issues primarily of Congress’s intent with respect to particular statutory schemes.” Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149, 154-55 (2014).

27. *Starr Int’l Co. v. United States*, 138 S. Ct. 1324 (2018) (denying certiorari).

28. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017).

29. *Id.* at 1301-02.

statutory right to sue under the FHA (a category, it noted, that was as broad as Article III could permit).³⁰ In finding that the City's claims fit within the relevant zone of interests, the Court noted that the banks allegedly "hindered the City's efforts to create integrated, stable neighborhoods" and "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services."³¹ The Court had previously recognized that cities could sue to remedy behavior that imposes social and economic harms,³² but it shied away from suggesting that the community-based (non-financial) harms were adequate to support city standing.

Bank of America was not argued as a representational case, but one might wonder why, given that the heart of the harm seems to have been to residents. One answer is simply that other standing cases said so,³³ as discussed below, an effort to frame Miami's interest as representational might well have failed.

B. *Parens Patriae Standing*

When states³⁴ sue in federal court, the Supreme Court has said that they generally pursue one of three types of interests: sovereign, quasi-sovereign, or proprietary.³⁵ Proprietary harms are like those

30. *Id.* at 1303. Unfortunately for the City, the Court then remanded with instructions to impose a heightened causation standard. *Id.* at 1301, 1305. On remand, the Eleventh Circuit concluded that the City adequately pled causation for its claims of lost tax revenue, but not for increased municipal expenses. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1263-65 (11th Cir. 2019); *accord City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112, 1117 (9th Cir. 2020) (ruling similarly in Oakland's suit).

31. *Bank of Am.*, 137 S. Ct. at 1304.

32. *See id.* at 1304-05 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)).

33. Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2105 (2019) (noting that it is good strategy to characterize financial injuries as proprietary harms because "[a] 'Wallet Injury' is the 'paradigmatic' injury in fact," but suggesting that the typical analysis of such a state injury is oversimplified (first quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment); and then quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005))).

34. Or entities like states, e.g., Puerto Rico.

35. *See Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02 (1982) (discussing states' different interests). Governments may also litigate on behalf of a private real party in interest, but the Court deems such actions essentially private suits. *Id.* at 602.

of any other injured entity—for example, property damage.³⁶ Sovereign interests are governance interests—in things like adopting and maintaining a legal code.³⁷ Quasi-sovereign interests are a hazy category, but generally relate to the health and welfare of constituents and include things like the interest in maintaining clean air and water.³⁸

The Supreme Court has described a state’s quasi-sovereign interests as giving rise to *parens patriae* standing,³⁹ which allows a state to sue most private parties if it can show (1) a quasi-sovereign interest; (2) harm to a substantial portion of the population; (3) a distinct injury from that of its constituents; and (4) a cause of action under the relevant statute.⁴⁰ The Supreme Court has said that states receive “special solicitude in ... standing analysis,”⁴¹ but what exactly that solicitude is or does remains unclear,⁴² as does whether a state must satisfy Article III in addition to the doctrinal requirements for *parens patriae* standing.⁴³

Though in reality cities have valid “quasi-sovereign” interests like states, federal courts have been very reluctant to recognize them for standing.⁴⁴ Federal courts typically deny *parens patriae* standing to cities, noting that cities, as mere creatures of their states, lack the sovereignty on which state (or federal) *parens patriae* standing is based.⁴⁵ As several leading federalism and localism scholars have

36. *Id.* at 601-02.

37. *Id.* at 601.

38. *Id.* at 602, 607.

39. *Id.* at 600-01; see also Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2072-74, 2082 (2011) (identifying ongoing muddiness in the case treatment of state interests for standing analyses).

40. Engel, *supra* note 4, at 368; see *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88, 1387 n.3 (2014) (explaining that the zone-of-interests test is a measure of the cause of action).

41. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). It is not clear that broad standing for states has historically been the norm, however. See Woolhandler & Collins, *supra* note 6, at 2019-20.

42. See Caruso, *supra* note 3, at 66-68; see also Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1922 (2019) (arguing that the “special solicitude” really only offered Massachusetts extra latitude regarding the “traceability and redressability” prongs of standing analysis).

43. See Caruso, *supra* note 3, at 66-68.

44. See *id.* at 68-69, 69 nn.53-55.

45. See *id.* at 69-70, 70 n.56; see also, e.g., *United States v. Walker River Irrigation Dist.*, No. 3:73-cv-00128-RCJ-WGC, at *6-8 (D. Nev. May 28, 2015) (CaseText) (denying a county

noted, there is little to recommend the fetishizing of states' historic sovereignty in modern federalism doctrine, as it poorly reflects current federal-state (and by extension, state-local) governance relationships.⁴⁶ Unfortunately, federal courts' adherence to old discourse around state sovereignty pervades the doctrine relating to governmental standing; this Essay will largely take such arguments on their own terms so as to provide practical guidance for prospective litigation.⁴⁷ And in litigation, the best that a non-sovereign city can often now hope for is a court that will broadly define a city's proprietary interests as encompassing community welfare in some way. A few cases do just that—making proprietary interests include any injury to the “city itself,” in ways that verge on (if not veer into) sovereign or quasi-sovereign interests.⁴⁸

parens patriae standing).

46. See, e.g., Kathleen S. Morris, *Rebellious Localism* (forthcoming 2021) (on file with author) (manuscript at 39-44) (noting that under the constitutions of a supermajority of states, the people and not the state government are sovereign, and arguing that that shorthand way of describing state and local power—by focusing on state or local government entities rather than as state and local-level agents of a sovereign populace, or how the work of governance operates in practice—contributes to distorted and misleading understanding of federal-state-local relationships); Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2014); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

47. Cf. Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2137 (2019) (“Given the mutable and elusive nature of sovereignty as a conceptual matter, it was probably inevitable that any effort to create a doctrinal rule for state standing rooted in that concept would generate confusion and instability. As a result, even if the notion of ‘sovereignty’ can provide a comforting verbal touchstone for analysis of state standing, it is unlikely to shed any meaningful analytic clarity on the matter.” (footnote omitted)).

