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ABSTRACT

This Article addresses the role of local governments in the most American of activities: the lawsuit. During the last few decades, city litigation has grown more proactive, diverse, and prominent. Cities now frequently file lawsuits respecting the most notable issues of the day. Each of these suits involves specific policy concerns peculiar to its subject matter, but as a group—as a legal phenomenon—they all raise common, and disputed, doctrinal questions pertaining to standing, local preemption, res judicata, state immunity, and more.

When tackling these diverse doctrinal issues—sounding in both civil procedure and local government law—courts and scholars have failed to establish a coherent and principled approach. Such an approach is attainable, however, once one recognizes that at their core all the disparate doctrines applicable to city suits give voice to the same foundational questions: (1) what is the nature of the city's right to sue?, and (2) what is that right's scope? This Article answers these two questions.

First, this Article establishes the nature of the city's right to sue as inherent. For both conceptual and normative reasons, the defining element of cityhood has always been the city's status as a separate legal entity—its corporate personhood. Corporate personhood, in turn, is manifested through the right to sue and be sued. Cities' right to sue, therefore, persisted throughout Anglo-American legal history. Contemporary criticisms notwithstanding, city suits are not some newfangled tools of social reform.

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Second, this Article explains that because the right to sue expresses the city's separate status, its scope is limited to suits that protect the city's own separate interests as an entity—not simply the economic, political, or social interests of its residents. A city suit may serve, or even be motivated by, residents' interests, but it must also further an independent city interest. A city suit solely reflecting residents' interests undermines the social promise of the city as a distinct and collective body. Contemporary proponents' enthusiastic embrace of the city suit often misses this limitation.

Drawing the connection between the city suit and cityhood, this Article thus answers both the doctrinal and academic challenges of the day. It provides ready solutions to civil procedure and local government law problems that have bogged down courts, while offering a normative theory of the city suit firmly grounded in values associated with the law of the city on the one hand and with access to justice principles on the other. In so doing, it erects potential defenses for the city suit against challenges that might come from a federal judiciary hostile to public-interest litigation.

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INTRODUCTION

The opioid epidemic, climate change, COVID-19 mitigation measures, Trump's immigration policies, the gig economy, social media:[1] These days, almost all issues of public concern in the United States are finding their way into court. This judicialization of policy is hardly a new feature of American life.[2] After all, Alexis de Tocqueville was already remarking all the way back in 1835 that "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."[3]

What is striking about the recent cases is the frequent, and often leading, roles cities have played in them.[4] Thousands of municipal governments sued opioid manufacturers. Major climate cases were filed by cities across the country. The City of Little Rock sued the State of Arkansas for the right to impose a mask mandate, while the City of San Francisco sued the San Francisco School District to force it to hold in-person classes.[5] Multiple cities sued federal officers over the Justice Department's sanctuary cities policy.[6] The City of Chicago sued Uber for failing to disclose a data breach that affected passengers.[7]

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[1] *See, e.g., In re*: Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020) (opioids); City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (climate); City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018) (immigration); City of Portland v. Uber Techs., Inc., No. 3:14-CV-01958-SI, 2014 WL 7146927 (D. Or. Dec. 15, 2014) (gig economy); Complaint at 1, Seattle School District No. 1 v. Meta Platforms, Inc., No. 23-cv-00032 (W.D. Wash. Jan 6, 2023) (social media).

[2] *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001) (arguing that the United States relies on policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation far more than other economically advanced democracies).

[3] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 330 (Henry Reeve trans., 1835).

[4] *See supra* note 1; *infra* Section II.B (collecting these and additional cases).

[5] Andrew DeMillo, *Schools Sue and Mayor Defies Arkansas Mask Mandate Ban*, AP NEWS (Aug. 5, 2021), https://apnews.com/article/health-arkansas-coronavirus-pandemic-ae0138fb1dd07838ccb44ccf607789af; Jocelyn Gecker, *San Francisco Sues Its Own School District to Reopen Classes*, AP NEWS (Feb. 3, 2021), https://apnews.com/article/san-francisco-sues-own-school-district-9fa9cf285326935ce79b86c3c4c56774.

[6] Ryan Lucas, *Los Angeles Sues Justice Department, Joining Other 'Sanctuary Cities,'* NAT'L PUB. RADIO (Aug. 22, 2017, 6:58 PM), https://www.npr.org/2017/08/22/545352996/los-angeles-sues-justice-department-joining-other-sanctuary-cities.

[7] Press Release, Mayor's Press Office, Mayor Emanuel and State's Attorney Foxx File Lawsuit Against Uber in Data Breach Case (Nov. 27, 2017), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2017/november/UberLawsuitDataBreach.html.

The Seattle School District sued Meta for operating social platforms that are psychologically harmful to children.[8]

These lawsuits have not gone unnoticed. Commentators, a few academic writers, legislators, and, of course, judges, have all reacted to them. The ensuing debates about the legality of these suits have been heated, yet predictable. Critical commentators argue that city officials should not be able to use courts as an arena for scoring political points.[9] Critical state legislators promote blanket prohibitions on city action, often succeeding in passing laws to that effect.[10] City-suit proponents, on the other hand, mechanically dismiss all of these assaults as politically motivated.[11] To defend the lawsuits (and the policies they aim to promote), they invoke lofty values such as representation, community standards, and the common good.[12]

Current debates about city suits, in other words, are not debates about city suits. They are debates about free enterprise and regulation, nativism and

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[8] Gene Johnson, *Seattle School District Sues TikTok, Meta over Youth Mental Health Crisis*, USA TODAY (Jan. 9, 2023, 10:41 AM), https://www.usatoday.com/story/tech/2023/01/09/seattle-schools-sue-tiktok-meta-youth-mental-health/11017357002/.

[9] *E.g.*, Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 955–56 (2008) (arguing that litigation should not be used to pursue regulatory aims); Timothy Wheeler, *Litigation Without Justification Is Tyranny*, NAT'L REV. (July 24, 2003, 2:25 PM), https://www.nationalreview.com/2003/07/litigation-without-justification-tyranny-timothy-wheeler/ (arguing that the NAACP rightfully lost in its "frivoulous" case against gun manufacturers); Zell Miller, *Firearms Firms Need Protection*, BOS. GLOBE (July 29, 2005), http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2005/07/29/firearms_firms_need_protection/ (arguing that anti-gun tort cases have been brought by "big-city mayors who lack the will to get tough with criminals"); Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 910–11 (2004) (arguing that economic, political, and legal harms of public interest mass torts brought by governments outweigh the benefits); Michael I. Krauss, *Public Services Meet Private Law*, 44 SAN DIEGO L. REV. 1, 23–27 (2007) (describing the policy and legal "red herrings" that undergirded government suits against corporate tortfeasors).

[10] *See* MICH. COMP. LAWS § 28.435 (2000) ("[An] action by [a] political subdivision against firearm or ammunition producer [is] prohibited . . . ."); ARK. CODE ANN. § 14-1-403(a) (West 2015) ("A county, municipality, or other political subdivision of the state shall not adopt *or enforce* an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law." (emphasis added)).

[11] Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, *in* LIMAN PUB. INT. PROG., WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 51, 57 (2008).

[12] Jill E. Habig & Joanna Pearl, *Cities as Engines of Justice*, 45 FORDHAM URB. L.J. 1159, 1164–66 (2018); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J. L. REFORM 581, 583 (2019); Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232 (2018) (arguing that "city litigation is legally, morally, and sociologically legitimate"); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 39 (2012) ("Allowing localities to pursue constitutional claims would bring constitutional litigation closer to the People.").

inclusion, right and left. They are, often, debates about liberal cities' interaction with conservative states and the federal government. Consequently, pressing legal questions—respecting preemption, standing, and a host of other issues—go unanswered, replaced by unsupported claims that track the speaker's political proclivities.[13] Meanwhile, when courts take up any of these myriad legal questions, they often answer each within the narrow silo of that particular doctrine, without appreciating the unique attributes of city suits qua city suits.[14]

That is highly unfortunate. Not only does this siloing often lead courts astray doctrinally, but it also obscures how the seemingly technical doctrinal issues implicate the conceptual and normative idea of cityhood. The right to sue gives voice to cities' legal existence. Through the courts, cities effectuate the disparate goals the law seeks to promote through its original recognition of cities as legal entities. In excavating, adapting, and applying these principles to the challenges modern city litigation has wrought, this Article offers a better understanding of the connection between the city and the suit—and better answers to the disparate doctrinal problems that current trends in city litigation engender.

No matter its individual guise, no matter if originating in the realm of civil procedure or local government law, each doctrine the city suit implicates inevitably (and perhaps obviously) embodies an attempt to ascertain the suit's legitimacy.[15] The inquiry is always whether a city has a right to sue, and, if so, whether the city can exercise that right in the case at hand.[16] In other words, all the legal puzzles currently surrounding city suits can, and should, be treated as giving concrete form to these two questions: what is the nature of the city's right to sue, and what is that right's scope.

In approaching these two questions, it is helpful to realize that the current wave of city litigation forms part of a much broader, and entrenched, phenomenon. While debates about city litigation focus on the city-initiated "public interest cases" of the last few decades,[17] these cases represent merely one form of cities turning to the court system—and cities have turned to courts

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[13] *See infra* Part II.

[14] *See infra* Section II.A.1.

[15] *See infra* Sections II.A.1.a–b.

[16] A separate question this Article does not take up is who within the city has the right to initiate the suit. Issues can arise, for example, respecting the power of the mayor as compared to the power of the city attorney. These issues turn on the intricacies of state and local law beyond the scope of this project.

[17] *E.g.*, Swan, *supra* note 12, at 1230–31. This type of litigation is sometimes referred to as "affirmative litigation." *See, e.g.*, *Affirmative Litigation*, CITY ATT'Y OF S.F., https://www.sfcityattorney.org/aboutus/affirmative-litigation (last visited Feb. 20, 2023).

since time immemorial.[18] From the resultant body of law that has evolved for almost a millennium, this Article distills a legal principle that can answer the twin questions respecting the nature of the city's right to sue and its scope. That principle is that a city has a right to sue that is inherent but cabined by the city's interests.

The first element of this suggested principle—the contention that the city's right to sue should be understood as inherent—is drawn from undisturbed practices of Anglo-American law. Cities were accorded the right to sue at the time of their emergence as legal subjects, back in the Middle Ages, as that right was tied to cities' original legal status as corporations.[19] Because the right was embedded in the city's corporate existence, the right to sue remained an inherent attribute of cityhood despite the weakening of city power in other areas of American law during the last two centuries.[20] No matter how constricted its powers became, the city was still a separate legal person—and its existence as such was always associated with a right to sue. This oft-ignored historical fact has clear doctrinal ramifications for current city suits. It resolves various questions related to the local power to sue and to the ability of states to preempt or release city claims.

The second element of the legal principle this Article establishes is that the scope of the city's—inherent—right to sue is delineated by the city's own interests. The city suit, as noted, is a defining attribute of the city's existence as a separate entity. Therefore, the city can resort to the right to sue only in service of its interests as a separate entity.[21] It cannot simply sue on behalf of the political or economic interests of some, or even all, of its residents.[22] This Article develops this principled view of the city suit's purview and translates it into a taxonomy of the concrete city interests upon which a city may sue: (i) its proprietary interests, (ii) its enforcement interests, and (iii) its interests in resisting interference by outside governments. This taxonomy resolves the current doctrinal puzzles left open even after the identification of the city's right to sue as inherent: issues of standing, court access, preclusion, and more.

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[18] *E.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907); City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 549 (1905); Hood v. Mayor of Lynn, 83 Mass. 103, 104–05 (1861).

[19] *See infra* Section I.B.1.

[20] *See infra* Sections I.B.2–4.

[21] *See infra* Section II.A.1.c.

[22] *See infra* Section II.C.3.

Aside from providing a coherent framework for addressing all pertinent doctrinal matters, the principle this Article establishes also intervenes in the contemporary academic debate engulfing the city suit. On the one hand, it shows that city suits cannot proceed just because they promote ends residents endorse—as the suits' supporters often contend—but instead must be yoked to concrete city interests. On the other hand, it shows that even suits that seemingly serve to represent city residents' preferences—suits that detractors often decry as political or symbolic ones—frequently should proceed because they also involve some concrete city interests.

Importantly, unlike the arguments of both sides, the analysis advocated here comports with the normative values relevant to city suits. The theory of the city demands that a city be treated separately from its residents; the theory of access to justice demands that an entity whose interests are implicated be accorded its day in court, no matter its reasons for seeking that day in court.

This intervention, though grounded in centuries of legal history, is of particular urgency today given certain troubling trends in American law. Due to changes to its composition, the Supreme Court is now increasingly hostile to traditional principles of access to justice.[23] Moreover, some Justices have exhibited few qualms about expressing, and acting upon, their animosity toward the substantive goals major cities seek to promote in their battles with higher-level governments and with corporations.[24] The city suit, we fear, is thus likely to find itself on this Court's chopping block. And even before the issue reaches the Supreme Court, recently appointed judges in lower courts who share the Court's sensibilities can be expected to do their best to clip the city suit's wings.

This Article, with its appeal to history and tradition, might help stave off some of the most aggressive attacks on the city suit. Demonstrating that the city suit has a long pedigree and embodies corporate principles might be appealing to a Court that loudly professes a respect for history and that zealously guards corporate powers. It should also aid sympathetic lower court judges in their efforts to explain why an embrace of the city suit does not run afoul of current rules and relevant trends emanating from the Court. History alone is not dispositive on legal issues, but it is informative, especially where, as here, it coheres with important normative values.

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[23] *See, e.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (revoking the rights of victims of race, sex, and disability discrimination to recover emotional distress damages).

[24] *See, e.g.*, *id.*

The balance of this Article proceeds as follows. Part I establishes the city's inherent right to sue. Tracing the history of local government law to at least the year 1100, this Part shows how the city's corporate roots were deeply intertwined with court access, even more so than with the power to make local laws. This early corporate history also explains an apparent contradiction—how American local government law in the nineteenth century could simultaneously disempower the city while also never wavering from a commitment to the city's inherent right to sue.

Part II takes up the limits of that inherent right. It too commences with the history. Nineteenth-century courts, confronting the city suit in its modern guise, insisted on the distinction between the city and its citizens as legal actors. Part II reveals this distinction they drew through the colorful cases of two provincial highway commissioners and of urban corruption kingpin William "Boss" Tweed.[25] These cases connected with contemporaneous developments in corporate law, also surveyed here, that culminated in an appreciation of the general distinction between a corporate entity and its members. Given this distinction that still dominates American thinking about corporate entities today, the key task respecting every city suit is to determine whether it implicates the city's own corporate interests. This Part therefore proceeds to construct a new taxonomy of the corporate interests on which city suits may proceed.

Parts I and II ground the city suit in its conceptual history, and then use that history to offer answers to today's pressing doctrinal questions—some originating in local government law, others in civil procedure. Each of the doctrinal problems is addressed at the conclusion of the Part that helps answer it. That allows the concluding Part III to turn to the normative analysis, explaining how this Article's historical and conceptual arguments dovetail with both the day-in-court ideal and with the normative underpinnings of local government. Most importantly, Part III shows that it is not only the history of city suits that defines the city's right to sue as inherent yet limited. The reasons for which we have cities in the first place also firmly support this Article's conclusion. This analysis thus demonstrates that both the city suit's modern critics on the one hand, and its uncritical proponents on the other, are misguided not only doctrinally but also normatively.

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[25] *See infra* Section II.A.1.b.

In sum, this Article gives the city suit the treatment it deserves, as a foundational element of cityhood and a tool that must be available for the purpose, and only the purpose, of protecting cityhood.

I. THE NATURE OF THE CITY'S RIGHT TO SUE

Many of today's city suits fail at a very early litigation stage. Some state courts simply hold that cities lack the power to initiate any lawsuit; others find that even if cities might enjoy that power, the mere potential of state disapproval suffices to prevent any such city suit from being brought; and still others somehow detect in tenuously related sources of law otherwise unexpressed state disapproval of a given city suit.[26] While the doctrinal guise differs, all these rulings express a belief that cities enjoy no power to sue unless the state affirmatively grants them such a power.

To explain this attitude, courts and commentators commonly turn to the foundational 1907 Supreme Court decision in *Hunter v. City of Pittsburgh*, which stands for the proposition that cities lack independent powers in American law. It then allegedly follows that the city lacks a power to sue unless authorized by the state.[27] Commentators who are sympathetic to the city suit naturally attempt to devise a way to overcome this threshold problem respecting a city's ability to sue—but they too begin with the almost obligatory reference to *Hunter*.[28]

These genuflections to *Hunter* obscure the specific legal history of the city's right to sue. *Hunter* undeniably reflects a general principle of city powerlessness in the face of the state legislature.[29] But, at the same time that nineteenth-century

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[26] *See infra* notes 167–72, 175–78 and accompanying text.

[27] Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 613 (2020) (asserting that *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), is the judicial block to the recognition of city corporate rights); Morris, *supra* note 12, at 3 (constructing grounds for overruling *Hunter* as the case that came to be the bar to cities suing their states); Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 70 (2014) (noting that "[m]any courts simply insist" that the city is a "creature of state law" and hence lacks a power to sue); Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 372 (2019) (lamenting *Hunter*'s long shadow and dedicating a portion of the article to show it can be construed narrowly to not interfere with city rights); *see also* David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. F. 21, 27 (2010) (arguing that a city's power to sue for collective harms is minimal due to "city-state powerlessness").

[28] *See, e.g.*, Wiseman, *supra* note 27, at 613; Morris, *supra* note 12, at 3; Blank, *supra* note 27, at 372. These city-suit proponents either propose doctrinal workarounds to escape *Hunter*'s specter or note the erosion of the decision's reach over the decades. Wiseman, *supra* note 27, at 613; Morris, *supra* note 12, at 3; Blank, *supra* note 27, at 372.

[29] *See Hunter*, 207 U.S. at 179.

courts were busy laying the foundations for *Hunter*, they were also expressing a resolute commitment to the city's power to head to court. This judicial support drew on the wording of almost all city charters that had ever been granted in America. The consistent practice reflected a legal reality whereby the city's right to sue originally was, and—irrespective of *Hunter*—always remained, inherent to cityhood.

To explore these themes, this Part will begin by presenting the contradictory nature of American law at the time of *Hunter*: the law insisted on denying the city any inherent rights while somehow consistently recognizing an inherent city right to sue. This Part will then turn to settle this seeming inconsistency by showing how the right to sue was a doctrinally and normatively important remnant of the city's original corporate nature. This discussion will establish that the right to sue was perceived as wholly distinct from "governmental" city rights—the proper realm of the *Hunter* principle—and could thus remain inherent. This finding will then be used to explain why current courts' treatment of doctrinal problems relating to the city's right to initiate a suit, and to state preemption of such suits, is deeply misguided.

A. The Seeming Contradiction

This section describes the law as it stood at the turn of the twentieth century. In so doing, it lays out a puzzle, for it first recites the well-known nineteenth-century legal processes through which the city's powers were dramatically curtailed, yet it then shows that contemporary courts never questioned the city's right to sue.

1. City Powerlessness in Nineteenth-Century American Local Government Law

Modern American local government law came to be in the middle decades of the nineteenth century. *Hunter v. City of Pittsburgh*, probably the most famous case in the field,[30] can be understood as the culmination of that

[30] For example, *Hunter* launches the doctrinal parts of multiple casebooks and has been cited by more than 500 law review articles (according to Westlaw), including countless leading studies of local government law. *See Citing References*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I0904b7139cc311d991d0cc6b54f12d4d/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Search)&docSource=a6cc944cebbf4d29bc220ea833eb6296&rank=1&rulebookMode=false&ppcid=2472f5856fda4bd393b9e895ba9f82aa (last visited Feb. 20, 2023).

development. In *Hunter*, the Supreme Court denied city residents' lawsuit against the state legislature that had forcibly merged their city into another.[31] The Supreme Court held that the state was always at liberty to remove city powers or even, as in the case itself, extinguish the city altogether.[32] In other words, the city was a "creature of the state"—a famous dictum from another case.[33]

Hunter did not come out of nowhere. The decision fairly reflected legal, political, and economic strands reigning at the time among practitioners, authors, and judges. As important historical works have established, the nineteenth-century history of American cities is largely a story of legal decline: of lost independence and increased subjugation to state legislatures.[34]

No legal principle embodied this fall better than the doctrine known as Dillon's Rule.[35] While *Hunter* was a Supreme Court decision grounded in the federal Constitution—and thus its application to many local government law issues was limited—Dillon's Rule was fully grounded in state law and therefore its ramifications for city action were dramatically more far-reaching.[36] Dillon's Rule dealt with the question that is at the core of the problem of city power. What gives a city the power to act—and, therefore, when is a city allowed to act?[37] In the first local government law treatise ever authored in America, John Dillon, an influential judge, lawyer, and professor, explained in 1872 that the only source for city action must be the state legislature.[38] For each move it contemplates, the city must be able to pinpoint a specific state law enabling that action.[39] Those laws were to be interpreted narrowly: any "doubt concerning the

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31 *Hunter*, 207 U.S. at 174.

32 *Id.* at 178–79.

33 City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 549 (1905).

34 *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1119–20 (1980); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 88 (1986); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 6 (1983) ("An autonomous British borough in the eighteenth century, possessing much real estate as well as its government, [New York City] had become the object of overt interventions by courts and the state legislature by the middle of the nineteenth century, lacking in rights that could be asserted against the state.").

35 *See* JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 101–02 (1872).

36 Williams, *supra* note 34, at 89, 94.

37 *Id.* at 89; *see* DILLON, *supra* note 35, at 101–02.

38 Williams, *supra* note 34, at 84, 90, 91.

39 *Id.* at 131.

existence of power is resolved by the courts against the [city], and the power is denied."[40]

Dillon's Rule established the limited nature of local government in American law. Unlike private actors, the city enjoyed no right to act freely.[41] The city was also very different from the state, which had (at least some) inherent sovereign authority. In fact, Dillon's Rule represented an explicit repudiation of the view associated with another famous nineteenth-century judge and treatise writer, Thomas Cooley,[42] whereby cities were fundamental components in our democratic system and thus enjoyed inherent powers because they were.[43]

The practical effects of Dillon's Rule on the resolution of specific disputes about city powers were debilitating. For example, its logic generated one court's holding that in the absence of a clear enabling statute, a town could not sponsor July Fourth celebrations[44] or commemorate Cornwallis's surrender,[45] and another court's insistence that a city could not increase its own officers' pay without state consent.[46]

2. *The Power to Sue in Nineteenth-Century American Local Government Law*

While Dillon in his treatise did not directly address the city's power to sue,[47] the next author to write a local government law treatise, Eugene McQuillin, did. In 1904, McQuillin wrote: "The power to sue and the liability to be sued is said

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[40] DILLON, *supra* note 35, at 102.

[41] *See* Williams, *supra* note 34, at 84, 90, 91.

[42] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 108 (1871) (Cooley, J., concurring) ("[L]ocal government is [a] matter of absolute right; and the state cannot take it away."). Cooley's theory was that the sovereign people only delegated parts of their sovereignty to the state, reserving the remainder in themselves. This remainder took the form of limitations on the state. A key limitation was the power of local governance. Hence, local governments enjoyed inherent sovereignty with which the state could not interfere. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 118–20 (1868).

[43] Williams, *supra* note 34, at 88–90 (explaining that Cooley's doctrinal arguments would have protected municipal rights from state usurpation, but by 1900, they had been rejected firmly in favor of the Dillon Rule). It is true that Dillon's Rule did not completely predominate Cooley, but because Dillon's Rule presents the seeming challenge to this Article's view, the discussion focuses on it here.

[44] Hood v. Mayor of Lynn, 83 Mass. 103, 104–05 (1861).

[45] *See* Tash v. Adams, 64 Mass. 252, 254 (1852).

[46] Bd. of Comm'rs of Tippecanoe Cnty. v. Barnes, 24 N.E. 137, 139 (Ind. 1890).

[47] The closest the treatise comes is noting, in the chapter dealing with city contracts, that there is implied or incidental authority for municipal corporations to sue and be sued in their corporate name. DILLON, *supra* note 35, at 365–66.

to be incident to the existence of a municipal corporation, and need not be expressly granted by statute or charter . . . ."[48] McQuillin thus described the right to sue as inherent to being a city—in seeming contrast to the basic premise of Dillon's Rule, which held that cities have no inherent powers.[49]

McQuillin's characterization of the city's power to sue as inherent would not have struck any other contemporary observer as noteworthy. No one appears to have questioned the city's right to sue. Even Dillon's treatise, far more hostile to city power than McQuillin's, indirectly expressed a permissive attitude toward the city suit.[50]

Furthermore, McQuillin's contention respecting the right's status could hardly be characterized as innovative, even for its time. The right's uncontested nature is most clearly seen in its routine inclusion in the legal document that established municipal governments: the charter. The most important of the colonial charters creating a city, the charter of New York City from 1686, provided that the City:

> [P]resents[] one Body Corporate and Politick . . . . [A]nd forever shall be hereafter, Persons able in Law, capable to plead and be impleaded, answer and be answered unto, defend and be defended, in all or any the Courts of his said Majesty, and other places whatsoever, and before any Judges, Justices and other person or persons whatsoever, in all & all manner of *actions*, *suits*, *complaints*, *demands*, *pleas*, *causes* & *matters whatsoever*, of what nature, kind or quality . . ., in the same, and in the like manner and form as other People of the said Province, being Persons able, and in Law capable . . . .[51]

The colonial era's other major city charter, which William Penn awarded Philadelphia fifteen years later, employed similar terms.[52]

Post-Independence, the number of city charters exploded. The many individual charters that were awarded as the nation expanded followed the template colonial New York and Philadelphia had set. They all awarded the

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[48] 5 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS §§ 2486–87 (1913).

[49] *Compare id.*, *with* DILLON, *supra* note 35.

[50] Dillon mentions the right thirty-nine times. None of these comments are negative, and they include statements whereby the right to sue is among the "[c]ertain attributes or powers [that] are absolutely essential to constitute a body corporate" and that charters usually declare that a town has the right to sue. DILLON, *supra* note 35, at 56, 61.

[51] The Charter of the City of New York, 4–6 (1686) (on file with *Emory Law Journal*).

[52] 1803 Pa. Laws appendix 1–3.

newly-minted city the right to sue.[53] As the century progressed, states supplemented individual laws chartering specific cities with general incorporation laws. They began adopting general statutes setting the procedures for incorporating all new cities and other local governments.[54] Like the individually granted charters, these statutes always declared that any location incorporated as a local government held the right to sue.[55]

Courts took notice of the mechanical inclusion of the right to sue in practically all city charters ever adopted in America. The Wisconsin Supreme Court illustratively remarked in 1859 that "[o]ne of the most ordinary incidents to [cities'] incorporations is the right to sue and of being sued in its corporate name."[56] The court thus briskly dismissed a litigant's challenge to a city's right to sue: "It cannot, therefore, be necessary for the city of Janesville, when it brings an action in the courts of this State, to allege that it has a legal capacity to sue."[57]

B. Explaining the Contradiction: The Enduring Corporate History of the City

The previous section presented a seeming tension within the law as it emerged from the nineteenth century: the city had no inherent rights, yet somehow it had an inherent right to sue. This section resolves this paradox through a fine-grained historical analysis of the city's corporate status. It first explains how the right to sue grew from the city's original status as a corporation.[58] Then it shows that even after American law ceased using the corporate framework to analyze the city's powers vis-à-vis the state, the city retained certain corporate attributes in other matters, particularly those pertaining to its relationship with courts.

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[53] *See, e.g.*, 1814 Ohio Laws 17, 19 (incorporating the city of Cleveland); Act of Feb. 17, 1805, ch. 12, 1804 La. Acts 44 (incorporating the city of New Orleans); 1837 Ill. Laws 50–51 (incorporating the city of Chicago); 1822 Fla. Laws 27 (incorporating the city of Pensacola); 1850 Cal. Stat. 223 (incorporating the city of San Francisco).

[54] *See, e.g.*, 1852 Ind. Acts 203, 207 (incorporating cities).

[55] *E.g.*, *id.*; Eastman v. Meredith, 36 N.H. 284, 288–89 (1858); *see also* DILLON, *supra* note 35, at 56; 1 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 547–48 (1904).

[56] City of Janesville v. Milwaukee & Miss. R.R. Co., 7 Wis. 484, 489 (1859).

[57] *Id.*

[58] *See* Section I.B.1.

1. *The Origins of the City's Right to Sue in the Law's Corporate View of the City*

To understand the role of the city's right to sue, it helps to think more about the city charter.[59] As seen, the right to sue and be sued was a standard feature of all American city charters—from their first inception in colonial times through the nineteenth century.

A charter's function was (and is) to establish a corporation: a "body corporate."[60] The close association between cities and corporations might strike many contemporary lawyers as surprising. But originally the common law did not distinguish local governments from those entities that today would have been deemed private corporations.[61] Thus, in his influential commentary about the laws of England, Blackstone grouped together as "lay corporations" towns, the "trading companies of London," and colleges.[62] All of these entitles were "called a *corporation*, or *body corporate*, because the persons are made into a body, and are of capacity to take, grant, &c., by a particular name."[63] Dillon's Rule itself arguably drew on this association. It reflected the then-prevailing corporate law principle of narrow construction of corporate charters.[64]

While scholars of local government law are well aware of these corporate roots of the city,[65] they have been less attentive to the connection between the city's corporate status and the right to sue. But it was a particularly tight connection.

At the time corporate law first consolidated into a coherent field, in the late fifteenth century, the law of corporations had settled on the idea that the grant of a corporate status entailed the "five points, namely the rights to have perpetual

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[59] For a particularly illuminating discussion of the evolution and current role of the American city charter, see Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. 839, 847 (2021). As the fact will become relevant later, it should be noted that "there is no legal necessity for local governments to have charters." *Id.* at 856.

[60] *See* DILLON, *supra* note 35, at 56, 61.

[61] *See* FRANK JOHNSON GOODNOW, MUNICIPAL HOME RULE: A STUDY IN ADMINISTRATION 11, 13 (1895).

[62] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 470–71 (1902).

[63] 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS 92 n.3 (2d ed. 1873).

[64] *See generally, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (construing narrowly a private corporate charter); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116 (1863); Nw. Fertilizing Co. v. Vill. of Hyde Park, 70 Ill. 634 (1873) (same).

[65] In even more recent work, leading legal historians have also traced the roots of the legal and political American notion of a written constitution to corporate charters, specifically those awarded to the colonies. Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1405 (2019); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006).

succession and a common seal, *to sue and be sued*, to hold lands, and to issue bye-laws [sic]."[66] The corporation was a body, a legal entity. Being a legal entity translated into being recognized in a court of law, and hence establishing a corporation—city or otherwise—without the right to sue would have made little sense.[67]

The association of the right to sue with the city specifically was even tighter than the right's association with other corporate bodies. It was tied to the original reason for the common law's recognition of cities as bodies back in the Middle Ages: according townspeople a separate status in the court system.[68]

In the medieval feudal order, lords gained their status from the king, and in exchange provided the king with military services (later transformed into payments).[69] In turn, those lords exercised powers over "tenants" residing within their domain.[70] Those lordly powers included, importantly, the power to judge the tenants in the manorial court under "the custom of the manor."[71]

Against this backdrop arose the town, the precursor to the modern municipality. Towns, where tradesmen and merchants resided, served as autonomous islands removed from the feudal system of the countryside.[72] Towns were chartered as borough corporations specifically in order to free them from the manorial courts,[73] as well as to provide them with the attendant right to construct their own court system.[74] The precursor to all borough charters, the *Carta Civilibus Londonarum*, wherein Henry I formally recognized the status of London in 1100, granted residents the power to hold their own courts—and an exemption from all other courts.[75] This right was essential to facilitate commerce, towns' *raison d'être*.[76] The unpredictable and archaic system of manorial laws, which were different at each manor, was a major impediment to business transactions.[77]

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66 SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS 113 (1977).
67 *See also Russell v. Men Dwelling in the Cnty. of Devon* [1788] 100 Eng. Rep. 359, 362.
68 REYNOLDS, *supra* note 66, at 101–02, 119–20.
69 *See, e.g.*, A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 3 (2d ed. 1986).
70 *See id.* at 4, 15–16.
71 MARC BLOCH, FEUDAL SOCIETY 221–22, 248–49 (L.A. Manyon trans., 1961).
72 *Id.* at 353 (describing towns as "isolated nuclei of merchants and craftsmen").
73 Reynolds, *supra* note 66, at 101.
74 *Id.* at 102, 119–20.
75 1 WILLIAM BENNETT MUNRO, MUNICIPAL GOVERNMENT AND ADMINISTRATION 47 (1923).
76 *Id.* at 49.
77 *See id.*

Importantly, granting towns these corporate rights respecting litigation preceded granting towns extensive political and regulatory powers—namely sending representatives to Parliament, electing a local government, and controlling the town's economy—which only became prevalent by 1500.[78] This claim bears repeating: The origins of municipalities' rights related to courts predate, by centuries, municipalities' now more famous political and economic powers.[79]

Consequently, by the time the chartering process was fully formalized in the fifteenth century,[80] the idea that it conveyed a corporate status, including rights pertaining to courts, which by that point had evolved into the right to sue and be sued, was entrenched.[81] A few decades later, when incorporation along this model became general practice under the Tudors, the charter's key function was, as one writer noted, to make it even easier for local governments to hold property and *sue and be sued*.[82]

The local government's right to sue was central to its charter, but the right soon acquired standing independent of the charter. As the Middle Ages drew to a close, new English towns were no longer awarded borough charters.[83] This posed a problem for English law: Strictly speaking, only those local government entities formally chartered in the preceding centuries counted as corporations and enjoyed all the attendant rights.[84] The law was unclear whether, and to what extent, formally unchartered entities that were substantively identical to those older chartered entities could exercise corporate rights.[85] English law struggled with this general issue for centuries, yet throughout the period, many unchartered towns exercised—without objection—one specific corporate right: the right to sue.[86]

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[78] REYNOLDS, *supra* note 66, at 108–09, 111–12, 127–28.