48. See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (noting that a municipality's “proprietary interests” include “its ability to enforce land-use and health regulations,” tax, and protect natural resources); *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1188 n.15 (D.N.M. 2020) (in a city and state's challenge to a federal policy that sent the city hundreds of “unassisted asylum seekers” weekly, denying the city *parens patriae* standing but finding standing based on “harm to the city itself” in its obligation to protect residents from “health and safety crises.”). For an excellent discussion of the deceptive complexity of a state's “proprietary” interests, see Seth Davis, *supra* note 33. As some scholars have noted, however, public corporations like cities may often be subjected to a narrower vision of their rights even than their private counterparts, despite their broad responsibilities. See, e.g., Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591 (2020); Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 70 (2018) (“So too the public/private distinction makes it difficult for a city *qua* city to assert that private actors are threatening its peace and security.”).

C. Associational Standing

As an alternative to *parens patriae* standing, I previously argued that cities should be able to avail themselves of associational standing—the doctrine that groups and associations like, famously, the NAACP, use to represent their members in federal court.⁴⁹ This form of standing is explicitly representational, depending on harm to members and not to the entity itself.

In the leading case on associational standing, *Hunt v. Washington State Apple Advertising Commission*,⁵⁰ 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."⁵¹ The commission in that case was state-created, with legally mandated "members."⁵² Even so, the Court found that 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 "[t]hey alone elect[ed]" commission members, were eligible to serve as commissioners, and "finance[d] its activities" through levied assessments.⁵³ The Court observed that the members used the commission to express and protect their interests and that the commission itself would be affected by the litigation, which ensured "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions."⁵⁴

49. See *supra* notes 8-9 and accompanying text.

50. 432 U.S. 333 (1977).

51. *Id.* at 343.

52. *Id.* at 344-45.

53. *Id.*

54. *Id.* at 345 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

II. MUNICIPAL ASSOCIATIONAL STANDING

A. *Where We Started*

I previously argued that cities straightforwardly, if not intuitively, fit the *Hunt* associational standing criteria.⁵⁵ Specifically, I argued that while we may not intuitively refer to city residents as members of their city, cities do serve a geographically specialized segment of the community,⁵⁶ and “[i]n a very real sense ... provide[] the means by which the[ir residents] express their collective views and protect their collective interests.”⁵⁷

Moreover, I argued that city residents possess the indicia of membership described in *Hunt*: they pick and comprise the city leadership and fund city activities through their taxes and fees.⁵⁸ If its residents are injured, then, the city should be able to show that it has at least one “member” with standing.

And again, although we do not generally talk about the “purpose” of a city, these public corporations have myriad powers and obligations under state statutory, constitutional, common, and local law that can be proved to a federal court.⁵⁹ When a city shows that it has a legal purpose that is germane to the suit, it will also assure the court that the city’s own interests are at stake, too.⁶⁰ And in injunctive cases over which there is no profound intra-city conflict, a city may very well be able to show that no participation by individual city residents will be required.⁶¹

This overview suffices for us to consider new critiques and developments in the area of city representational standing. For the sake of brevity, I will not repeat here all the details of the normative case for city representational standing or all of the fine points about associational standing doctrine that map onto city structures and their relationships with their citizens. To those interested in the

55. See Caruso, *supra* note 3, at 74-75.

56. See *id.* at 75-78.

57. *Hunt*, 432 U.S. at 345.

58. Caruso, *supra* note 3, at 77-78.

59. See *id.* at 81-82.

60. See *id.*

61. See *id.* at 80-81.

fuller consideration, I refer you to my initial essay⁶² and the subsequent analysis by Professor Sarah Swan.⁶³

B. A City Is Not an All-Purpose Litigant

Recently, Professor Heather Elliott argued that municipal associational standing creates constitutional problems underrecognized in my prior article—essentially, it would risk granting too much standing.⁶⁴ As an initial matter, we appear to agree that associational standing plausibly creates an avenue for more city standing in federal court.⁶⁵ We have also both considered that courts may seek a limiting principle to avoid granting potentially broad municipal associational standing;⁶⁶ Professor Elliott, though, has helpfully identified one possible doctrinal framing for that risk.⁶⁷ She argues that allowing cities (and some other large, broad-purposed associations) to invoke broad associational standing is in “conflict” or at least “serious tension” with another important standing principle—the ban on “pure private attorneys general”⁶⁸ for whom Article III standing requirements impose no meaningful limit. She raises important questions about the limits of municipal associational standing and how we define who belongs in a city, a challenge I take up in part below. Ultimately, however, I find that concerns over the scope of city standing need not dash our hopes for responsibly applied municipal associational standing.

The Supreme Court has generally said that private parties may not be pure private attorneys general—that is, they may not bring cases without having suffered a cognizable injury (or representing

62. Caruso, *supra* note 3.

63. Swan, *supra* note 4.

64. Elliott, *supra* note 18, at 1333-34.

65. *Id.* at 1381 (“*Hunt* permits at least some, and perhaps many, organizations and municipalities to act as nearly pure private attorneys general.”).