[79] *Id.* at 108–09, 111–13, 127–28.

[80] The charter Henry IV granted Kingston-upon-Hall in 1439 is considered the first "charter of incorporation" of a modern form. MARTIN WEINBAUM, THE INCORPORATION OF BOROUGHS 65 (1937).

[81] REYNOLDS, *supra* note 66, at 113.

[82] GOODNOW, *supra* note 61, at 13.

[83] Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 382 (1985).

[84] *Id.* at 382–84.

[85] BRYAN KEITH-LUCAS, THE UNREFORMED LOCAL GOVERNMENT SYSTEM 15 (1980) (noting that only about two hundred ancient boroughs were corporations).

[86] It appears that many English towns had exercised the right to sue even before the grant of a formal charter. *See* REYNOLDS, *supra* note 66, at 113. The foundational local government law treatise observed: "Another characteristic of a corporation is, that it may sue and be sued in its collective capacity; but *in ancient*

This fact was of particular importance for American colonial law. New York City and Philadelphia, whose charters were excerpted above, were exceptional: they were the only two major chartered colonial cities.[87] The many other colonial communities were not chartered until (at least) Independence, thus putting in doubt their eligibility for any rights that might have resembled corporate privileges.[88] But these communities' right to sue and be sued never presented a real problem in the emerging American law of cities. Courts, even when refusing to recognize unincorporated towns and counties as full corporations, routinely granted those places the right to sue or be sued under a variety of common law theories.[89] Probably even more effectively, starting as early as 1694, colonial and later state legislatures removed any doubts by simply adopting laws announcing that all towns, irrespective of their chartered or unchartered status, had the right to sue and be sued.[90] Courts expanded the reach of these statutes further by reading them liberally.[91]

The legal treatment of unchartered local governments provides strong support for the key conclusion emerging through the historical review of the common law's treatment of the city's right to sue. More than almost any other city power, the power to sue and be sued was perceived as inherent to—indeed, as constitutive of—the city. A city could not meaningfully exist without it. Even if cities could exist without charters—as they did in early America—they could not exist without the right to sue.

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times there are many instances of other collective bodies suing and being sued in the same manner." 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 10 (1793) (emphasis added).

87 *See supra* notes 50–51.

88 *See supra* notes 52–53.

89 *E.g.*, Rouse v. Moore, 18 Johns. 407, 411 (N.Y. Sup. Ct. 1820) (allowing the overseers of the poor to be sued because they are a corporation for certain purposes); Todd v. Birdsall, 1 Cow. 260, 261 (N.Y. Sup. Ct. 1823) (holding that overseers of the poor can be sued because it was "expedient"); Jansen v. Ostrander, 1 Cow. 670, 678–79 (N.Y. Sup. Ct. 1824) (holding that while the form and process of the claim might differ from a corporate suit, overseers of the poor have the right to sue and be sued); Grant v. Fancher, 5 Cow. 309, 312 (N.Y. Sup. Ct. 1826) (holding that overseers of the poor can be sued because they were a quasi-corporation); Cushing v. Inhabitants of Stoughton, 60 Mass. (6 Cush.) 389, 392 (1850) ("It is incident to towns to be the subject of suits at law and in equity.").

90 *See, e.g.*, 1694 Mass. Acts 182–83; *see also* DANIEL FOWLE, ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE IN NEW ENGLAND 216 (1761) (identical to Massachusetts act); 1 N.Y. REV. STAT. ch. XI, tit. 1, § 1 (1829) (towns); 1 N.Y. REV. STAT. ch. XII, tit. 1, § 1 (counties); Norton v. Peck, 3 Wis. 714, 721 (1854).

91 For example, in 1816, although it held that a statute empowering inhabitants to raise money for a schoolhouse did not award a school district any corporate rights, the Massachusetts court still acknowledged the district's right to sue as vital to its existence. Inhabitants of Fourth Sch. Dist. in Rumford v. Wood, 13 Mass. 193, 195–96, 198 (1816).

2. *The City's Dual Nature in Modern Law: The Survival of Corporate Attributes*

From colonization through the nineteenth century, charters, statutes, and court decisions viewed the right to sue as inherent to a local government entity. They thereby reflected conceptual and doctrinal traditions dating all the way back to the Middle Ages. As shown, these traditions revolved around the city's status as a corporation.

In the decades following Independence, however, American jurists developed a new distinction, unknown in earlier English law, between two different types of corporations: "private" and "public." The shift began, and had its most dramatic effects, in state law, where it varied in timing and specific form across states.[92] Nonetheless, the 1819 Supreme Court decision in *Dartmouth College v. Woodward* is normally held out as the shift's epitome.[93] There, interpreting the Constitution's Contracts Clause, the Court held that the charter of a private corporation—such as a college or business—was immune from state intervention.[94] In dicta, Chief Justice Marshall explained that conversely, a public corporation, such as a city, did not enjoy any protections from state interference.[95]

This new public-private distinction presents a major disjuncture in the city's corporate history just told. Once cities' legal status vis-à-vis the state was distinguished from that of other corporations, the road was paved for states' moves to substantially limit city power. In 1877, the Supreme Court could announce: "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature."[96]

Yet the transformation in the city's status—its deportation from the realm of corporate law and into that of public law—was in actuality never quite as complete as such statements would have one believe. Courts would often soften the harshness of such pronouncements by adding the qualification that while the

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[92] Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 231 (1985) (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1983)).

[93] 17 U.S. (4 Wheat.) 518, 638 (1819).

[94] *See generally id.*

[95] *Id.* at 637–38.

[96] New Orleans v. Clark, 95 U.S. 644, 654 (1877).

rule respecting the state's omnipotence applied to the city's governmental acts, it did not necessarily apply when the city acted as a property owner.[97] Even the most famous of the disempowering rulings, *Hunter*, included such a proviso:

> The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts, and it has been held that as to the latter class of property the legislature is not omnipotent.[98]

Although routinely acknowledged, this distinction between acts the city performed as a government and those it performed as a private property owner was almost impossible to draw in practice.[99] When a city bans the consumption of alcohol in the park, is it acting as a government or as owner of the park?[100] Almost all regulations of public spaces or resources can be portrayed both as the actions of a government (they regulate behavior) and as those of a property owner (in a space or resource the city owns). Perhaps consequently, reviews of this era's court decisions mostly conclude that the caveat remained rather meaningless.[101] Very few cases can be found where courts prevented states from interfering with city affairs because those specific affairs pertained to the city's own property.[102]

Still, although ineffective in protecting a city's regulation of local assets from state intervention, the singling out of the city's proprietary functions for separate treatment implied that the city retained some corporate legal attributes in the courts' eyes.[103] The city became, in a sense, an entity of a dual nature, one public and one private: governmental and corporate.[104] When acting as a regulator the

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[97] The distinction was first discussed in *Bailey v. Mayor of New York*, 3 Hill 531, 531 (N.Y. Sup. Ct. 1842).

[98] Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) (citation omitted).

[99] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–43 (1985) ("To say that the distinction between 'governmental' and 'proprietary' proved to be stable, however, would be something of an overstatement.").

[100] Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 584 (2018); *see, e.g.*, ROY ROSENZWEIG & ELIZABETH BLACKMAR, THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK 254–56 (1992).

[101] Schanzenbach & Shoked, *supra* note 100, at 583–85.

[102] *Id.* at 584 & n.115.

[103] *Id.* at 582 & n.100. This result is faithful to the legal meaning of proprietary. Proprietary does not mean for profit, but something closer to private holder. Thus, recourse to the adjective in legal parlance embodied a notion that the city was still at times a private law subject. Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 175 (2016) (referring to proprietary actions as those taken in the government's "private capacity"). *See generally Proprietary Definition & Legal Meaning*, LAW DICTIONARY https://thelawdictionary.org/proprietary-2/ (last visited Mar. 8, 2023).

[104] Schanzenbach & Shoked, *supra* note 100, at 583.

city was held to be a government—and, as such, under *Hunter* and Dillon's Rule, a creature of the state.[105] When acting as a private actor, however, the city was still held to be a corporate entity, and a plethora of corporate law doctrines ruled its actions.[106]

The key bodies of law that regulate the corporate form and mode of operation—fiduciary law and agency law—continued to reign in the legal treatment of cities, even though these doctrines did not apply to purely public, or government, actors. City officials, unlike all other public officials, were still held subject to the two fiduciary duties: the duty of care (to exercise sound management when dealing with the entity's assets) and the duty of loyalty (to refrain from conflicts of interest).[107] These fiduciary duties could only be held relevant to city officials because courts envisioned the city not as a typical government, but as a corporation afflicted by the agency problem that is at the core of the corporate form: the separation of ownership from control.[108] Residents were imagined as the owners of city assets—as, that is, shareholders—and officials as the managers handling those assets on their owners' behalf—as, that is, directors.[109] This private law conceptualization of government was one courts would not resort to when treating non-local governments, such as state or federal governments.[110]

General agency laws, which serve as corporate law's infrastructure, also continued to apply to cities. The power of an agent or employee to bind the city, through the agent's decisions or acts, was determined in accordance with corporate law practices—with courts citing corporate law doctrines without comment.[111] The same was true when at issue was the power of city officials to hire employees[112] or dispose of city properties.[113]

In sum, American law's formal creation of the public-private divide did not result in practice in the neat labeling of a city as public, but instead left the city as a hybrid entity with public and private attributes. As will be seen next, the

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105 *Id.*
106 *Id.* at 591.
107 *Id.* at 592; *see* 2 RESTATEMENT (THIRD) OF AGENCY §§ 8.02, 8.08 (AM. L. INST. 2005).
108 Schanzenbach & Shoked, *supra* note 100, at 585–93.
109 *See id.* at 572.
110 *Id.* at 575–78.
111 City of Memphis v. Adams, 56 Tenn. 518, 529–30 (1872).
112 *Id.*
113 Schuylkill & Dauphin Imp. & R.R. Co. v. McCreary, 58 Pa. 304, 318 (1868).

private attributes dominated the status of the city as a litigant, and thus explain the survival of the city's inherent right to sue even in post-*Hunter* American law.

3. The City Remains a Corporate Litigant

The city's dual nature implied that it was a subject of public law but also that several private or corporate law doctrines still applied to it. Consistent with the deeply engrained connection between court access and the city's corporate form,[114] traces of the city's old corporate nature were particularly marked in the judicial attitude toward issues pertaining to city litigation. Specifically, the city was treated as a private corporation (or, at least, partially as a private corporation) in the context of derivative suits, client-attorney relationships, immunity from suit, diversity jurisdiction, and criminal law.

a. Derivative Suits

Perhaps the most striking illustration of the private-law treatment of city litigation is the derivative suit. The derivative suit is an exception to the normal practice whereby the legal rights of an entity can only be pursued in court by the entity itself.[115] The entity, in this respect, is no different from any other legal actor. It holds the sole power over its legal rights. Yet, in a derivative suit, a corporation's lawsuit is brought not by the corporation itself, but by one of its members.[116] Corporate law resorts to this exceptional tool to protect the corporation's interests when those charged with representing the corporation—the directors—neglect to do so.[117] The directors might refrain from bringing a lawsuit because while the potential lawsuit is in the shareholders' best interests, it might not be in the directors' best interests (indeed, the directors might be the lawsuit's target). The law then allows a shareholder to bring the lawsuit on behalf of the corporation—despite the fact that normally shareholders are not empowered to act on the corporation's behalf.[118]

The derivative suit is thus firmly planted in the structural problem specifically afflicting the corporate form. Consequently, when individual

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[114] *See supra* Section I.B.

[115] JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 15.01 (2d ed. 2003).

[116] *See id.*

[117] *See id*.

[118] *Id.* As will become relevant later in the context of city suits, it is important to recognize that this special rule allowing shareholders to sue on behalf of the corporation's interests does not permit the corporation to sue on behalf of the shareholders' interests.

citizens sought to sue on behalf of state governments in the late nineteenth and early twentieth centuries, courts disapproved.[119] The state, courts reckoned, is too distinct from the corporation for derivative suits to be permitted on its behalf.[120]

But the derivative suit persisted as a component of the law of cities. In 1879, the Supreme Court unequivocally accepted a derivative lawsuit resident taxpayers brought on behalf of their city,[121] because, as Justice Sutherland later explained:

> The reasons which support the extension of the equitable remedy to a single taxpayer in [cases of municipal claims] are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. . . . [T]he relation of a taxpayer of the United States to the federal government is very different.[122]

By the time of this statement, the principle was well established in state courts as well, where derivative lawsuits were routinely allowed on behalf of local governments.[123] Dillon himself could not imagine any other result, writing that since the derivative lawsuit could be brought on behalf of a corporation, "[w]hy should a different rule apply to a municipal corporation?"[124]

b. Cities and Attorneys

Principles of corporate law, rather than public law, also governed the relationship between the city and its legal representatives. Courts repeatedly asserted that the relationship between a city and its attorney was identical to that of a private corporation and its attorney.[125] Thus, a city could always choose to hire an attorney, with one court calling it a "necessity."[126] As the power to

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119 Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922).

120 Massachusetts v. Mellon, 262 U.S. 447, 487 (1923).

121 Crampton v. Zabriskie, 101 U.S. 601, 609 (1879).

122 *Mellon*, 262 U.S. at 487 (citation omitted).

123 *See, e.g.*, N. Tr. Co. v. Snyder, 89 N.W. 460 (Wis. 1902) (permitting a plaintiff-taxpayer to sue to prevent the county from paying bills for which the county was not liable).

124 JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 2766 (5th ed. 1911).

125 *See* Eugene McQuillin, *Contracts for Legal Services by Municipal and Other Public Corporations*, 54 CENT. L.J. 343, 343 (1902).

126 Jack v. Moore, 66 Ala. 184, 187 (1880); *see also* City of Memphis v. Adams, 56 Tenn. 518, 526 (1872) ("The power to employ counsel whenever and wherever, in the discretion of the Board, is necessary . . . ."); Martin v. Whitman Cnty., 20 P. 599, 600 (Wash. 1889) (finding the board of county commissioners had the authority to hire private counsel to effectuate duties); Wilhelm v. Cedar County, 50 Iowa 254, 255 (1878)

employ an attorney was "an incident to its very corporate existence," the city was free to hire as many attorneys as it pleased.[127] Even if the city had its own legal department, as a corporation it could always also employ outside counsel.[128]

The same corporate powers enabling cities to hire attorneys also entitled them to set the terms of those attorneys' compensation freely as any other corporation would. They could therefore agree, for example, to hire lawyers on a contingency basis, as long as the portion of the award promised to the attorney was reasonable.[129] Thus, for example, Laredo, Texas, was allowed to dedicate a portion of its future revenue from a ferry franchise to the lawyer representing it in litigation pertaining to that ferry.[130]

Once working for a city, whether as part of the city's legal department or as outside counsel, a city attorney's powers were interpreted as those of a corporation's lawyer.[131] The city was, courts reasoned, like any other private client.[132] Hence, the attorney enjoyed no independent powers from the city—even if he were popularly elected separately.[133] The city attorney could not make the city a party to a suit,[134] reach an agreement conceding parts of a city's potential claim,[135] make offers to allow judgments to be entered in actions

(finding the county had the implied power, in the absence of the explicit power, to hire an attorney to assist in executing county business).

127 Cheesebrew v. Town of Point Pleasant, 76 S.E. 424, 425 (W. Va. 1912); *see also* Cushing v. Inhabitants of Stoughton, 60 Mass. (6 Cush.) 389, 392 (1850) (noting the right to hire counsel is implied in the municipality's right to fulfill its other duties).

128 Hoxsey v. Mayor of Paterson, 40 N.J.L. 186, 188–89 (1878) ("There is no valid reason why, in important causes, a corporation representing the citizens at large should not, as well as an individual, have the power to employ additional counsel when the exigencies of the case demand it."); Smith v. Mayor of Sacramento City, 13 Cal. 531, 533 (1859) ("It is true, the charter provides that an Attorney shall be elected by the people to attend to the business of the city; but this does not prevent the employment of other counsel when it is impossible for the Attorney of the city to discharge the required duty.").

129 County of Chester v. Barber, 97 Pa. 455, 463–64 (1881). *See generally* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 318, 326 (2001).

130 L. Waterbury & Co. v. City of Laredo, 60 Tex. 519, 522 (1883).

131 Stone v. Bank of Com., 174 U.S. 412, 423 (1899); Bush v. O'Brien, 58 N.E. 106, 107–08 (N.Y. 1900) ("It is claimed, however, that the powers of a city attorney, or corporation counsel, differ from those of an attorney employed by an individual. They undoubtedly do if the charters under which they are elected or appointed give[] to them greater or different powers, otherwise not.").

132 *See Stone*, 174 U.S. at 423; People v. Mayor of New York, 11 Abb. Pr. 66, 77 (N.Y. Sup. Ct. 1860).

133 *Mayor of New York*, 11 Abb. Pr. at 66–77.

134 *Id.* at 75–78.