66. See Caruso, *supra* note 3, at 82.

67. See Elliott, *supra* note 18, at 1333.

68. *Id.* at 1333-35, 1380. Analogous concerns have recently been raised about state standing—that applying standing tests meant for private litigants to states results in too much standing. See, e.g., Woolhandler & Collins, *supra* note 6, at 2023-24, 2028-29. I find these arguments interesting but unpersuasive; the number of an entity’s otherwise-valid interests should not trigger special rules to keep them out of court.

someone who has).⁶⁹ Professor Elliot contends that cities' size (that is, the number of "members" from which a city might draw a harmed person to support standing) and broad array of municipal "purposes" combine under associational standing doctrine to make cities functionally unconstrained, nearly pure private attorneys general in a way that is inconsistent with Article III.⁷⁰

1. Membership: The Limits and Risks of Defining Who Belongs

a. Who Counts as a Member?

As noted above, where an entity is not organized as a membership organization, it may still invoke associational standing if, functionally, the "specialized segment" of the population that it serves "possess all of the indicia of membership in an organization."⁷¹ The *Hunt* Court identified several "indicia of membership": the de facto members "alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of [a] lawsuit, through assessments levied upon them."⁷² Lower courts have added to or broadened these indicia, for

69. Elliott, *supra* note 18, at 1333; see *Sierra Club v. Morton*, 405 U.S. 727, 736-39 (1972) (noting that public interest cases still require cognizable injury, as do organizations, as "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to" establish a claim under the APA).

70. See Elliott, *supra* note 18, at 1366-67, 1378-79 ("[B]ecause associations have standing wherever their members have standing, associations may base their standing on the risks that their members face.... That organization will thus be able to satisfy *Hunt* if it can satisfy the germaneness prong; the broader the organization's purpose, the more likely it will have associational standing."). She concedes that cities are not exactly "private" attorneys general. See *id.* at 1371 n.242, 1378 (describing a litigating city as a pure "private" attorney general "at least in the sense that it is not the attorney general of the United States" or a state). It suffices for present purposes to treat them as such, as I have largely argued that cities must be prepared to invoke associational standing on the same footing as any private entity. But as Professor Young observed of state standing, while Justices and critics complain of "private attorneys general" and class counsel as unaccountable, governments suing for their citizens are not. Young, *supra* note 42, at 1923-24.

71. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977).

72. *Id.* at 344-45; cf. *AARP v. EEOC*, 226 F. Supp. 3d 7, 17-18 (D.D.C. 2016) (noting the limited extent to which members generated the AARP's budget and controlled its activities but finding that sufficient for standing for the membership organization). See generally Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2075-77 (2019) (arguing that states meet the indicia of membership).

example, adding the voluntariness of membership⁷³ and other accountability mechanisms between clients or members and the organization.⁷⁴ These cases suggest a somewhat flexible analysis, but one that strongly (and in some circuits, exclusively) centers on whether “members” can guide the association’s activities, comprise and select its leadership, and finance its work.⁷⁵

I concede that it is not intuitive to think of city residents as “members” of a city.⁷⁶ But intuition will not do as a substitute for careful comparison, and as I and others have noted, cities are legally, practically, and sometimes emotionally salient representatives of their residents.⁷⁷ “[C]ities ... are constituted by their obligation to respond to community concerns and to care for their residents”;⁷⁸ they exist almost exclusively to serve their residents, and their leaders are directly elected to that end. They are, at their core, agents of the public as a whole. Perhaps unsurprisingly, then, many people do affiliate with their hometowns and expect those places to protect them and pursue their best interests.⁷⁹ Indeed, Professor Sarah Swan has argued that bringing affirmative litigation to protect residents’ well-being can itself be part of a city’s “statebuilding” efforts—that is, the ways it constructs itself as a legitimate political entity and community.⁸⁰

73. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) (treating this indicator as helpful, though obviously not required in light of *Hunt*).

74. *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110-12 (9th Cir. 2003) (granting standing based on other indicia, where a protection and advocacy organization was not funded by client/members and they did not exclusively control the organization or comprise its board). *But cf.* *Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 157-58 (2d Cir. 2012) (noting split of authority over whether such organizations qualify).

75. *See, e.g., Am. Legal Found. v. FCC*, 808 F.2d 84, 90-91 (D.C. Cir. 1987) (rejecting standing). *Compare* *NAACP v. Harris*, 567 F. Supp. 637, 640 (D. Mass. 1983) (allowing standing on behalf of the NAACP’s historic “constituency” as distinct from its membership, notwithstanding the indicia), *with* *Hope, Inc. v. County of DuPage*, 738 F.2d 797, 814-15 (7th Cir. 1984) (refusing to extend standing based on injuries to a constituency rather than members).

76. *See Elliott, supra* note 18, at 1373; *see also* *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002) (rejecting the idea that cities have voluntary members, asserting that the City was simply “attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*”); *Prince George’s County v. Levi*, 79 F.R.D. 1, 5 (D. Md. 1977) (similar).

77. *See Caruso, supra* note 3, at 77.

78. *Mendelson, supra* note 14, at 256.

79. *See id.*

80. *Swan, supra* note 4, at 1284-85.

But even if I am right, this does not fully answer Professor Elliott's concerns; she rightly asks, who specifically, among those who live, work, or otherwise spend time there, is a city "member?"⁸¹ That question has several parts.

i. Better Together

The first question is—at what level of generality will the court consider the question? Will it accept evidence that the city's residents *as a group* exhibit the indicia of membership? Or will it require the specific individuals that the city claims are harmed (for purposes of showing that a member has Article III standing) to satisfy many or all of those indicators?

This difference matters: if the city must identify individual residents who both satisfy all the indicia and suffer the relevant Article III injury, perhaps the pool from which even big cities can draw is smaller than we might first imagine. Worse, if that is the case, a city may be unable to protect significant portions of its population—especially those least able to protect themselves, as discussed at greater length below.

Primarily, then, a city looking to invoke associational standing should vociferously frame the analysis as whether its residents *collectively* meet the standard—comprising, electing, and guiding city leadership, and financing municipal activity through taxes and fees. And, indeed, this collective approach seems the most consistent with *Hunt*: there, the Court did not, for example, focus on whether any particular grower relied on the association to represent its views regarding grading or interstate marketing.⁸²

A skeptical court, however, might require a city to show that the specific people on which it relies for Article III standing satisfy the *Hunt* indicia.⁸³ In that case, the analysis gets more challenging, and cities may be less able to invoke the interests of everyone in their communities.

81. Elliott, *supra* note 18, at 1373-76.

82. See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343-44 (1977).

83. See, e.g., *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 209-11 (D.D.C. 2007) (examining the named individuals' indicia of membership in the litigating organization).

ii. Leadership Participation, Selection and Guidance

City residents collectively select and direct their leadership as required by *Hunt*. If a court assesses membership at the city-wide level, a city can show that its residents both comprise and choose its leadership. Elected officials will at least generally be responsible for authorizing the suit and can be held to account by residents for it. Notwithstanding dismal rates of participation in municipal elections,⁸⁴ this level of community involvement surely exceeds that of many nonprofits that have been given associational standing.

If a court rejects a community-level assessment, however, this criterion will narrow who counts as a member. On this more restrictive interpretation, “members” might only include those who can vote in the municipal elections most relevant to the suit (e.g., for the City Attorney, Mayor, or Board of Supervisors, depending on how the suit is authorized). And if membership is tied to voting eligibility, the relevant members would generally seem to be adult residents, and likely only U.S. citizens, depending on the city’s voting rules.⁸⁵ Members might also include participants of any relevant city advisory board or committee, but certainly will not include the entire city, if city residents are disaggregated for the purpose of the standing analysis.

iii. Financing City Activity

The question of whether members finance city activities is also fairly straightforward at the community level. It is true that cities derive funding from many sources, including the federal government,⁸⁶ in addition to their residents. However, *Hunt* appeared to

84. A research team at Portland State University compared voting rates in local elections across cities and concluded that local voting rates are “abysmally low.” See Carson Gorecki, Stephanie Hawke, Phil Keisling, Jason R. Jurjevich, & Kevin Rancik, *Who Votes for Mayor?*, URB. STUD. AND PLAN. FAC. PUBL’NS AND PRESENTATIONS (2016), https://pdxscholar.library.pdx.edu/usp_fac/166 [<https://perma.cc/M4PJ-62WS>].

85. Wiseman, *supra* note 48, at 647, 649 (noting that “some municipalities ... allow noncitizens and sixteen-year-old[s] ... to vote” and that cities “generally only speak for the voting residents within their boundaries,” though some states allow municipalities to let nonresidents vote on some issues).

86. See, e.g., THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER, PRELIMINARY COMPTROLLER ANALYSIS: FEDERAL FUNDING AND NEW YORK CITY’S BUDGET (2016), <https://>

focus on financing at least in substantial part because of its role in member accountability, so probably not *all* funding need come from members.⁸⁷ Moreover, many nonprofits and associations likewise receive at least some grant or other funding.⁸⁸ Generally, then, cities' revenue schemes should favor a finding that residents are city members.⁸⁹

But again, things are slightly more complex at the individual-member level. Not everyone eligible to vote, for example, will pay much in taxes. Even where there is a local income tax, the poorest community members may have little income and owe no taxes. But if paying nothing satisfies their local tax obligations, they should still be construed as meeting this criterion—after all, other associations may offer free membership but request contributions or charge a membership fee on a sliding scale.⁹⁰

Even apart from income taxes, most residents pay into city coffers in some non-negligible way; they likely pay more in local sales taxes, parking and other municipal service fees than they would to be a member of many private associations.⁹¹ The precise contours of this analysis will depend on the structure of local taxes and fees, but, if needed, showing that a city's injured members contribute to the city budget should be straightforward in many cases.

iv. Voluntary Association

Some courts have considered voluntariness of participation to be a helpful but optional indicator of membership beyond *Hunt's* listed

comptroller.nyc.gov/wp-content/uploads/2016/11/Federal_Budget_Vulnerabilities_Memo.pdf [<https://perma.cc/PG25-Y478>].

87. *See, e.g., Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110-11 (9th Cir. 2003) (granting associational standing despite the protection and advocacy system's receiving most of its funding from the federal government.).

88. *See, e.g., id.*

89. Non-residents, even if taxpayers, are unlikely to be members in many cases: for example, a commuter who pays commuter taxes and local sales taxes on purchases she makes there will for most purposes still not count. *Cf. Elliott, supra* note 18, at 1375 (asking whether commuter-taxpayers will count).

90. *Cf. AARP v. EEOC*, 226 F. Supp. 3d 7, 17 (D.D.C. 2016) ("Members play a role in financing AARP's activities ... through the payment of membership dues, although ... not all AARP members are required to pay dues, as some members' dues are included in a spouse's membership.").

91. Particular thanks to Jill Habig for pressing me on this point.

few.⁹² And although parts of local government law and theory have long centered on the notion that municipalities compete for residents, it would be a gross exaggeration to say that people can leave their cities as easily as they can quit, say, AARP.⁹³ Merely living and continuing to live in a city is no assurance of total voluntariness if one is practically or financially unable to move. Especially if the city must define members at the individual level, residence is an especially weak signal of voluntary membership.