135 *Stone*, 174 U.S. at 420–23.

pending against the city,[136] determine whether or not to file an appeal,[137] or decide whether to enter a settlement.[138]

All these holdings about the city's relationship with its lawyer drew on the city's enduring corporate nature. The city was a government, but in litigation, it was often viewed as a corporation.

c. Immunity from Suit

Nineteenth-century courts and thinkers were adamant that under the common law, the state enjoyed immunity from private lawsuits.[139] This protection was, as Alexander Hamilton had once put it, "inherent in the nature of sovereignty."[140]

Yet, as the law developed, courts concluded that the city was not quite as sovereign, or governmental, as the state. Already in 1827, treating the city as any other contracting corporation, the Supreme Court allowed an individual to sue Washington, D.C., for refusing to pay his lottery prize.[141] Under the emerging rule, a city could rely on sovereign immunity to defend itself from private claims only when it acted in its governmental capacity, not when it acted in its proprietary capacity.[142] In the latter cases, it was treated as any other corporate defendant.[143] Again, this approach is markedly different from the law applied to state defendants. The state was always a governmental (and therefore

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136 *Bush*, 164 N.Y. at 209–11.

137 *Mayor of New York*, 11 Abb. Pr. at 72; O'Neill v. City of Chicago, 169 Ill. App. 546, 553 (1912).

138 Sackett v. City of Morris, 149 Ill. App. 152, 160 (1909).

139 Bd. of Land Comm'rs v. Walling, Dallam 524, 525 (Tex. 1843) ("That it is one of the essential attributes of sovereignty not to be amenable to the suit of a private person without its own consent has grown into a maxim, sanctioned as well by the laws of nations as the general sense and practice of mankind.").

140 THE FEDERALIST No. 81 (Alexander Hamilton).

141 Clark v. Mayor of Washington, 25 U.S. (12 Wheat.) 40, 62–63 (1827).

142 *E.g.*, DeVoss v. City of Richmond, 59 Va. (18 Gratt.) 338, 344 (1868); Eastman v. Meredith, 36 N.H. 284, 292–94 (1858).

143 *E.g.*, Bailey v. Mayor of New York, 3 Hill 531, 540–41 (N.Y. Sup. Ct. 1842); *see also* Cnty. Comm'rs v. Duckett, 20 Md. 468 (1864) (treating the municipality as a corporation). For similar reasons, some courts created a distinction between counties and cities—the former always enjoyed immunity, the latter did not, for "[c]ounties are not corporations in the fullest sense of that term." Heigel v. Wichita County, 19 S.W. 562, 562–63 (Tex. 1892).

immune) defendant in court[144]—the city could be either that or a corporate defendant.[145]

For issues of immunity in federal constitutional law, the Supreme Court developed an even more clear-cut dividing line between the state and the city. In 1890, the Court flatly denied localities the protection of the Eleventh Amendment, which immunizes a state from suits that another state's citizens bring.[146] The only rationale the Court provided for distinguishing the city from the state was the fact that the city was a corporation.[147] An established principle was that the state could not delegate its immunity to a private corporation[148]—even one in which it held shares[149]—and the same was apparently true regarding attempts to confer the state's immunity to municipal corporations. One important ramification of this holding was that while bondholders could not sue a defaulting state,[150] they could sue a defaulting city,[151] like any other corporate debtor.[152] To be sure, immunity arises for defendants, while the subject of this Article is cities as plaintiffs. But this example still helps as it illustrates the consistent treatment of cities as corporate litigants across doctrinal contexts.

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144 Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924) ("Taking it for granted that in Anglo-American law the Crown or State cannot be sued without its consent . . . .").

145 Maxmilian v. Mayor of New York, 62 N.Y. 160, 164–65 (1875) ("There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes[.] The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, . . . a municipality is like a private corporation, and is liable for a failure to use its power well . . . . But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable . . . ." (citation omitted)).

146 Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

147 *Id.* In later decisions denying immunity, the Court specifically highlighted the local government's right to sue and be sued, holding it apart from the state. *See* Moor v. County of Alameda, 411 U.S. 693, 719 (1973).

148 Bank of Commonwealth of Ky. v. Wister, 27 U.S. (2 Pet.) 318, 321–22 (1829).

149 Bank of U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907 (1824).

150 *See generally* Louisiana v. Jumel, 107 U.S. 711, 749 (1882) (explaining that if bondholders were not paid out of funds designated for expenses of the state government, bondholders would simply be unable to collect any amounts owed).

151 *See generally* Wolff v. New Orleans, 103 U.S. 358, 366 (1880) (defaulting city failed to levy taxes set aside for paying the interest on issued coupons, so the claimant sued and recovered judgment from the city).

152 *See* Nadav Shoked, *Debt Limits' End*, 102 IOWA L. REV. 1239, 1249 (2017).

d. Diversity Jurisdiction

Even before it addressed the Eleventh Amendment question, the Supreme Court had, in 1868, insisted on treating municipalities as corporations—rather than states—in another procedural context: diversity jurisdiction.[153]

The Constitution awards the federal courts jurisdiction over controversies "between Citizens of different States."[154] The Court always treated as well-settled the proposition that a state does not qualify as a citizen—and hence a lawsuit between a state and a citizen of another state could not generate diversity jurisdiction.[155] Local governments, however, were different. After ruling in 1844 that corporations qualify as citizens for diversity jurisdiction purposes,[156] the Court refused to entertain the argument that municipal corporations were somehow different from other corporations.[157] As a party to federal litigation, the city was a corporation—not a state or an organ thereof.[158]

e. Criminal Cases

Finally, the city was treated as a corporate, rather than governmental, defendant in another, perhaps surprising, litigation setting: criminal cases.

For decades into the twentieth century, states continued to bring criminal charges against cities.[159] This practice, which courts treated as uncontroversial, was wholly incongruous with the notion of the city as fully an organ of the state.[160] For, if the city was merely the state, a state criminal process against it would have been a criminal process against the state—a nonsensical

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153 *See* Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 122 (1868). *See generally* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3623 (3d ed. 2022) (explaining that diversity actions may be brought against self-governing political subdivisions of one state by the citizens of another state).

154 U.S. CONST. art. III, § 2, cl. 1.

155 *E.g.*, Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894); Stone v. South Carolina, 117 U.S. 430, 433 (1886).

156 Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

157 *See Cowles*, 74 U.S. at 122.

158 *Id.*

159 Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1201 (1994).

160 Some courts therefore applied in these cases the same distinction between proprietary and governmental acts that was developed in the tort immunity cases. *See, e.g.*, People v. City of Chicago, 100 N.E. 194, 196 (Ill. 1912); City of Georgetown v. Commonwealth, 73 S.W. 1011, 1012 (Ky. 1903).

proposition.[161] The doctrine was thus firmly planted in the law's old conception of the city as a corporate entity.[162]

The specific rules applicable to the criminal prosecution of cities reflected this attitude. Cities could only be prosecuted for offenses for which corporations were liable—namely, offenses lacking a mens rea component.[163] Again, the corporate origins of the city continued dictating its place in court.

4. Synthesis: The Right to Sue as Distinct from Cities' Lawmaking Powers

During the nineteenth century, courts may have been transforming old corporate law along a new public-private divide, but the city preserved some corporate attributes—especially in the sphere of litigation. This duality explains the unwavering dedication to the city's inherent right to sue, expressed even when cities were otherwise being deprived of autonomy.

The seeming contradiction presented in the preceding section was therefore not a real contradiction. One court explicitly said as much. In 1870, the Pennsylvania Supreme Court allowed the state to freely remove powers from Philadelphia—a body which the court described as the "creation" of the state.[164] Nonetheless, it explained that although the state was the city's "creator" and could thus extinguish it, this fact was only relevant to the city's relationship with the state.[165] As long as the city existed, in its interactions with actors other than the state the city enjoyed all the powers "of any other corporation"—among which the court cited, importantly, the right "to sue and be sued."[166] This right was so inherent to the city's existence that the court insisted on mentioning it twice, noting later that the city was "a *persona standi in judicio*."[167]

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[161] Green, *supra* note 159, at 1209–10.

[162] *See, e.g.*, State v. City of Portland, 74 Me. 268, 272 (1883) (citing cases dealing with corporations to justify the prosecution of a city).

[163] *See* McKim v. Odom, 3 Bland 407, 421 (Md. 1829); Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854) ("Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offences against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them.").

[164] Philadelphia v. Fox, 64 Pa. 169, 177 (1870).

[165] *Id.* at 180–81.

[166] *Id.* at 180.

[167] *Id.*; *see* Ball v. Texarkana Water Corp., 127 S.W. 1068, 1070 (Tex. Civ. App. 1910); People v. Ingersoll, 58 N.Y. 1, 29–30 (1874); *see also Persona Standi in Judicio*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining this phase as "the right to appear in court").

With this history in mind, it is clear why, decades after the rise of Dillon's Rule, and after the Supreme Court had announced that local governments were mere "subdivisions[] of the State,"[168] McQuillin could still firmly proclaim that a city's right to sue was inherent. The city's status as a litigant was conceptually distinct from its status as a lawmaker. When acting in the latter capacity, it was treated as a government—and, eventually, an arm of the state government that could therefore control it.[169] But as a litigant, the city was the corporate entity the law had originally imagined.[170] As such, it had, by definition, a right to sue.[171]

Importantly, while the law characterized litigation as a corporate, or private, function, the litigation itself frequently touched on issues of public concern. That is, the label "private" related to the nature of the right to sue, not necessarily to the purposes for which a given lawsuit was filed. The city's private law right to sue could support lawsuits pursuing private purposes, public purposes, or a mix of the two. The law's categorization of city litigation as private owed to the (alleged) nature of the city litigant, rather than to the (alleged) nature of the litigation's purpose.

C. Ramifications for Current Doctrine

This synthesis establishing the status of the city's power to sue in traditional American law answers current doctrinal questions about the city suit sounding in local government law. In particular, it helps answer the questions introduced at the outset of this Part: questions about the local capacity to sue and about state preemption of that local power.

1. The City's Power to Sue

As established through several doctrines this Part surveyed, modern American law demands that a city pinpoint a source of authority for each of its actions. Therefore, in some instances, mostly in very recent times, courts have questioned a city's power to bring a lawsuit. The New York courts have been

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168 Atkin v. Kansas, 191 U.S. 207, 220 (1903).

169 *See id.*

170 *Id.* at 217.

171 *Ball*, 127 S.W. at 1070; *see also Ingersoll*, 58 N.Y. at 29–30 ("In political and governmental matters the municipalities are the representatives of the sovereignty of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations, and may acquire property, create debts, and sue and be sued as other corporations.").

most aggressive in starting to insist, during the past two decades, that in the absence of a state statute specifically authorizing the city suit in question, the city lacks the power to bring it.[172] The New York courts proclaim that "such entities have neither an inherent nor a common-law right to sue."[173] Several other state courts have reached similar conclusions.[174]

This position is untenable. As this Part has clearly established, the city's legal right to sue is an inherent city right.[175] That should end the inquiry.[176]

2. Preemption

A much greater challenge to a city's right to sue is presented by the doctrine of preemption. While, as just seen, the city need not pinpoint an affirmative grant from the state of a right to sue, what of state efforts to curtail the right?

Because American law imagines the city as subservient to the state, the state always enjoys a right to prevent, or undo, the city's activities—even when the city has the initial power to act. In several instances, states have proceeded to exercise this power to block city suits, either prospectively,[177] or after the suits

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[172] Graziano v. County of Albany, 821 N.E.2d 114, 117 (N.Y. 2004); Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trs. of State Univ. of N.Y., 713 N.Y.S.2d 908, 921 (Sup. Ct. 2000); *see* Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 832 N.E.2d 1169, 1173 (N.Y. 2005).

[173] Cmty. Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 148, 155–56 (1994).

[174] *See* Braillard v. Maricopa County, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010) (dismissing the County Sheriff's Office from the case as a nonjural entity because it was not given the capacity to be sued by the Arizona legislature); Racine Fire & Police Comm'n v. Stanfield, 234 N.W.2d 307, 311 (Wis. 1975) (holding that since the legislature gave boards of fire and police commissioners broad authority over its subordinates, the boards have standing in actions challenging the scope of their authority); Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Supervisors of Fairfax Cnty., 666 S.E.2d 315, 317 (Va. 2008) (holding that boards of zoning appeals have only those powers expressly granted by state legislature); Clark v. Fitzgerald Water, Light & Bond Comm'n, 663 S.E.2d 237, 240 (Ga. 2008) (holding that although the water commission had the right to enter into contracts, its right to contract did not come with an implicit right to sue).

[175] SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 24.02 (2d ed. 2022) (noting that even under Dillon's Rule, which only recognizes explicitly grated powers or those tied to them, "the right to sue and be sued is the most properly appreciated essential power of a local government" (emphasis omitted)).

[176] Even if courts opt to deviate from this principle, they should acknowledge a city's power to sue when that city enjoys home rule powers. Under home rule constitutional amendments, home rule cities enjoy power over all "local" matters. GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 174–76 (6th ed. 2014). As Part II will show, when vindicating one of the city's corporate interests, the city suit pertains, by definition, to a matter distinct to the city—a matter that is, in other words, local.

[177] MICH. COMP. LAWS ANN. § 28.435 (West 2022) ("[A] political subdivision shall not bring a civil action against any person who produces a firearm or ammunition."); ARK. CODE ANN. § 14-1-403(a) (West 2015) ("A county, municipality, or other political subdivision of the state shall not adopt *or enforce* an ordinance,

had been brought.[178] This type of state interference has become increasingly common in our politically polarized times.[179] Given the law's strong support for the state's alleged omnipotence, preemption cases are often rather easy: the city can resort to few defenses against a preemption claim.[180]

However, in certain—albeit limited—circumstances, this Part's insights can still aid a city suit facing preemption claims. Most prominently, the traditional nature of the city's right to sue as inherent should dictate courts' attitude toward the interpretation of allegedly preemptive statutes. While the state's preemption *power* is seldom open to question, the question often arises whether, in the given case, the state has chosen to *exercise* the power.[181] That is, a statute might not explicitly state its preemptive effect, but a litigant might argue that the statute intended to do so. Exhibiting their foundational distrust of city power, courts have often been quite receptive to such claims, even when rather far-fetched.[182]

Given the inherent nature of the right to sue established in this Part, courts should insist on explicit preemption in this context. They should hold a city suit preempted only when the state adopted a statute clearly stating that a city suit is not allowed.[183] Ohio courts' development of such a rule respecting tax issues can serve as inspiration.[184] While those courts allow implied preemption in general, they refuse to accept such claims respecting local taxes, given the power of taxation's nature and centrality.[185] As the right to sue is a quintessentially corporate, rather than governmental, right—one that is inherent to the city's

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resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law." (emphasis added)).

178 Five days after the City of Atlanta sued gun industry defendants, Georgia's state legislature passed a law reserving to the state the right to bring civil actions against firearms manufacturers, providing that the law apply to any actions already pending. Smith & Wesson Corp. v. City of Atlanta, 543 S.E.2d 16, 18 (Ga. 2001). Louisiana did the same six months after New Orleans brought its suit. Morial v. Smith & Wesson Corp., 785 So. 2d 1, 6 (La. 2001).

179 *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1998 (2018).

180 *Id.* at 2008 ("Existing legal doctrines provide local governments with few protections against state preemption.").

181 Holt's Cigar Co. v. City of Philadelphia, 10 A.3d 902, 906–07 (Pa. 2011).

182 *E.g.*, *id.* at 919 (Castille, C.J., dissenting) (explaining how the majority's finding of implied preemption struck down an ordinance that clearly promoted the goals of the allegedly preempting state law).

183 *See* Cincinnati Bell Tel. Co. v. City of Cincinnati, 693 N.E.2d 212, 218 (Ohio 1998). This requirement of explicit preemption is the inverse of the historical practice of finding implicit authorization of city suits in state laws addressing unchartered municipalities. *See id.* (finding that the continued practice of applying the implied preemption doctrine is unconstitutional).

184 *See id.*

185 *See id.* at 217.

legal existence—the logic of these decisions applies even more strongly to the right to sue.

Insistence on explicit preemption would mean, for example, that attorneys general should not be able to contend that a state statute impliedly preempts a given city suit just because it authorizes the attorney general to bring a state suit on the same matter.[186] Similarly, a state should not be able to assert the power to settle claims on behalf of cities without pointing to express authority to do so.[187]

The origins and logic of the right to sue should impact the inference of preemption in other ways as well. Because, as seen, the right to sue is fundamentally distinct from the right to regulate, statutes preempting city *regulation* of certain activities should not be read as also encompassing a prohibition on city *litigation* respecting those activities. Thus, for example, a state statute prohibiting cities from "regulating" firearms should not be understood as also blocking city suits on firearm issues.[188] Many courts have adopted this approach in tax matters: insisting that the power to tax is distinct from the power to regulate and thus not automatically preempted when the latter is.[189] Again, the power to sue merits at least the same type of preferential treatment as the power to tax.[190]

When state legislatures explicitly preempt city suits, the options available to cities are undeniably limited. Still, a city suit might at times be able to survive attempts at explicit preemption. Aside from certain state constitutional protections that might be of help in very specific circumstances,[191] cities should

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[186] *E.g.*, *In re* Certified Question from U.S. Dist. Court for E. Dist. of Mich., 638 N.W.2d 409, 415 (Mich. 2002) (finding that Attorney General's settlement with tobacco companies binds cities as well); *see also* State v. City of Dover, 891 A.2d 524, 534 (N.H. 2006) (holding that city suit must yield to state suit).

[187] *See City of Dover*, 891 A.2d at 534.

[188] *Contra* Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999) (holding that despite the county's claims that only regulations "regulate," a lawsuit against a gun manufacturer counted as a regulation and was thus preempted by statute).

[189] Nadav Shoked, *Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation*, 79 OHIO ST. L.J. 801, 820 (2018).

[190] The only cases in which the city suit is clearly tied to the city's powers to regulate—and thus preempted alongside them—are when the city's corporate interest justifying the suit is in enforcement of its own laws. *See infra* Section II.B.2.a. Yet, even there, the city should retain the right to sue to challenge the preemption, for example, as a violation on bans on special legislation.

[191] Namely, home rule immunity where available, see generally Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1049 (2017) (explaining that home rule preserves distinctions between state and local matters), and prohibitions on special legislation, see generally FRUG ET AL., *supra* note 176, at 166.

be allowed to make federal procedural due process claims to protect their right to sue,[192] especially as federal courts have recognized cities' procedural due process rights elsewhere.[193] These arguments might have particular bite when a state seeks to preempt ongoing litigation, a move which has the flavor of retroactive legislation.[194] Because, as this Part established, the right to sue is corporate, the traditional reasons for protecting a private right from government interference apply.[195] Interestingly, although not in a preemption setting, one court recognized, through this same corporate analogy, a city's rather similar First Amendment right to petition an administrative agency in a matter affecting the city.[196]

II. THE SCOPE OF THE CITY'S RIGHT TO SUE

Establishing that the city has an inherent right to sue, as Part I just did, resolves some legal questions about the city suit. But not all, or even most, of them. For the city's right to sue may be inherent, but even inherent rights have limits. For city suits, those boundaries are drawn under the banner of any number

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[192] *Cf.* City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 891 (E.D. Pa. 2000) (rejecting a city's claim that preempting its right to sue violates state constitutional due process rights and principles of separation of powers), *aff'd*, 277 F.3d 415 (3d Cir. 2002).

[193] *In re* Real Est. Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 769 (3d Cir. 1989) (holding that a school district's due process rights will be violated if forced to litigate in a forum with which it had no contacts); Township of River Vale v. Town of Orangetown, 403 F.2d 684, 686–87 (2d Cir. 1968) (allowing a city to sue another state's city for a zoning change when that zoning change had reduced plaintiff city's property values without due process of law).

[194] *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) (rejecting the premise "that what Congress can legislate prospectively it can legislate retrospectively"). Retroactivity also might be relevant to statutory interpretation. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.").

[195] *E.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 26, 31 (1984) (protecting a city's property rights under the Takings Clause); City of Philadelphia v. New Jersey, 437 U.S. 617, 618, 629 (1978) (protecting the city's rights under the Commerce Clause); *see also* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1671 (2011) (arguing that courts should "accord constitutional protections to corporations when it promotes the objectives of those protections").

[196] *See* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual. The right to petition administrative agencies is a basic First Amendment right." (citation omitted)). *See generally* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 901 (1997) (arguing the Petition Clause of the First Amendment creates the right to sue the government for unlawful conduct).

of doctrines—standing,[197] parens patriae,[198] court access,[199] res judicata,[200] and state immunity from city suits.[201]

The individual questions each of these doctrines raises demand answers—which this Article aims to provide below—but treating them as merely individual questions obscures the fact that they all express that one common question: what are the limits of the city's right to sue? Or, in more concrete terms, what are the interests in whose defense or for whose promotion a city may exercise its inherent right to sue?

This Part analyzes the history and theory of the city suit to offer a comprehensive explanation of the appropriate occasions for the exercise of the city's right to sue. The answer we propose is the straightforward rule that the city can sue when its *corporate interest* is at stake. We elaborate this rule by focusing on its two aspects. The first aspect appears in the negative: A city may not sue purely as a representative of citizen interests. As described above in Part I, the city's right to sue is grounded in the city's traditional nature as a corporation.[202] Therefore, perhaps inevitably, the common law has historically held that that right to sue could only be exercised whenever the city's own distinct corporate interest was at stake.[203] As a corporation, the city was separate from its residents, and accordingly, in court, it stood for its own interests as an

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197 *See, e.g.*, City of Miami Gardens v. Wells Fargo & Co., 931 F.3d 1274 (11th Cir. 2019) (per curiam) (remanding the city's claim with instructions to dismiss for lack of standing).

198 *See, e.g.*, United States v. City of Pittsburg, 661 F.2d 783, 786–87 (9th Cir. 1981) (holding cities cannot assert standing under parens patriae).

199 *See, e.g.*, City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (denying an association of cities' motion to intervene).

200 *See, e.g.*, County of Boyd v. US Ecology, Inc., 858 F. Supp. 960 (D. Neb. 1994) (dismissing county's claim because the court found the county and state were in privity), *aff'd*, 48 F.3d 359 (8th Cir. 1995).

201 *See, e.g.*, City of New York v. State, 655 N.E.2d 649, 654 (N.Y. 1995) (holding city cannot sue state because its claims do not fall "within any recognized exception to the general rule that municipalities lack capacity to sue the State").

202 *See supra* Part I.

203 *See* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 62, 69–70 (2014) (discussing how cities are unable to bring suit on behalf of their citizens but instead must bring suit for their own interests); City of Wheaton v. Chicago, A. & E. Ry. Co., 120 N.E.2d 370, 373–74 (Ill. App. Ct. 1954) ("A municipality, in the absence of injury to it in its corporate capacity, has not standing generally to sue on behalf of its residents."); *In re* Nepperhan St. in City of Yonkers, 75 N.Y.S. 923, 924 (App. Div. 1902) (holding city did not have standing because it had no corporate interest in the litigation); City of New Castle v. Pub. Serv. Comm'n, 88 Pa. Super. 314, 317 (1926) (holding city could not appeal because it was not adversely affected in its corporate capacity); City of Detroit v. Detroit & Milwaukee R.R. Co., 23 Mich. 173, 216 (1871) (discussing the importance of basing the city's standing on its corporate capacity but ultimately deciding the case against the city on the merits, without deciding the issue of standing); City of Denver v. Kent, 1 Colo. 336 (1871) (finding the city competent to sue because asserting its right to public lands was within its corporate interest).

entity rather than for the interests of its residents.[204] Section A develops this aspect of the law of the city suit, relying on a series of illustrative nineteenth-century cases from New York and connecting them to debates in corporate theory that were unfolding around the same time.

The second aspect of our answer to the question respecting the appropriate cases for the city's right to sue is affirmative: A city may sue to pursue one of its corporate interests, a set of interests that has been developed in common-law fashion throughout the city's history. Section B combs through centuries of city suits to identify the different types of city corporate interests that the law has recognized. In so doing, it develops a novel taxonomy of the interests upon which cities have the power to sue.

Taken together, these two aspects of the answer establish the potential bases—and thus limits—of a city suit. Section C applies this legal framework to solve the specific challenges presented by current applications of the law of standing, parens patriae, court access, res judicata, and state immunity from city suits.

A. City Suits Versus Resident Suits

Many contemporary commentators argue that cities should be able to sue whenever the interests of city residents—all or some of them—are threatened. City officials, too, often justify the specific city suits they bring as serving to represent residents' rights and preferences.[205] This characterization has intuitive appeal. In some sense, city officials are always, of course, *representatives* of the city's residents. Whether elected or appointed, local officials are obligated (formally or informally) to work for the city and its residents.

Nonetheless, a representative approach to the city suit is not the path the law has elected. Instead, the law drew a clear dividing line between city residents' interests and city interests—and did not allow a city suit simply pursuing the former.[206] It insisted that any city suit vindicate a separate corporate interest of

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[204] *See supra* note 203.

[205] *See* United States v. City of Pittsburg, 661 F.2d 783, 786 (9th Cir. 1981) (city attempting to "assert the rights of the local residents"); *City of Wheaton*, 120 N.E.2d at 373 ("[The city has] sought equity's aid not to protect private or corporate property rights, but to protect the public interest."); City of East Liverpool v. Columbiana Cnty. Budget Comm'n, 870 N.E.2d 705, 711 (Ohio 2007) ("East Liverpool is not advancing equal protection rights for itself. Rather, it is asserting the equal protection rights of its citizens and council members.").

[206] *See City of Pittsburg*, 661 F.2d at 786–87 (holding the city could not assert claims on behalf of its residents but must instead show injury to the city itself); *City of Wheaton*, 120 N.E.2d at 373–74 ("A

the city.[207] The nineteenth-century cases that established this principle reflected key contemporaneous developments in corporate law theory.[208] This section first reviews the cases and then connects them to those developments in legal theory.

1. The City's Corporate Interest as Distinct from Residents' Interest

Courts first confronted the question of the reach and limits of the city suit during the nineteenth century's middle decades. Earlier cases engaging that question were scarce. Historically, government activities were rather limited, curtailing the number of potential disputes involving cities and the attendant need to discern the city suit's boundaries.[209] But in the nineteenth century, as the nation swelled and as industrialization, immigration, and urbanization transformed it, the role of local governments expanded.[210] Cities were providing more, and sometimes wholly new, services such as streets, education, water, sewage, parks, and policing.[211] They were regulating individual activities to promote health, safety, and morals.[212] Substantial financial resources were involved: cities were raising more taxes and then spending more money.[213] Consequently, the potential for city litigation grew, and at least occasionally the question of the reach of the city's right to sue became unavoidable.

Illustrative of courts' approaches to these questions is a series of decisions from New York. In a line of cases starting in the 1840s, the New York courts were faced with the task of delineating the reach of a city's right to sue.[214] These cases, although hailing from one state, reflect an understanding of the allowable

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municipality, in the absence of injury to it in its corporate capacity, has not standing generally to sue on behalf of its residents.").

[207] *See supra* note 203.

[208] *See* discussion *infra* Section II.A.2.

[209] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 15 (1996) (noting the large uptick of city government regulation).

[210] *Id.* (describing "the deluge of laws and ordinances passed by states and municipalities regulating American life" beginning in 1787, with a large uptick in 1801, and continuing "well into the nineteenth century").

[211] MICHAEL RAWSON, EDEN ON THE CHARLES: THE MAKING OF BOSTON 15 (2010); NOVAK, *supra* note 209, at 1, 16, 195.

[212] NOVAK, *supra* note 209, at 1–2.

[213] Randall G. Holcombe & Donald J. Lacombe, *Factors Underlying the Growth of Local Government in the 19th Century United States*, 120 PUB. CHOICE 359, 373 (2004).

[214] Elsewhere, cases where the city's right to sue were directly questioned mostly dealt with standing under the specific rules applicable to the public nuisance tort. *E.g.*, Inhabitants of Springfield v. Conn. River R.R. Co., 58 Mass. (4 Cush.) 63, 67–68 (1849); City of Llano v. Llano County, 23 S.W. 1008, 1008–10 (Tex. Civ. App. 1893). Since the common law has always had special rules pertaining to the identity of those who can sue for public nuisance, these cases are of limited relevance for the general city suit.

subject matter for local governments' suits that other courts across the country were simultaneously expressing in diverse contexts.[215] The New York cases are particularly illuminating because, unlike cases in other states, they represented a direct attempt at distinguishing the category of cases where a city suit was appropriate. In their effort to do so, New York's courts noted that as a legal entity, the city was, and must be, distinct from its residents—and this nature defined the reach of the city's suits.[216]

a. Cornell & Clark

The first set of New York decisions arose out of a dispute involving the Town of Guilford, an Upstate New York hamlet of 322 residents.[217] In 1838, the town's elected Commissioners of Highways, Daniel Cornell and Ransom Clark,[218] brought a complaint against a private turnpike they claimed was trespassing on the town's public highway.[219] As will prove important later, Cornell and Clark formally brought the suit in their own names, not in the name of the town.[220] Eventually, a court sided with the defendant who owned the private turnpike.[221] It also obliged the plaintiffs, Cornell and Clark, to pay legal costs.[222]

Cornell and Clark paid the fees and then asked the town for reimbursement.[223] The town refused, and a new lawsuit ensued.[224] Cornell and Clark argued that they brought the original lawsuit for the town's benefit, and thus the town should carry any costs.[225] The court dismissed their reimbursement

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[215] While other state courts did not necessarily address the question directly, they reached the same answer indirectly, through cases where plaintiffs challenged a city's right to hire lawyers to pursue a case, or offer awards in connection with the apprehension of criminals. These cases are discussed in Sections II.B.3.b.

[216] *See, e.g.*, Town of Guilford v. Cornell & Clark, 18 Barb. 615 (N.Y. Gen. Term. 1854) (holding the town cannot sue because it is not impacted in its corporate capacity), *aff'd sub nom.* Town of Guilford v. Bd. of Supervisors of Chenango Cnty., 13 N.Y. 143 (1855).

[217] *Guilford CDP, New York*, CENSUS.GOV, https://data.census.gov/profile/Guilford_CDP,_New_York?g=1600000US3631137 (last visited Jan. 31, 2023) (citing the 2020 population for the town as 322).

[218] During the mid-1800s, Daniel Cornell and Ransom Clark were involved in a number of lawsuits, which this Article discusses below. Some reporters spell Ransom's name as "Clark" and others as "Clarke." For clarity and consistency, this Article uses the more frequent spelling of "Clark."

[219] Cornell & Clark v. Town of Guilford, 1 Denio 510, 511 (N.Y. 1845).

[220] Cornell & Clarke v. Butternutts & Oxford Tpk. Co., 25 Wend. 365, 365 (N.Y. Sup. Ct. 1841).

[221] *Id.* at 369.

[222] *Town of Guilford*, 1 Denio at 511.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 511–12.

suit in harsh terms.[226] It refused to accept their argument's basic premise.[227] The town was a corporate body—an independent entity with its own separate interests.[228] No one other than the town itself could pursue its claims in court—not even those like Cornell and Clark, whom the residents attending a town meeting authorized to do so.[229] The residents were not the town, so the suit could not be theirs to give to others.[230] A town suit, for the court, had to be brought in the town's name, and it could not be appropriated by anyone, resident or official.[231]

This focus on the names of the plaintiffs listed in a suit might strike readers as exceedingly technical. But it expressed the court's commitment to protecting the distinct nature of the town's interest—an interest distinct from the interests of anyone else and belonging to the town alone. Indeed, so strong was the court's commitment that it reached a result that was clearly at odds with the case's facts. The original lawsuit's whole logic was premised on it being a lawsuit on behalf of the town; recall, the defendants were being pursued for entering town property.[232] As Cornell and Clark had no interest of their own in the property, very little sense could be found in identifying them as bringing the suit in their own personal capacities.[233]

Perhaps because this interpretation of their original acts and intent was so twisted, Cornell and Clark were successful in lobbying the state legislature to provide them with the redress the court had withheld.[234] In 1852, the legislature enacted a state law appointing commissioners to assess the costs the two had borne, mandating that the county levy a tax on properties in the Town of Guilford to raise that sum.[235]

But the story did not end there. Now the town sued, arguing that the state-imposed tax was unconstitutional.[236] Ironically enough, while the earlier Cornell and Clark case explained why *individuals* could not sue on a *town's* behalf, in

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226 *Id.* at 515.
227 *See id.*
228 *Id.* at 514–15.
229 *Id.*
230 *See id.*
231 *Id.*
232 Cornell & Clarke v. Butternutts & Oxford Tpk. Co., 25 Wend. 365, 365 (N.Y. Sup. Ct. 1841).
233 *See id.* (noting the action was brought in response to the taking of a public highway and public bridge).
234 Town of Guilford v. Cornell & Clark, 18 Barb. 615, 615 (N.Y. Gen. Term. 1854), *aff'd sub nom.* Town of Guilford v. Bd. of Supervisors of Chenango Cnty., 13 N.Y. 143 (1855).
235 *Id.*
236 *Id.* at 633.

this new suit the court explained that a *town* could not sue on *individuals'* behalf.[237] The court reasoned that the tax the town was contesting "does not affect the town in its corporate [capacity]."[238] The fact that the tax affected the residents of the town was of no moment. Continuing the corporate analogy, the court remarked: "Suppose the legislature had authorized a tax to be apportioned upon the taxable property of each stockholder in a banking corporation in no respect affecting the corporate property; clearly the bank could not restrain its collection."[239]

The court thus drew a clear line between the interests of the town as a corporate entity and those of its individual inhabitants. It understood a town to be a collective body rather than the mere representative of some, or even all, inhabitants.[240] Indeed, elsewhere in the decision, employing soaring language, the court viewed the promise of towns and cities as dependent upon this fact.[241] If the town interest stood for nothing but taxpayers' interests, it would not be exercising its corporate powers in promotion of its "benevolent and patriotic purpose."[242] The town had to protect not the property of residents, but its own property—which it held for the shared benefit of all residents, "the poverty-stricken as the more fortunate or affluent, without regard to age or sex."[243] From this nature of the town, the court concluded that the town had a right to sue only when its own corporate interests or property were affected.[244]

The town, therefore, could not challenge the tax.[245] Finally, Cornell and Clark were paid.[246] In tandem, the cases dealing with their demand for restitution neatly defined the contours and goals of a city's right to sue. The cases did so by separating the city's interests from those of individual residents.