Even so, if this factor is anything, it is positive. Voluntariness is absolutely doctrinally optional, given that the membership in *Hunt* was legally mandated; a weak signal of voluntariness is thus perhaps a weak doctrinal plus.⁹⁴ At the end of the day, what cities may lack in voluntariness relative to other associations, they likely gain in (democratic) accountability, which is fundamental to the *Hunt* analysis.⁹⁵

* * *

All told, cities should argue that the indicia of membership should be analyzed at the community, rather than individual, level. They must also, however, be prepared to concretely identify who among their residents meet the indicia of membership relative to the suit in question. Though there may be some room to argue for additional indicia (like voluntariness) to factor into the analysis, cities should expect to have to show that they meet at least all or nearly all of the *Hunt* factors.

92. See, e.g., *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997).

93. See Caruso, *supra* note 3, at 76 & nn.94-95 (noting that the idea of competing for residents has pervaded local government cases and scholarship and the controversy over how voluntary these associations really are); Elliott, *supra* note 18, at 1374 n.260 (noting that the assumptions about voluntariness and exit options may be far less realistic for poorer and lesser-advantaged residents of a community).

94. See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (“Nor do we find it significant in determining whether the Commission may properly represent its constituency that ‘membership’ is ‘compelled’ in the form of mandatory assessments.”).

95. Cf. Wiseman, *supra* note 48, at 650 (“[M]unicipalities arguably provide more opportunities for members to voice objections, whereas shareholders can arguably more easily exit a traditional corporation than a municipality.”).

It is undoubtedly true, as Professor Elliott notes, that big cities could have a deep pool of residents from which to identify injured members.⁹⁶ But it is possible (though, I think, misguided) that a court could decide to conduct the indicia of membership analysis focused just on those harmed individuals. This seems particularly likely if a city is relying on a harm to one or a very few of its residents. But as we have seen, a city is ill-advised invite such a tighter focus in the mine run of cases; such a narrow view of which members should “count” is not compelled by *Hunt* and seems less (not more) likely to lead to a grant of city standing in some cases.

b. How Many Members Is Enough?

The Supreme Court’s standing cases say that one member with an Article III injury suffices to support associational standing.⁹⁷ Despite the challenges outlined above, there may be a city that opts to pursue an associational case based on harms to just one resident. Even if that city successfully establishes the requisite *Hunt* indicia of membership, the city, especially if it is large, should expect judicial skepticism elsewhere in the associational analysis as well.⁹⁸ While the precise status of the various third-party prudential standing limitations in federal court remains unclear,⁹⁹ we can still expect courts to closely scrutinize a claim brought by a city of, say, nine million people to vindicate the interests of just one.

Professor Elliott seems to view the number of potential “members” from which to identify an affected person and the number and breadth of municipal purposes as layers of weak limitation that combine to create an essentially meaningless restraint.¹⁰⁰ However, we might equally expect them to operate in tandem the opposite way. A court may, for example, be *less* willing to decide that a

96. See *supra* note 70 and accompanying text.

97. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

98. See, e.g., *Telecomms. Rsch. & Action Ctr. v. ALLNET Commc’n Servs., Inc.*, 806 F.2d 1093, 1095-96 (D.C. Cir. 1986); *Action All. for Senior Citizens of Greater Phila. v. Shapp*, 400 F. Supp. 1208, 1213 (E.D. Pa. 1975) (granting standing to seek injunctive relief to benefit 6 of 3,500 members, but noting that “we might feel more confident of [the association's] taking a vigorous, adversarial stance had plaintiff been able to identify more members adversely affected by the Act”).

99. See *supra* notes 22-27 and accompanying text.

100. See Elliott, *supra* note 18, at 1378-80.

dispute is germane to a city's purpose when the problem only affects a single resident; it might either discard the suit altogether as not germane or require the city to show an explicit state law giving it a very specific purpose or interest justifying the suit.

2. *Municipal Purposes Have Meaning, and Limits*

a. *Municipal Purposes Are Set by State and Local Statutory, Regulatory, Constitutional, and Common Law*

Municipalities do a lot. Those many municipal powers and functions are largely determined by state statutory, constitutional, common, and local laws validly adopted pursuant to those powers.¹⁰¹ Many, if not most, cities have at least some type of broad “police power” to protect the health and welfare of those within their jurisdiction, on top of myriad explicit responsibilities allocated by more specific state laws and regulatory schemes.¹⁰² Just as scholars have argued when considering the breadth and diversity of states' interests, however, the very fact that cities have so many different authorities and responsibilities does not lessen their obligations under, or commitments to, any of them.¹⁰³

How a city will prove that a given suit is germane to its purposes will vary by issue and case. Often, I expect, it will be by pointing to an eclectic mix of state and local law—in some cases, determined by state constitutional powers or unfunded state mandates; in others, by local ordinances. Those powers and duties, when matched to what a city is *actually doing* to help its residents, well support standing; in *Hunt*, after all, the Court returned to the impacts the Commission would suffer itself as reassurance that standing was appropriate.¹⁰⁴

101. See Caruso, *supra* note 3, at 81-82.

102. See *id.* at 81-82, 82 n.123.

103. See Young, *supra* note 42, at 1902 (“[S]tate litigants engage in a broader range of activities than most plaintiffs. But ... the burden should be on opponents of state standing to explain why those differences are relevant to the basic principles of Article III.”); Crocker, *supra* note 72, at 2072 (“[T]he fact that states' proprietary interests are so diffuse that a host of federal-government actions could cause them injuries does not make those injuries generalized grievances.”). *But cf.* Woolhandler & Collins, *supra* note 6, at 2024 (expressing concerns that states have nearly limitless interests that, if injured, could support standing).

104. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977). Whether those

City purposes, explained this way, are broad and varied, but do not cover the waterfront. The robust scholarship on federal and state preemption of local action itself suggests as much.¹⁰⁵ Moreover, the idea that city purposes are a category without meaningful boundaries discounts the fact that a city's legal interest in an issue is a function of both power and process. Such a view ignores state-government actors' pervasive structuring, monitoring, and editing of areas of local authority and discretion (including cities' ability to litigate), to which a recent wave of scholarship regarding "hyper preemption" bears witness.¹⁰⁶ Nor is litigation an area where states hesitate to step in; indeed, some states opposing cities' affirmative litigation have adopted laws specifically blocking certain kinds of city cases.¹⁰⁷

Professor Elliott, too, acknowledges that it is unlikely that municipal associational standing is so broad that a city could bring absolutely any suit it wished, and so the doctrinal friction she identifies is not an absolute conflict.¹⁰⁸ Even so, she argues, the conflict ought to be remedied "given the Court's separation-of-powers rhetoric and the emphasis it has placed on a strict doctrine of standing," and given that "it violates our ideas of the rule of law that courts would simultaneously prohibit and allow an action."¹⁰⁹

efforts could give rise to standing under other theories is beyond the scope of this Essay. *Cf.*, *e.g.*, *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1018 (N.D. Ill. 2019) (relying on *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976), to conclude that a municipality can claim standing under the diversion of resources theory of organizational standing).

105. *See, e.g.*, Swan, *supra* note 12.

106. *See, e.g.*, Erin Adele Scharff, *Hyper-Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018).

107. Savit, *supra* note 18, at 589-93 (noting that states preempt affirmative city litigation through direct legislation, by preempting local regulation that could support enforcement suits, and through their own litigation); Swan, *supra* note 12, at 1246-56 (discussing state preemption of city litigation through examples of preclusive settlements, litigation, and legislation).

108. Elliott, *supra* note 18, at 1392 (acknowledging that the issue "may be [just] short ... of a true conflict" such that it "need not be fixed").

109. *Id.* at 1393 (footnote omitted). Professor Fred Smith has recently and persuasively argued, however, that the increasing constitutionalization of prudential standing principles in fact stifles Congress's ability to play its constitutional part in defining the role of the courts. *See* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 878 (2017). That debate well exceeds the scope of this Essay. However, it bears noting that Professor Smith's work suggests, at least, that the strict notions of standing to which Professor Elliott refers are not an automatic constitutional good.

C. Municipal Associational Standing Is Manageable and Appropriate

Professor Elliott has helpfully described the tension between the potentially numerous and varied cases in which a city could validly claim associational standing and the need to guard against unconstrained “pure private attorneys general.”¹¹⁰ Looked at from a distance and in the abstract, the conceptual tension is indeed concerning. Looked at in the context of actual litigation, though, with demonstrated harms and specific municipal purposes affected by them, it becomes far less alarming.

Consider a case in which a city invokes associational standing: it identifies a specific harm to its residents, shows that the harm affects the city’s own well-being, and articulates which of its local powers and responsibilities make that harm “germane” to a legitimate city “purpose.” The need to avoid creating a pure private attorney general will doubtless be raised by the defendant in an effort to defeat standing, and that need offers the court an outer limit to when it should validate city standing. Like any plaintiff, the city will have to convince the judge that its interests are real, substantial, and cognizable and that it is no roving enforcer of the law. This is the bread-and-butter stuff of a skilled litigator, though, and necessitates no doctrinal overhaul.

There likely will be cases in which the connection between claim and city purpose is too attenuated to convince a court to read standing doctrine generously in the city’s favor. I doubt any of us will agree with every ruling on whether a city gets associational standing, as amply demonstrated by the differing attitudes of the Seventh and D.C. Circuits in *City of Milwaukee v. Saxbe* and *City of Olmsted Falls v. FAA*.¹¹¹ Given the range of acceptable outcomes in even a well-designed doctrine, however, the problem with *Olmsted Falls* is not the result—it is that the analysis is based on instincts about cities rather than a careful consideration of the state law that constructs what a city is “for.”

110. Elliott, *supra* note 18, at 1333-35; *see supra* notes 64-70 and accompanying text.

111. *Compare* *City of Milwaukee v. Saxbe*, 546 F.2d 693, 698-99 (7th Cir. 1976), *with* *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002).

There is, in sum, no great need to dispense with municipal associational standing to avoid creating thousands of pure private attorneys general. No judge will ever have to decide which doctrine wins out—only where on the spectrum of interests, from directly injured to freewheeling private attorney general, the city's role in a particular case lies. But the ordinary filtering processes of litigation are more than up to the task of addressing edge cases where a city might push too far; we need not discard an entire avenue of standing to guard against that risk.

III. PATHWAYS TO CITY STANDING

It is worth pausing here to consider the stakes of this debate. Does it matter, really, whether a city can bring a representational case in federal court?¹¹² In practice, there are relatively few cases—especially against private parties—in which a city's case really *needs* to be in federal court,¹¹³ and cities can often get around a lack of federal standing by, for example, partnering with a nonprofit whose standing is more certain¹¹⁴ or bringing the case in state court. There will be some cases where it matters, of course: for example, if a city wants to sue the federal government,¹¹⁵ invoke certain federal statutes, or to intervene in litigation to seek different or better relief for its residents.¹¹⁶ But in most representational suits it will not.

In that sense, the potentially greater risk posed by federal cases that limit city standing is that the rationale of those cases may be contagious. Enough state courts follow federal standing precedents

112. *Cf.* Caruso, *supra* note 3, at 97 (rejecting the idea that city suits belong just in state court).

113. *See generally* Robert A. Mikos, *Standing for Nothing*, 94 NOTRE DAME L. REV. 2033 (2019) (arguing that states rarely actually need standing in federal court to protect their own laws).

114. *See* Caruso, *supra* note 3, at 71.