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237 *Id.* at 635.

238 *Id.*

239 *Id.* at 638–39.

240 *Id.* at 638.

241 *Id.* at 638–39.

242 *Id.* at 638.

243 *Id.*

244 The Court of Appeals affirmed the decision, briefly observing: "It does not appear to me that the town, as a corporate body, can have a standing in court to vindicate the individual rights of the tax payers." Town of Guilford v. Bd. of Supervisors of Chenango Cnty., 13 N.Y. 143, 147 (1855).

245 *See id.* at 146.

246 *See id.* at 144–46 (upholding the decision allowing the legislature to tax the county to repay Cornell and Clark).

b. Boss Tweed

The next dispute in our story involved a protagonist much more colorful than Cornell and Clark. It centered on the doings of the person whose name was quickly becoming synonymous with big city corruption in America: William "Boss" Tweed.[247]

In 1870, the New York state legislature adopted a law creating a commission to audit the debts of the city and county of New York (current day Borough of Manhattan) and issue bonds to repay those debts.[248] The commission, led by Boss Tweed, did as much—but then issued some more bonds raising additional funds which it funneled into the commissioners' pockets.[249] The State Attorney General brought a complaint against Tweed and his associates.[250] But then the city and county intervened, seeking to bring their own suits against the defendants.[251] Tweed and the other defendants claimed that those local bodies, and not the state attorney general, had the authority to pursue the complaint.[252] This argument was not born of principle. Tweed was a county supervisor, and another defendant was a member of the city council.[253] The mayor, who instructed the city's counsel to commence proceedings on behalf of himself and the aldermen, was also a defendant in those same proceedings.[254] The court thus took for granted, probably for good reason, the proposition that the city and county sought to intervene in the case with the sole goal of derailing the proceedings.

Still, disingenuous as the argument unmistakably was, the court had to contend with the legal claim that the appropriate tool for prosecuting the case against the defendants was a city suit. The court dispensed with that argument in reasoning that reflected the holdings in the earlier *Cornell & Clark* cases. It explained that the harm the commissioners had wrought was not inflicted on any corporate interest of the city or county.[255] Rather, the harm was to "the private

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247 People v. Tweed, 13 Abb. Pr. (n.s.) 25, 26–27 (N.Y. Sup. Ct. 1872).
248 1870 N.Y. Laws 875, 877–78.
249 *Tweed*, 13 Abb. Pr. (n.s.) at 39.
250 *Id.* at 26–27, 54.
251 *Id.* at 71–72.
252 *Id.* at 41.
253 *Id.* at 71.
254 *Id.* at 71–72.
255 *Id.* at 66 ("The injury complained of in this case, is not one that affects the corporate interest of the county of New York, or their corporate property.").

interests of the future tax-payers of [the] county."[256] Once the fraudulently issued bonds became due, taxpayers would have to pay back these funds the commissioners had pocketed. But the county and city

> are not made, by law, the general guardians or protectors of the rights and interests of the people of the county, or clothed with authority to sue for injuries inflicted upon them; much less are they the guardians of that distinct and separate portion of the people called tax-payers of the county.[257]

Harmed individuals must represent themselves.[258]

This holding shed light on the principle emerging from the *Cornell & Clark* cases from a slightly different angle. The city was not, the *Tweed* court announced, "the representative of private interests," precisely because it had its own interests to represent.[259] Hence, the court was at pains to distinguish the case at bar from a hypothetical case in which moneys are stolen from the city treasury or prevented from reaching it.[260] Unlike in the current case where the money was taken from taxpayers, a case involving the city treasury, the court explained, would be a quintessential case of harms to the city's corporate interest—which the city would then be able to, and must be able to, pursue through a city suit.[261]

c. Summary

The decisions in these New York cases neatly show how through defining the negative—cases where others cannot sue on the city's behalf (as in the first *Cornell & Clark* case),[262] or cases where the city cannot sue (as in the second *Cornell & Clark* case and in the *Tweed* case)[263]—courts isolated and recognized a concrete city interest that city suits were to pursue. The city was not "the

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256 *Id.*

257 *Id.* at 74–75.

258 *Id.* at 73. In the specific case of bonds, the harm was a harm to future individuals, and therefore no city, nor any current private individual, could seek a remedy or punishment for the perpetrators. Instead, the office of the state's attorney general could pursue such cases of a diffuse public harm. *Id.* at 100.

259 *Id.* at 75.

260 *Id.* at 66.

261 *Id.* at 75 ("The injury is not one affecting the corporate treasury of the county."); *see also id.* at 66 ("No money for this purpose has been drawn from the county treasury.").

262 *See* Cornell & Clarke v. Butternutts & Oxford Tpk. Co., 25 Wend. 365, 369 (N.Y. Sup. Ct. 1841).

263 *See* Cornell & Clark v. Town of Guilford, 1 Denio 510, 515 (N.Y. Sup. Ct. 1845) (holding that the commissioners of highways cannot bring suit in this case); *Tweed*, 13 Abb. Pr. (n.s.) at 81 (holding that it is the state, not the city, that must furnish a remedy for its people when none is provided by law).

representative of private interests."[264] It could sue when something else, separate from the interests of its residents as individuals, was threatened—when its own interest as a body was at stake. The city could sue, the New York courts established, to protect a corporate interest that was all its own.[265]

As we noted at the outset, New York courts were not alone in this conclusion. Countless cases from across the country reached similar conclusions.[266] Those cases—and the law of city suits they embody—are applications of the basic tenets the New York courts expressed in the matters of *Cornell & Clark* and *Tweed*.

2. Corporate Theory

The New York decisions just described not only laid out the law of city suits; they were also engaging with much broader legal concerns—of their era, and of ours. The courts dealing with the question of the reach of the city's corporate right to sue were operating in a legal environment in which the fundamental idea of the corporation was in flux. The questions they confronted respecting the city suit were emblematic of this legal struggle. The principles those courts developed to answer those specific questions announced a conceptual evolution corporate law itself would only complete decades later.

Part I noted that as a legal form, the corporation dates back to the medieval early days of the common law. But the corporation's role in the American economy shifted dramatically, quantitatively and qualitatively, in the nineteenth century.[267] The number of corporations active in the United States exploded.[268] Their importance to the economy and to daily lives reached heights never imagined before.[269] Inevitably, legal thinkers, and also judges and lawyers, were soon pressed to rethink the rationales for the legal recognition of the rights of these now all-pervasive—yet wholly intangible[270]—collective entities.

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264 *Tweed*, 13 Abb. Pr. (n.s.) at 75.

265 *See id.* at 66 (explaining that the county cannot sue because the injury does not affect the corporate interest of the county).

266 We take up many such cases in Section II.B, where we explore in more detail the elements of a city's corporate interest.

267 JAMES S. COLEMAN, POWER AND THE STRUCTURE OF SOCIETY 30 (1974).

268 *Id.*

269 *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 427 (2003) ("[A]s business people tried to expand their operations beyond what a few individuals could fund, manage, and carry out, they discovered that incorporating and investing through a separate entity made it easier for them . . . .").

270 Incorporeal might be a better word, but intangible is more common in this context.

Earlier thinkers conceived of the corporation as an artificial entity the sovereign had created. The corporation was an artificial being in that it (or the individuals creating it as a group) had no natural basis or standing. Corporate status was merely a privilege conferred by the sovereign. The Crown—and post-Independence, the state—individually chartered each and every corporation.[271] The sovereign would establish a given corporation to promote through it a specific public interest—say, the construction of a turnpike. All corporate rights thus emanated from the sovereign's specific grant. With the proliferation of general incorporation laws in the middle decades of the nineteenth century, however, this view of the corporation became dubious. The state's role in the corporation's creation became a formality: anyone could create a corporation, for almost any purpose, without the need for individual permission. A few thinkers and judges thus began toying with the so-called partnership model of the corporation, which treated the corporation as an artificial entity with no existence, powers, or rights separate from those of the individuals standing behind it.[272] But this view gained limited traction.[273] It could afford the corporation those rights the individual owners held (for example, their constitutional entitlements),[274] but if the corporation was nothing but its individual shareholders, legal rights such as limited liability—the notion that corporate liabilities were separate and could not be held against the shareholders—were incoherent.[275] Effective corporate management was also impossible under a partnership model. As long as the corporation was not a body in and of itself, for any major decision all shareholders had to assent unanimously.[276]

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[271] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 72 (1992).

[272] *Id.* at 73. An 1882 treatise writer explained: "The word 'corporation' is a collective name for the corporators or members who compose an incorporated association . . . . [T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 1–2 (1882).

[273] One potential exception is when the Supreme Court still relies on partnership-like notions when adjudicating the federal constitutional rights of corporations. *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 145 (2018).

[274] *E.g.*, R.R. Tax Cases, 13 F. 722, 744 (C.C.D. Cal. 1882) (extending individuals' equal protection constitutional rights to a corporation because "the courts will always look beyond the name of the artificial being to the individuals whom it represents"); Horwitz, supra note 271, at 70 ("The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and trading corporations* IS *the property of the individual corporators*." (quoting Argument for Defendant at 10, San Mateo v. S. Pac. R.R., 116 U.S. 138 (1885))).

[275] HORWITZ, *supra* note 271, at 76.

[276] *Id.* at 73.

Accordingly, by the early twentieth century, a new idea of the corporation was rising: the natural entity model of the corporation.[277] Under this conceptualization, the real world and economic existence of the group entity, in and of itself, renders the entity—the corporation—into a body holding rights, which the law simply cannot ignore. For those committed to this idea, "[a]n association of individuals has an existence that is distinct from that of its members. . . . It has its own dynamics, motivations, aims, and group spirit."[278] Under this new model, the rights and interests that the corporation enjoyed and could vindicate were its *corporate* rights and interests, not the rights and interests of any individual owners.

Against this theoretical background, the nineteenth-century decisions respecting the city's corporate interest discussed in the preceding section should be read. At a relatively early point, the law of the city suit was embodying core principles that general corporate law would settle upon only a few decades later. According to the city cases, the rationale for recognizing city rights, and specifically, the right to sue, was the promotion of a natural, preexisting group interest of the city—the city's "benevolent and patriotic purpose."[279] In 1892, close to four full decades after the New York court first made this statement about city suits, a corporate law commentator criticizing the partnership model that was now on the decline would similarly write: "Any mingling of corporate existence with the existence of the shareholders will weaken corporate rights."[280]

The law of the city suit thus announced the basic tenet of the modern conception of the corporate form, which general law would settle on decades later. Corporate law largely still adheres to that conception today. The corporation's nature as an entity separate from its owners lies at the core of most current legal understandings of the corporate form.[281] It affects all the legal rights and functions of the corporation: the corporation's permanence, its separation of ownership from management, its separate liability, and more.[282] It

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[277] *Id.* at 74.

[278] Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1442 (2006).

[279] Town of Guilford v. Cornell & Clark, 18 Barb. 615, 638 (N.Y. Gen. Term. 1854), *aff'd sub nom.* Town of Guilford v. Bd. of Supervisors of Chenango Cnty., 13 N.Y. 143 (1855).

[280] Dwight Arven Jones, *A Corporation as "A Distinct Entity,"* 2 COUNSELLOR 78, 81 (1892).

[281] *See* 1 FLETCHER CYCLOPEDIA CORP. § 25, Westlaw (database updated Sept. 2022) ("It is generally accepted that the corporation is an entity distinct from its shareholders with rights and liabilities not the same as theirs individually and severally." (footnote omitted)).

[282] *Id.*

also affects the corporation's right to sue.[283] The modern theory of the corporation demands that a corporation, whether a business association or a city, only bring a lawsuit when its own corporate interest—rather than the individual interests of some, or even all, of its members—is at stake.[284]

B. The Concrete Interests Forming the City's Corporate Interest

The corporate roots of the city not only help reject the purely representational city suit, but they also help define the interests upon which the city may sue. The latter constitute the city's *corporate* interests.

This section collects and categorizes the city's corporate interests through a careful reading of the long history of city suits. It identifies three long-standing categories of corporate interests that can support a city suit: (1) proprietary interests; (2) enforcement interests; and (3) interests in resisting inter-governmental interference.

As we review these three categories of the city's corporate interest, it is important to bear in mind a key point—dictated by logic, but also consistent with the normative theory this Article proposes. As the preceding section established, resident interests alone do not support a city suit. Still, the presence of such resident interests does not bar a city suit. A city may, and often will, bring a suit that represents the interests of its citizens—as long as the suit also furthers some corporate interest of the city. In other words, while a representational interest does not supply a corporate interest, it also does not negate an existing one. The question is always whether the suit also involves one of the city corporate interests we now categorize.

1. Proprietary Interests

Everyone has an interest in their assets. What is true for natural persons is also true for legal persons. Indeed, one of the earliest powers of and reasons to create a corporation was to hold assets in perpetuity.[285] Like a private corporation, a municipal corporation may own property, sign contracts, and raise and spend funds.[286] Like a private corporation, a municipal corporation can

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[283] *Id.*

[284] *Id.* § 36.

[285] Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 54 (1993).

[286] *See* Swan, *supra* note 12, at 1255.

access the courts to protect these interests. Each of these proprietary interests has historic roots. Each evolved over time as the legal environment changed.

a. Property

Perhaps the most straightforward interest on which cities may sue is their interest in their property.[287] From their earliest days, cities have owned property.[288] Even as the power of cities waned in the nineteenth century, the right of a city to own property was never questioned.[289] It almost goes without saying that once a person or entity is permitted to own property, they can sue to protect their property interests.[290] As a Louisiana court once put it, it would be "absurd" if a municipal body, such as the plaintiff school district suing the mill whose operations were interfering with its school building, was created with the power to acquire buildings and other property and then could not have the power to use the judicial branch to enforce the goals it was created for.[291]

Throughout American history there are many examples of cities suing on property interests—protecting their land, their chattels, and their intangible interests.[292] For example, in the nineteenth century, Laredo, Texas, sued to protect its ferry franchise,[293] and Memphis, Tennessee, sued to protect its investment in a railroad.[294] Nineteenth-century courts were so committed to a city's right to protect its property in court that they authorized cities to pay

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[287] Professor Swan called this "the least controversial basis for city litigation." *Id.*

[288] *See, e.g.*, Frug, *supra* note 34, at 1104 (explaining that cities, which have the power to own property, have a history in both England and America as being separate entities not created by the government).

[289] *See, e.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275 (O.W. Holmes ed., 12th ed. 1873) ("Public corporations . . . may also be empowered to take or hold private property for municipal uses; and such property is invested with the security of other private rights."); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819) ("[I]t will hardly be contended, that even in respect to [municipal] corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation . . . acquired under the public faith."); DILLON, *supra* note 35, at 557 ("[A] municipal corporation has the common law or implied power, unless restrained by charter or statute, to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created.").

[290] *See, e.g.*, Town of Troy v. Cheshire R.R. Co., 23 N.H. 83, 94 (1851) ("Towns may be the owners of property used upon highways, as animals and carriages, or property carried upon them, and as such, they have the same rights, and the same remedies for such injuries, against other towns, corporations or persons, as other persons or corporations would have in a like case.").

[291] Caddo Par. Sch. Bd. v. Pyle, 30 So. 2d 349, 351–52 (La. Ct. App. 1947).

[292] *See, e.g.*, Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 292 (1815) (adjudicating an action on ejectment).

[293] L. Waterbury & Co. v. City of Laredo, 60 Tex. 519, 519, 522 (1883).

[294] City of Memphis v. Adams, 56 Tenn. (9 Heisk.) 518, 526 (1872).

lawyers litigating cases where the city itself was not even a party, as long as city property was somehow involved. The California court, for example, focused on a city's right to protect its real property from the potentially injurious effects of ongoing litigation[295] when it permitted Sacramento to pay an attorney to aid in a Supreme Court dispute between the U.S. government and an individual making land claims under an old colonial grant.[296]

Just as in the past, cities today sue on everyday property issues—even if the assets involved are not exactly those one could easily find in the nineteenth century. For example, in 2013, Portland, Oregon, sued a corporation that it claimed had violated its trademark and design for the Portland Loo, an award-winning portable toilet big enough to accommodate a bicyclist and their bicycle.[297]

Today's cities also use property interests as the basis to sue on somewhat more high-profile matters. Climate change cases often rely on city property interests.[298] For example, in 2018, the City of New York sued the largest producers of fossil fuels.[299] The City sought "compensatory damages for the past and future costs of climate-proofing its infrastructure and property."[300]

b. Contracts

A similar story could be told about cities as contract parties. As with private corporations, there is no doubt that municipal corporations can enter contracts

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[295] Smith v. Sacramento City, 13 Cal. 531, 533 (1859).

[296] The underlying litigation pertained to the validity of grants made to a settler under Mexican law. United States v. Sutter, 62 U.S. (21 How.) 170, 172 (1858).

[297] *Defending the Portland Loo*, COURTHOUSE NEWS SERV. (Aug. 20, 2013), https://www.courthousenews.com/defending-the-portland-loo/; *see also* Cleveland v. Dickerson, 60 N.E.3d 686, 688 (Ohio Ct. App. 2016) (handling an action for trespass for entering restroom at municipal airport after warning from police officer).

[298] *See, e.g.*, Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 342 (2d Cir. 2009) (describing property damage claims of New York City and others); City of New York v. Chevron Corp., 993 F.3d 81, 88 (2d Cir. 2021) (addressing city claims based on harm to city property). The Supreme Court addressed a similar issue in the context of state lawsuits in *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

[299] *Chevron Corp.*, 993 F.3d at 86, 88.

[300] *Id.* at 88.

respecting activities that fall within their scope of authority.[301] Once an authorized contract is in place, there is no doubt that cities can sue upon it.[302]

Here, too, city suits evolved alongside city functions. In an early Massachusetts decision defining the ability of local governments to sue, a school district was permitted to sue for the breach of a contract to build a schoolhouse.[303] When cities began financing railroads,[304] they sued on railroad bond contracts.[305]

In our own days, city contracts sometimes provide the basis for suits related to matters of major public concern. In a move reminiscent of the slightly-older asbestos claims, cities recently sued providers of lead paint and piping based on city supply contracts.[306] Notably, these contract claims stood on much firmer footing than city lawsuits against lead providers relying on public nuisance theories.[307] The public nuisance city suits largely foundered because courts found that as the alleged injurious conditions existed in private homes the claims involved individual, not city, rights, or they objected that the specific provider could not be identified.[308] These doctrinal problems are not present when the city suit is grounded in its own specific contract with an individual supplier.[309]

c. Fiscal Interests

Central to cities' corporate function is their ability to collect, hold, and decide how to spend city funds.[310] Like traditional property assets, therefore, the city's

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[301] *See, e.g.*, 10 MCQUILLIN MUN. CORP. § 29:9 (3d ed.), Westlaw (database updated July 2022) ("A municipal corporation authorized to do an act has, in respect to it, the power to make all contracts that natural persons could make.").

[302] *See, e.g.*, *id.* § 49:73 ("[A] municipal corporation is bound by, and may sue and be sued on, all contracts which it may legally enter into in the same manner as a private corporation or an individual."). For early examples, see *Inhabitants of the Fourth School-District in Rumford v. Wood*, 13 Mass. 193, 198–99 (1816), and *City of Worcester v. Worcester Consol Street Railway Co.*, 196 U.S. 539, 548 (1905).

[303] *Wood*, 13 Mass. at 193, 198–99.

[304] *See* Frug, *supra* note 34, at 1110–11.

[305] *See, e.g.*, *City of Worcester*, 196 U.S. at 543; Chambers County v. Clews, 88 U.S. (21 Wall.) 317, 317 (1874); Franklin County v. German Sav. Bank, 142 U.S. 93, 98 (1891); Schanzenbach & Shoked, *supra* note 100, 584–85 (discussing contract cases).

[306] *E.g.*, City of Philadelphia v. Lead Indus. Ass'n, Inc., 994 F.2d 112, 120–21 (3d Cir. 1993).

[307] Kate Fritz, *Public Pollution/Public Solution: A Framework for City-Led Toxic Tort Litigation*, 28 N.Y.U. ENV'T. L.J. 319, 340 (2020).

[308] *See id.* at 328–29.

[309] For earlier contract cases about asbestos, see, for example, Kansas City v. Keene Corp., 855 S.W.2d 360 (Mo. 1993); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 647 (D.R.I. 1986).

[310] *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 694–95 (1819) (rejecting the idea that "the legislature [can] confiscate to its own use the private funds which a municipal corporation holds

fiscal resources have always been perceived as proprietary interests and threats to them have always justified city litigation.[311] Raising taxes was the municipality's "business," and thus an 1878 Iowa court found that a county had the power to hire an attorney to help collect unpaid taxes.[312] A Washington court similarly allowed a county board—indeed, claimed it was the county board's duty—to hire an expert to compile a list of delinquent taxes because the board must "care for the county property, and manage the county funds and business."[313]

The city's interest in retention of its fiscal rights extends beyond the mere collection of currently-due taxes; it includes abetting potential threats to a future stream of taxes. A nineteenth-century Illinois decision provides a stark example.[314] It permitted a local government to support other litigants lacking any formal relationship to that local government—just because future fiscal interests were at stake.[315] A county sought to pay an attorney for the representation of a taxpayer in a federal case questioning the validity of county-issued bonds.[316] The court found this retention agreement within the scope of the county's corporate interests because the case affected the county's fisc.[317] If the taxpayer's suit failed and the bonds were upheld, the county would have to raise revenue through taxation to pay them back.[318] In a more recent, and straightforward (though politically charged), example, the Oregon Supreme Court allowed a city suit challenging a referendum-approved state law that would have forced cities to compensate owners for any land use regulation.[319] The court grounded the city's right to sue in the reform's fiscal impact on cities.[320]

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under its charter, without any default or consent of the corporators"). As with private corporations, the risk of city officials spending such funds inappropriately justifies the availability of the derivative suit on behalf of municipal corporations. *See supra* Section I.B.3.a.

311 *See, e.g.*, Lowell v. Bos. & Lowell R.R. Corp., 40 Mass. (23 Pick.) 24 (1839) (regarding indemnity); Town of Hamden v. New Haven & Northhampton Co., 27 Conn. 158 (1858) (regarding indemnity); Town of Barkhamsted v. Town of Farmington, 2 Conn. 600 (1818) (regarding assumpsit); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) (regarding declaratory judgment action based on economic interest).

312 Wilhelm v. Cedar County, 50 Iowa 254, 255 (1878).

313 Martin v. Whitman County, 1 Wash. 533, 536–37 (1889).

314 County of Franklin v. Layman, 34 Ill. App. 606, 608–09 (1889).

315 *Id.* at 610.

316 *Id.* at 606.

317 *Id.* at 610–11.

318 *See id.* at 611.

319 League of Or. Cities v. State, 56 P.3d 892, 896–97 (Or. 2002).

320 *Id.* at 903.

Recent high profile city suits sometimes similarly rely on claims of economic injury to the city's fiscal resources—particularly on the argument that the defendant's acts forced, or will force, the city to spend revenue.[321] A federal court allowed cities operating public health departments caring for uninsured residents to sue the Trump administration, alleging its regulatory actions increased the uninsured rate over what it was intended to be under the Affordable Care Act.[322] Another allowed Cook County, Illinois, to challenge the Trump Administration's public charge rule because it imposed financial costs on the county budget.[323] Imperial Beach, California, filed a climate change lawsuit grounded in a study concluding that the tiny community must spend at least $50 million to erect sea walls so as not to be washed away.[324] Cities relied on fiscal theories of recovery in cases against gun manufacturers, e-cigarette manufacturers, and social media companies.[325] Fiscal injuries of various sorts are also central to the claims of cities in the ongoing opioid litigation.[326] For cities such as Chicago, the economic injury arose from the city's self-insured health care plans for city employees.[327] Other cities have sought recovery for funds spent to respond to the opioid crisis, such as "increased spending on child support services, medical examiners, jails, courtrooms, and coroner bills."[328]

Of course, whether a particular economic injury that a city allegedly endured is sufficient to satisfy a given doctrinal test (say the "injury in fact" requirement for Article III standing) depends on what that test demands. We have more to say about some of these demands below. But the important point to stress again here is that when cities have been allowed to access courts to protest economic

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[321] Yet another set of financial injury suits are those that arise from so-called unfunded mandates. *See, e.g.*, Town of Nelson v. New Hampshire Dep't of Transp., 767 A.2d 435, 436 (N.H. 2001); Village of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 878 (N.D. Ill. 2020). *See generally* Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495–96 (2008) (discussing debates over unfunded mandates).

[322] City of Columbus v. Cochran, 523 F. Supp. 3d 731, 744 (D. Md. 2021).

[323] Cook County v. Wolf, 962 F.3d 208, 218, 233 (7th Cir. 2020).

[324] Joel Stronberg, *A Win for the Oil Companies: No Actionable Tort(ure) Was Found*, RESILIENCE.ORG (June 28, 2018), https://www.resilience.org/stories/2018-06-28/a-win-for-the-oil-companies-no-actionable-torture-was-found/.

[325] *See, e.g.*, Swan, *supra* note 12, at 1234–36 (collecting sources on gun cases); *In re* JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020) (e-cigarettes, including claims by school districts); Complaint at 1, Seattle Sch. Dist. No. 1 v. Meta Platforms, Inc., No. 23-cv-00032 (W.D. Wash. Jan. 6, 2023) (social media).

[326] *See generally* Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation and the Opioid Crisis*, 50 URB. LAW. 87, 113–14 (2019); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 289 (2021).

[327] Second Amended Complaint at 248, City of Chicago v. Purdue Pharma L.P., 211 F. Supp. 3d 1058 (No. 14-cv-04361), 2015 WL 7722444, at ¶ 635 (N.D. Ill. 2015).

[328] Monea, *supra* note 326, at 116.

injuries, it has been to protest economic injuries *to the city*. Sometimes cities win and sometimes they lose, but city fiscal interests, like other proprietary interests, have always opened courthouse doors to cities.

2. Enforcement Interests

A second category of corporate interests that support city suits is a city's potential interest in enforcing certain laws in court. The city's law enforcement interest has two aspects—what we will call local law enforcement and delegated law enforcement—reflecting the city's dual public-private nature.

First, although cities do not have the same plenary lawmaking authority as states, they are governments and thus, under state law, they possess local lawmaking authority. Consequently, cities have a corporate interest in enforcing their duly enacted laws. This interest in *local law enforcement* resonates with cities' history. Cities were originally established in medieval England to govern a defined area and later, in nineteenth-century American law, were treated as at least partially public due to this purpose of theirs.[329]

Second, as private entities, cities can function as "private enforcers" of the laws other governments make. States and the federal government routinely diffuse law enforcement authority to non-state actors. Once the state or federal government authorizes "persons" to enforce a state or federal law, the city—a corporate person—has a corporate interest in this *delegated law enforcement*.

a. Local Law Enforcement

Under tenets of American law described in Part I, to regulate, the city must receive authorization.[330] For these reasons, we have stressed that the right to sue is not dependent on the right to regulate. But that does not mean that the right to regulate, where present, may not generate a right to sue.

States constantly authorize cities to adopt their own regulations. When and if a city is authorized to regulate, an ancillary component of that authority is the right to sue to enforce the properly enacted local ordinance. As a leading treatise puts it: "The general rule is that a municipal corporation has power to enforce

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[329] Frug, *supra* note 34, at 1082.

[330] DILLON, *supra* note 35, at 55.

ordinances . . . ."[331] Indeed, the treatise goes on to observe that "[i]f an ordinance exists, a municipality has no option but to enforce it."[332] The enforcement of an ordinance the city is authorized to adopt is thus a quintessential corporate interest.

The city's ability to enforce its own local regulations has been accepted for centuries. Historically, cities would enforce their ordinances either through a common-law action of debt or assumpsit, or through a summary proceeding on information or complaint.[333] Many courts held that the city's right to recover penalties for violations of ordinances was inherent.[334] Exercising this right allowed the city to preserve local peace and good order, an "important object of the corporation."[335]

The types of city suits enforcing ordinances will vary, of course, depending on the topics which cities regulate. As the scope of government regulation has expanded exponentially over the past century and a half, cities have gone to court to enforce ordinances on a range of topics from zoning[336] to environmental laws[337] to gun regulations[338] to public utilities[339] to consumer protection[340] to anti-animal cruelty[341] to workers' rights.[342] While the power to sue to enforce local ordinances seems boundless (could not a city justify any suit by having the foresight to adopt an ordinance first?), of course such suits could be challenged on the basis that the original ordinance was unconstitutional or *ultra vires* (that

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331 5 MCQUILLIN MUN. CORP. § 17:3 (3d ed.), Westlaw (database updated Oct. 2022) [hereinafter 5 MCQUILLIN MUN CORP.].

332 9A MCQUILLIN MUN. CORP. § 27:5 (3d ed.), Westlaw (database updated Oct. 2022) [hereinafter 9A MCQUILLIN MUN. CORP.]; *see also* DILLON, *supra* note 35, at 289–90 ("Since an ordinance . . . without a penalty would be nugatory, municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them." (footnote omitted)).

333 9A MCQUILLIN MUN. CORP., *supra* note 332, § 27:5 (describing and collecting historical and modern cases); DILLON, *supra* note 35, at 339.

334 *See, e.g.*, People v. Dummer, 113 N.E. 934 (Ill. 1916); Barter v. Commonwealth, 3 Pen. & W. 253 (Pa. 1831); *see also* DILLON, *supra* note 35, at 351 ("[C]ourts have uniformly held that it was competent for the state legislatures to create municipal corporations with powers of local government, and to authorize them to adopt ordinances or by-laws with appropriate penalties for their violation.").

335 Cullen v. Town of Carthage, 2 N.E. 571, 572 (Ind. 1885).

336 King v. City of Bainbridge, 531 S.E.2d 350, 350 (Ga. 2000); Dvorak v. City of Bloomington, 796 N.E.2d 236, 237 (Ind. 2003).

337 C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 386 (1994); Town of Frederick v. North Am. Res. Co., 60 P.3d 758, 760 (Colo. Ct. App. 2002).

338 City of Chicago v. Taylor, 774 N.E.2d 22, 28 (2002).

339 City of Anaheim v. Pacific Bell, 134 Cal. Rptr. 2d 701, 702 (Cal. Ct. App. 2003).

340 City of Chicago v. Purdue Pharma L.P., 211 F. Supp. 3d 1058 (N.D. Ill. 2016).

341 Park Pet Shop, Inc. v. City of Chicago, 872 F.3d 495 (7th Cir. 2017).

342 New Mexicans for Free Enter. v. The City of Santa Fe, 126 P.3d 1149, 1155 (N.M. Ct. App. 2005).

is, lacking state authorization). The ordinance, not the suit qua suit, would be problematic in those cases.

The exercise of this right to sue to validate the corporate interest in local law enforcement has recently come under criticism. The Department of Justice's investigation of the Ferguson, Missouri, police department following the killing of Michael Brown documented the overuse of local enforcement to generate revenue.[343] Professor Alexandra Natapoff has identified a host of problems associated with the more than 7,500 municipal courts across the country—a common (though not exclusive) venue for city suits enforcing city laws.[344] Yet even these critics express no doubt that cities have the power to enforce their local laws in court.[345] The concern is with the specific processes of enforcement—and, perhaps even more importantly, with the underlying laws being enforced.

b. Delegated Law Enforcement

One notable feature of the American system of governance is that much of the work of enforcing a law is done by entities other than the government making that law. Private enforcement, as it is often called, is a dominant modality of enforcing laws on issues from civil rights to the environment to antitrust.[346] Federal and state laws routinely delegate litigation authority to private actors, often with inducements such as fee-shifting provisions or damages enhancements.[347]

Cities, as entities with certain private law attributes, have always been among the potential delegates of such enforcement authority, and this potential has been

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[343] INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, U.S. DEP'T OF JUSTICE, C.R. DIV. 2 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[344] Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 975 (2021).

[345] *See id.* at 994. *See generally* 6A MCQUILLIN MUN. CORP. §§ 24:1 et seq., Westlaw (database updated July 2022) (discussing the municipal police power).

[346] *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 4–5 (2010); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 789–90 (2011); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2149 (2004). The history of such suits is long—longer than often appreciated. *See, e.g.*, James E. Pfander, *Standing to Sue: Lessons from Scotland's* Actio Popularis, 66 DUKE L.J. 1493, 1527 (2017); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 719–31 (2004).

[347] *See, e.g.*, FARHANG, *supra* note 346, at 16. Governments also may delegate enforcement authority to other governments, such as when the federal government empowers states to enforce federal law. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 707–08 (2011); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077, 1080 (2018).

realized—and realized consistently. As the realm of state legislation began expanding in the late nineteenth century, enforcement of new state laws was often bestowed on cities. For example, the New York state legislature delegated the power to enforce labor laws and building codes to various city departments around the time it first introduced such laws in the Progressive Era.[348] City attorneys in California could always sue on behalf of the state and seek compensation from it for their services.[349] The Texas legislature empowered Houston through its original city charter to represent the state in court.[350]

The practice has continued unabated. Today, state and federal laws of all sorts expressly authorize city suits. Wisconsin authorizes cities to sue for public nuisance.[351] Virginia allows cities to sue for deceptive practices.[352] California's labor law authorizes cities to sue employers who misclassify gig workers as private contractors.[353] Its consumer protection law similarly allows city suits,[354] a power cities have used, for example, to bring lawsuits against paint manufacturers for lead paint found in private homes,[355] and against Wells Fargo for opening accounts without costumers' consent.[356]

In these instances, the original lawmaker explicitly delegated a power to enforce the law to cities. In other, more common cases, state or federal statutes provide a cause of action to "persons," a term which courts have consistently interpreted to include cities, in full alignment with the common law's equation for litigation purposes of the city with other private entities as discussed in Part I.[357] A longstanding example of this type of delegation comes from antitrust law. In 1906, the Supreme Court held that a city was a "person" under the Sherman Act, permitting it to sue a water pipe supplier for Clayton Act violations.[358]

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348 *See* People v. 20 E. 74th St. Corp., 68 N.Y.S.2d 73, 75–77 (Magis. Ct. 1947).