115. Some have understandably expressed concern about the trend toward resolution, and constitutionalization, of federal politics and policy through federal litigation. *See, e.g.*, Ernest A. Young, *supra* note 42, at 1918-21. Even if this is a problem, however, a unique disadvantage imposed upon cities relative to other parties hardly seems like the solution. *Cf. id.* at 1919-20 (making a parallel point regarding state standing). Suits against the federal government, like suits against a city's own state, will present federalism challenges that may require issue-by-issue consideration.

116. *See* *Town of Chester v. Laroe Ests.*, 137 S. Ct. 1645, 1648 (2017).

that such logic may spread back into state court—where cities should have the best shot at a good, hard look at city interests pursuant to state law.¹¹⁷ It is worth it, then, to encourage federal courts to do a better job of accounting for cities in standing doctrine, particularly where it can impact city residents’ access to justice *vel non*.¹¹⁸

So, how federal courts treat city standing matters. Given that, even if associational standing is one route to federal court, we should examine all avenues to get cities there. Standing doctrine generally has long been criticized as messy, irrational, ahistorical, and even misleading.¹¹⁹ And despite late Justice Scalia’s attempt in *Lexmark* to clarify parts of prudential standing,¹²⁰ I share others’ skepticism that a wholesale rationalization of standing doctrine is on the near horizon.¹²¹ Certainly, it seems that a clear, predictable standing mechanism for cities to bring representational cases would be preferable to current affairs. In that spirit, let us briefly consider other recent proposals for modest reforms to bring cities reliably and successfully into federal court, and how they might compare with municipal associational standing.

A. Statutory Enforcement Power

Professor Kathleen Morris, among others, argues that the best way to let cities bring impact cases is to give them statutory enforcement authority (especially in consumer protection laws).¹²² With this approach, cities generally need not build huge factual records to support standing, harm, and causation; instead, the case focuses on whether the defendant’s conduct is lawful.¹²³

117. See, e.g., *Coldsprings Township v. Kalkaska Cnty. Zoning Bd. of Appeals*, 755 N.W.2d 553, 556 (Mich. Ct. App. 2008) (following federal standing analysis in *Olmsted Falls* and rejecting associational standing); *Tuma v. Kerr County*, 336 S.W.3d 277, 281 (Tex. Ct. App. 2010) (rejecting without analysis the notion of a county as an “association of individuals” given standing by statute).

118. See generally Habig & Pearl, *supra* note 10, at 1162-65.

119. See Elliott, *supra* note 18, at 1334-35, 1334 n.17.

120. See *supra* notes 24-26 and accompanying text.

121. Elliott, *supra* note 18, at 1383-85.

122. See Morris, *Expanding Local Enforcement*, *supra* note 18, at 1907-08; Morris, *supra* note 1, at 203.

123. See Morris, *supra* note 1, at 203.

This is by far the tidiest resolution, where the legislators are willing, and the harm is covered by statute. It should be sought whenever possible, particularly in public rights laws. Interesting federalism questions arise when the *federal* government directly empowers a city,¹²⁴ but enforcement authority should be broadly sought in both federal and state statutes. Absent legislative cooperation, though, and for harms not covered by statute, other broad, flexible standing theories will still be required.

B. A Return to *Parens Patriae*

Professor Eli Savit recently argued for individual states to remedy standing gaps by expressly delegating to cities *parens patriae* authority to sue.¹²⁵ The Supreme Court has not allowed states to delegate their sovereign interests to just any private party, instead concluding (on one reading, anyway) that each state is free to choose which of its *officials* or true agents may represent its interests in court.¹²⁶ Accordingly, to benefit from delegated *parens patriae* authority, a city must define itself to the court as merely an arm or agent of the state.¹²⁷ That description of local power is persuasively

124. See Morris, *Expanding Local Enforcement*, *supra* note 18, at 1926-27; Morris, *Local Constitutional Enforcement*, *supra* note 18, at 6-7, 43 (objecting as a constitutional and historical matter to the idea of state plenary control of city powers and noting one theory of federalism that would exclude federal involvement in state-local relationships); Davidson, *supra* note 46, at 960-61; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) (analyzing whether “the federal government [must] take state institutions as it finds them, or can ... expand these institutions’ powers even in the teeth of state laws that seem to” preclude such an expansion); Bendor, *supra* note 9, at 421-22 (arguing that federal supremacy allows federal delegations of powers to cities even over state objections).

125. Savit, *supra* note 18, at 608-09.

126. Cf. *United States v. Walker River Irrigation Dist.*, No. 3:73-cv-00128-RCJ-WGC, at *6 (D. Nev. May 28, 2015) (CaseText) (“The Idaho Supreme Court has ruled that a state statute providing county prosecutors with the duty to ‘prosecute or defend all actions ... in the district court of his county in which the people, or the state, or the county, are interested’ provides county prosecutors with standing to assert the public’s right to recreation on private land. Because municipalities are not sovereign, however, absent such a statute explicitly providing standing, they cannot bring *parens patriae* suits on behalf of their residents.” (citation omitted)). Compare *Hollingsworth v. Perry*, 570 U.S. 693, 712-13 (2013) (concluding that delegating a state’s interest in the enforceability of its law was not enough to confer standing on a private party absent a proper agency relationship or an otherwise cognizable injury), *with id.* at 715-17 (Kennedy, J., dissenting) (debating this point).

127. Savit, *supra* note 18, at 609-10.

contested as a practical and doctrinal matter and as a matter of state constitutional law and history,¹²⁸ but may present distinct advantages in practical terms for establishing standing in federal court under current doctrines.¹²⁹

Delegated *parens patriae* reverses the challenges and strengths of associational standing. The city would have to emphasize its public rather than its corporate attributes in litigation.¹³⁰ *Parens patriae* standing more closely matches our intuitions about cities, but would require an express, litigation-directed delegation from the state to overcome the weight of precedent holding that being an arm of the state *prevents* rather than *enables* cities' exercise of *parens patriae* standing.¹³¹ Of course, one could argue that, even absent an explicit delegation, when states share some of their caretaking and governing interests by giving cities autonomy (or by enmeshing them in a state-local governance framework), a corresponding portion of the state's *parens patriae* power should follow. Unfortunately, courts have often, though not always,¹³² been unmoved by similar claims. An express delegation in some form is, therefore, probably required for success.

Professor Savit's proposal, therefore, is contingent on support from state-level actors. It is likely more attainable than state statutory standing, however, as it can require support from fewer actors: Professor Savit argues that the delegation could come either as a statute *or* unilaterally from an attorney general.¹³³ It is thus more politically dependent than a claim of associational standing, though less so than statutory standing. Conversely, if adopted by a unilateral (and presumably revocable) delegation, it may be less

128. See, e.g., Morris, *Local Constitutional Enforcement*, *supra* note 18, at 32-34.

129. Caruso, *supra* note 9; see also Morris, *Local Constitutional Enforcement*, *supra* note 18, at 37 (“[A] legal rule that undermines [local] autonomy might simultaneously *enhance* [local] power, and vice versa.”).

130. That is to say, a city would have to emphasize its identity as an “arm of the state,” rather than as analogous to other corporate organizations or associations, to gain standing. Cf. Caruso, *supra* note 9 (suggesting the advantages of emphasizing municipalities' corporate natures, including in standing).

131. See *supra* notes 44-45 and accompanying text.

132. See *In re Del. Pub. Schs. Litig.*, 239 A.3d 451, 520-21 (Del. Ch. 2020) (recognizing that, under Delaware law, a city had *parens patriae* standing to sue on behalf of its residents due to its home rule authority).

133. Savit, *supra* note 18, at 611-12.

durable than statutory standing, but likely more reliable than associational standing, at least as the doctrine currently stands.

C. A Unified Theory of Standing for Organizations

Professor Katherine Mims Crocker's recent work on state representational standing suggests another intriguing alternative.¹³⁴ Highlighting the similarities between *parens patriae* and associational standing and between standing for state proprietary and private organizational economic harms, she argues that courts could unify all of these doctrines under the general umbrella of organizational standing.¹³⁵ Professor Crocker argues that the parallels between the doctrines should make us more comfortable with the seemingly broad and ill-defined standing that states have in federal court.¹³⁶ I would argue that such a unified approach to standing for organizations of all stripes should similarly increase comfort with broad local standing under either theory.¹³⁷

Professor Elliott has noted that this approach does nothing to ameliorate her concerns with potentially broad municipal standing.¹³⁸ But that objection misses the mark. Professor Crocker has offered an avenue for us to clearly define and articulate the differences between public and private associations as litigants and pinpoint precisely where in the standing doctrine those differences matter. If we avail ourselves of that opportunity, we will have a

134. Crocker, *supra* note 72.

135. *See id.* at 2070.

136. *See id.* *But cf.* Seth Davis, *supra* note 33, at 2121-23 (arguing that state representational cases may justify special disfavor *or* special solicitude in federal court).

137. Crocker and Elliott seem to agree that if localities can invoke associational standing, they have an advantage over states invoking *parens patriae* because the latter requires harm to a substantial portion of residents while the former needs only a single injured member. *See* Elliott, *supra* note 18, at 1376 (first citing Crocker, *supra* note 72, at 2079-80; and then citing Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 112-13 (2018)). As noted above, it is not clear that a court would find such a case germane to city purposes, *see supra* note 100 and accompanying text, nor is a city likely to commit resources to such a case. Moreover, as Crocker notes, it is not clear whether the multiple affected residents under *parens patriae* must have an Article III injury; it could be that the standards have offsetting advantages, requiring, respectively, fewer members with Article III injuries versus more members with more abstract harms. *See* Crocker, *supra* note 72, at 2078-79.

138. Elliott, *supra* note 18, at 1376 n.266.

better way to account for standing for cities—potentially a way that accounts for their complicated public-but-not-sovereign nature.¹³⁹ Given an integrated theory of standing for public and private associations, the ban on private attorneys general seems even less sensibly to apply to cities.

CONCLUSION

People matter to their cities, and cities often matter to their people. Recent trends nationally show that local voices remain urgently needed to speak up for their residents, even as trends also show a mounting hostility to local impact litigation and standing. Cities will often hurt—albeit somewhat differently—when their residents do, and so have every reason to speak directly to both of those harms. Representational standing doctrines in federal court need not ignore that connection.

Our current structure for public protection litigation contains too little redundancy to withstand changes in circumstance and politics at state and federal levels, and as a result important public rights and norms go underenforced.¹⁴⁰ Adopting and recognizing a stable form of municipal representational standing and situating it clearly within the broader universe of representational standing, would afford the public additional assurance that someone can speak up for it. Although the mixed nature of the case law means that the question is hardly free from doubt, associational standing can and should remain a viable option for allowing cities to do just that.

139. This approach is different from the more pragmatic recommendation that I have made previously regarding the advantages to cities of embracing their identities as corporations rather than arguing for status as mini-sovereigns. See Caruso, *supra* note 9. I maintain that under present doctrine, cities are and should be able to claim associational standing on fundamentally the same terms as other associations. However, Professor Crocker's taxonomy, if it produces a refined standing doctrine that encompasses both associational and *parens patriae* standing, might be able to create space for cities to claim standing based on the fullness of their interests, simultaneously "public" and "private."

140. Habig & Pearl, *supra* note 10, at 1162-65, 1187-88.