349 *See* Tilden v. Bd. of Supervisors of the Cnty. of Sacramento, 41 Cal. 68, 71 (1871).

350 *See* Harris County v. Stewart, 41 S.W. 650, 650 (Tex. 1897).

351 WIS. STAT. ANN. § 823.01 (West 2022) (regarding public nuisance).

352 VA. CODE ANN. § 59.1-203 (West 2022) (regarding deceptive practices).

353 CAL. LAB. CODE § 2786 (West 2022).

354 CAL. BUS. & PROF. CODE § 17204 (West 2022).

355 *See* California v. Atlantic Richfield Co., No. 1-00-CV-788657, 2013 WL 3971239, at *1 (Cal. Super. June 12, 2013).

356 E. Scott Reckard, *L.A. Sues Wells Fargo, Alleging 'Unlawful and Fraudulent Conduct,'* L.A. TIMES (May 4, 2015), https ://www.latimes.com/business/la-fi-wells-fargo-suit-20150505-story.html.

357 *See, e.g.*, City of Sausalito v. O'Neill, 386 F.3d 1186, 1200 (9th Cir. 2004) (holding that the City of Sausalito is a "person" entitled to sue under the Administrative Procedures Act).

358 Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 395 (1906). Today, cities frequently file antitrust suits under federal and state law. *See, e.g., In re* Loestrin 24 Fe Antitrust Litig., 814 F.3d

Today, courts routinely treat cities as "persons" for various federal law enforcement purposes.[359] For example, the Supreme Court read the Fair Housing Act's private right of action to authorize city suits in *Bank of America Corp. v. City of Miami*.[360] Indeed, it was so obvious to the Court that the city could be an "aggrieved person" under that statute that the opinion did not even mention the plaintiff's municipal status as a potential issue.[361] State and federal statutes, therefore, often empower a city to sue even without naming cities specifically.

None of this means that all statutes empower cities to sue in all circumstances. Where a statute does not delegate law enforcement powers to any actor, cities do not have a right to enforce that statute.[362] Cities in their capacity as enforcement delegates are not endowed with special rights to sue, distinct from those of other actors. Moreover, when a law designates a city as a potential delegate, it does not change the city's nature as a city. Thus, other limits on city power—such as state law limits on the geographic authority of cities—can cabin the city's authority to sue.[363]

This analysis of the two subtypes of the city's corporate law enforcement interests thus has an important implication that should be stressed. For the city to have an interest in law enforcement, other legislatures need to, at some point, delegate enforcement powers to it. The city does not hold an inherent right to enforce laws. The city in American law, as noted, is not the equivalent of the state which is responsible for the public's general welfare.[364] Instead, a city law

538, 541 (1st Cir. 2016); City of Oakland v. Oakland Raiders, 445 F. Supp. 3d 587, 590–91 (N.D. Cal. 2020); City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730, 742–43 (N.D. Ill. 2019).

[359] A similar analysis would apply to statutes empowering "citizens," as in the Clean Water Act. *See, e.g.*, Cal. Sportfishing Prot. All. v. Allison, No. 2:20-cv-02482 WBS AC, 2022 U.S. Dist. LEXIS 198973, at *5–6, *10–11 (E.D. Cal. Nov. 1, 2022) (approving a suit against a state prison by Amador County, California, under the Clean Water Act's citizen suit provision).

[360] *See* 137 S. Ct. 1296, 1300–01 (2017).

[361] *Id.* at 1301, 1307. Treating cities as "persons" in this fashion is consistent with the common-law history of corporations. Thus, statutory references to legal "persons," unless explicitly stating otherwise, should be read as including all corporations, a group that encompasses cities.

[362] *See, e.g.*, City of Ashdown v. Netflix, Inc., 52 F.4th 1025, 1027–28 (8th Cir. 2022) (rejecting a city suit against Netflix and Hulu under state statute because the statute included no express or implied private right of action, but instead empowered only the state Public Service Commission to sue).

[363] *See, e.g.*, Abbott Lab'ys v. Super. Ct. of Orange Cnty., 467 P.3d 184, 192–97 (Cal. 2020) (discussing potential state-law limits on district attorney's delegated authority to enforce state law against unfair competition).

[364] Criminal laws supply the best illustration for this principle. Late-nineteenth-century courts were adamant that cities lacked the power to employ lawyers to assist the state in prosecuting crimes—as they argued that enforcement of state criminal laws was a state, rather than a city corporate, interest. MCQUILLIN, *supra* note 48, at 5160; *see also* Montgomery v. Bd. of Supervisors of Jackson Cnty., 22 Wis. 69, 72 (1867) ("It appears to us

enforcement suit can only proceed when the state empowered the city to make the laws that were violated (assuming the state did not explicitly reserve in itself the right to enforce the authorized city law),[365] or when the creator of the specific law—the federal or state government—authorized the city to bring a suit for its breach.

3. Intergovernmental Interference

A third set of city corporate interests that can underlie a city suit relate to protecting the city from other governments. The corporate interest here is rather obvious: a separate entity has a patent interest in maintaining its separate existence or the powers it holds as a separate entity.

The conceptual account of such defensive suits is, in many ways, similarly self-evident. At various times, higher levels of government might choose to act upon municipal governments. They might adopt laws that seek to control the behavior of municipalities;[366] they might seek to expand or contract municipal powers;[367] they might seek to dissolve the municipality altogether.[368] When cities want to resist these actions, they can sue to defend themselves. Although the state has the authority to empower or disempower the city, once the city is endowed with certain authorities and interests, it must be able to protect them. Furthermore, when the higher level of government regulates (in a sense, acts upon) a city as a separate entity, it is essentially acknowledging that the city's separate entity status is implicated by the regulation. The higher-level government can thus hardly deny a defensive reaction by that entity—even if

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that the prosecution of criminal offenders is not a part of the corporate or administrative powers of a county, and no authority to employ the appellants can be implied from that provision."). This principle held even if the city was a crime's victim. *See* Butler v. City of Milwaukee, 15 Wis. 493, 498 (1862); *see also* Hight v. Bd. of Comm'rs of Monroe Cnty., 68 Ind. 575, 577–78 (1879); Patton v. Stephens, 77 Ky. (14 Bush) 324, 326–27 (1878) ("In its legal aspect the crime with which [an embezzling city treasurer] was charged was not a crime against the city of Covington any more than the larceny of one's goods or the forging of his name is an offense against him.").

[365] For example, Nevada law allows cities to impose by ordinance a franchise fee on video service providers for using public rights of way, NEV. REV. STAT. ANN. § 711.670 (West 2021), but the statute insists that "[a]ny action to recover a disputed underpayment of a franchise fee from a video service provider must be commenced and prosecuted by the Attorney General on behalf of the affected local governments." NEV. REV. STAT. ANN. § 711.680 (4) (West 2021); *see* City of Reno v. Netflix, Inc., 52 F.4th 874, 877 (9th Cir. 2022) (interpreting the statute in this way).

[366] For example, cities are regulated by the federal antitrust laws. *See* Schanzenbach & Shoked, *supra* note 100, at 600–02.

[367] *See, e.g.*, Briffault, *supra* note 179, at 1997–99.

[368] *See generally* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1366 (2012).

that reaction, given the entity's subservient status, might eventually fail on the merits.

A West Virginia case from over a century ago offers a particularly striking example. The state there decided to prosecute a liquor retailer who did not hold a state license—but did hold a license issued by the Town of Point Pleasant.[369] The town then hired, and sought to pay, lawyers to argue the seller's case.[370] The court allowed it to do so. Of course, the court stressed, a town is normally not allowed to volunteer its public resources for the defense of individual residents and their interests.[371] But this case was different. It implicated the town's right to license the sale of liquor, and the state's alleged intrusion on that right.[372] If the state were successful in convicting the defendant, a precedent would be established that only a state license could render liquor sales legal.[373] The town would effectively have lost the power to issue licenses, "an annihilation of a municipal policy."[374] To protect this existing law-making prerogative, the town was allowed to sue.[375]

Over time, cities have done more with their existing powers, and higher-level governments have consequently, and perhaps inevitably, found more to be displeased with. They have thus endeavored rather frequently to police city action—generating more and more defensive city suits.[376] Some of these have made it to the Supreme Court. *Seattle School District No. 1* involved a local government suing over the state's attempt to limit the integrationist purposes for which the local government could engage in otherwise permissible student busing.[377] In *Romer v. Evans*, multiple Colorado municipalities sued the state for mandating that they remove from their duly authorized anti-discrimination ordinances all protections based on sexual orientation.[378]

Even more recently, as partisan policy battles between major cities and higher-level governments intensified, federal and state governments began

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369 *See* Cheesebrew v. Town of Point Pleasant, 76 S.E. 424, 424 (W. Va. 1912).

370 *Id.*

371 *Id.* at 425.

372 *Id.*

373 *Id.*

374 *Id.*

375 *Id.* at 426.

376 For any number of examples in the context of property law, see Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215 (2021).

377 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 459 (1982).

378 517 U.S. 620, 623–24 (1996).

routinely turning to financial sanctions as tools to change city behavior. City suits challenging these acts may thus implicate the city's interest in protecting itself from interference, as well as the city's fiscal (and hence proprietary) interests, discussed above. For example, defying federal demands, cities across the country declined to cooperate with federal Immigration and Customs Enforcement under so-called sanctuary city policies.[379] In response, President Trump issued an executive order making sanctuary jurisdictions presumptively ineligible to receive federal grants.[380] Later, the Attorney General conditioned certain federal funds on city cooperation with immigration enforcement.[381] Cities sued to challenge these policies.[382]

Cities have similarly sued when state governments imposed their own fiscal sanctions against cities that adopt ordinances or policies the particular state disfavors.[383] Laws with such fiscal penalties have grown rather common.[384] An Arizona law, for example, empowers the state to withhold all shared monies from cities that do not repeal ordinances that might arguably contradict state laws.[385] Tucson, Arizona, brought a lawsuit when this fiscal sanction was levied following its refusal to repeal an ordinance that allowed the city's police to destroy forfeited firearms.[386]

In all such cases, the municipal government seeks policy independence from higher levels of government by suing on the theory that the higher government's attempt to regulate—directly through law or indirectly through financial penalties—a power the municipality already held is somehow improper. Even in cases where the court ultimately decides that the state regulation was proper, the city still has the power to sue to find out.

In sum, city suits must promote a city corporate interest, be it a proprietary interest, an interest in enforcing a law, or an interest in combatting inter-governmental interference. The city suit cannot merely attempt to vindicate a

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379 *See, e.g.*, Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 550–51 (2018); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 541 (2017).

380 Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

381 *See* City of Chicago v. Sessions, 888 F.3d 272, 276–77 (7th Cir. 2018).

382 *See, e.g.*, *id.*; City & County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018).

383 For example, the Texas anti-sanctuary-city law imposes fines on cities, with penalties of up to $1,500 for a first violation and $25,500 for subsequent violations. TEX. GOV'T CODE ANN. § 752.056(a)–(b) (West 2021).

384 *See* Briffault, *supra* note 179, at 2004–07.

385 ARIZ. REV. STAT. ANN. § 41-194.01(B)(1)(a) (2021).

386 *See* State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663, 667 (Ariz. 2017).

residents' interest—that would be inconsistent with the city's separate legal personhood.

That said, we must stress again that nothing in this analysis suggests that it would be improper for the city to sue to serve one of the noted corporate interests while also supporting the interests of residents. The separation of the city from its residents means that resident interests do not *establish* a corporate interest. It also means, however, that they do not *negate* an existing corporate interest. Those resident interests may be relevant to the political calculation of individual city officials as they contemplate a potential city suit promoting an independently existing corporate interest, but they are in no way relevant to the legal assessment of that corporate interest.

C. Ramifications for Current Doctrine

This Part's analysis—whereby a corporate interest is a necessary condition for city involvement in a suit—defines the scope of the city's right to sue. In so doing, it serves to answer all doctrinal questions which in one way or another inquire whether the city is an appropriate litigant in a specific case given that case's subject matter. These include the civil procedure doctrines of standing, parens patriae, court access, and res judicata, as well as local government law rules respecting city suits against the state.

1. Standing

The law of standing regulates *who* may bring a claim. Given this assignment, when a litigant's claim deals with an issue, such as climate change, guns, or the market economy, that affects many potential claimants, the question of standing becomes the focal point for pitched battles. Standing disputes are thus routine in city suits.[387]

As seen throughout, in American law, the city is not the equivalent of the state and does not hold the powers that the state does. City standing cannot, and

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[387] *See, e.g.*, *Whittaker*, 357 F. Supp. 3d at 946 (finding, consistent with our framework, no standing where city did not allege interference with property); City of Kansas City v. Yarco Co., Inc., No. 09-0510-CV-W-GAF, 2009 WL 3379096, at *3 n.2 (W.D. Mo. Oct. 19, 2009) (suggesting, erroneously under our framework, that the city lacked standing for claim under the Fair Housing Act); City of Albuquerque v. U.S. Dep't of Interior, 379 F.3d 901, 912 (10th Cir. 2004) (holding, erroneously under our framework, that the city had standing for claim challenging Department of Interior's selection of a site for office space on the ground that it affected the City's efforts at community development). *See generally* Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329 (2020).

must not, therefore, be simply an extension of state standing.[388] Cities should not rely on federal standing cases that aver "special solicitude" afforded to states.[389] This insight is especially important, as state governments have been pushing ever more attenuated theories of fiscal injury to facilitate lawsuits against the federal government. Even if federal courts accommodate such state claims for special standing to pursue legal claims, city standing should not be affected. City claims do not draw on state claims.

Instead, this Part's analysis suggests that a city seeking to establish standing must link its claim to one of the city's own corporate interests categorized in Section II.B.[390] This basic principle should inform the analysis under any standing test a court adopts.

Interpreting Article III of the federal Constitution, the Supreme Court has held that standing in federal court requires showing an injury in fact, traceability, and redressability.[391] Our analysis suggests that a city's injury in fact must be tied to its corporate interest; an allegation of injury to its residents cannot suffice.[392] This is of course the same analysis that would apply to any private party seeking standing to sue.

At the same time, the fact that residents were also injured, and that city officials proclaimed the city's desire to represent them, does not in and of itself deprive the city of standing. The city still has standing if it can show that one of its own corporate interests—a proprietary interest, interest in law enforcement,

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388 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007) (finding standing for State to challenge rejection of rulemaking under the Clean Air Act); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1238–51 (2019); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1081–82 (2015).

389 *See* Massachusetts v. EPA, 549 U.S. 497, 536–37 (2007); *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U. S. 592, 607 (1982).

390 Fallon, *supra* note 387, at 1081–82.

390 *See supra* Section II.B.

391 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). This Article does not necessarily endorse this or any other particular understanding of constitutional standing doctrine, nor does it suggest that today's understanding tracks the law throughout the history of the city. *Cf.* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 817–18 (1969) (stating that prior practice "did not in fact demand injury to a personal interest as a prerequisite to attacks on jurisdictional excesses"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 478–79 (1996) ("The only plausible historical support for standing is the first part of *Marbury* . . . ."); Pfander, *supra* note 346, at 1496 ("[T]he King's Bench permitted 'strangers'—those without a personal stake—to pursue such prerogative writs as mandamus, prohibition, and certiorari."). But, as throughout, this section applies the common law of city suits to today's legal environment.

392 Moreover, the fact that the vast majority of cities lack the power to establish an income tax means that harms to residents' pocketbooks do not even indirectly injure city budgets.

or interest in resisting intergovernmental interference—was also injured in some way.[393] Just as courts do not look into the minds of individual plaintiffs to determine whether the injury they cite as basis for standing is indeed their real reason for suing,[394] the proper question about a city's standing is whether the city has alleged an injury in fact. Many city climate suits, for example, thus stand on solid ground when filed in federal court, because they are tied to cities' own proprietary or law enforcement interests. More on these cases below.

Turning to state law, some state courts follow federal law and require an injury in fact. In those states, judges should follow the prior suggestions. But even in states that depart from the federal approach, the suggested focus on the city's corporate interests easily fits within other conceptions of standing law. For example, some state courts find standing whenever a legislature has provided a cause of action.[395] For cities, this is just the doctrinal manifestation of the city's interest in delegated law enforcement.[396]

2. Parens Patriae

Related to the law of standing is the special doctrine of parens patriae. Parens patriae is the common law right of a sovereign to bring suit on behalf of its citizens.[397] Parens patriae, in other words, expands the interests upon which a sovereign may sue.

The leading American case explicating the doctrine is *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, where Puerto Rico filed a suit on behalf of its citizens against Virginia apple companies for their unlawful termination.[398] The Supreme Court explained that a state could not sue on behalf of residents

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393 *See* Schanzenbach & Shoked, *supra* note 100, at 570 & n.21, 583.

394 *See, e.g.*, Evers v. Dwyer, 358 U.S. 202, 204 (1958); 13 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5972 (observing, when discussing derivative actions, that "the motive for bringing the action[] is irrelevant to the issue of standing"); *see also* MCQUILLIN, *supra*, note 331, § 2584 ("The general rule is that the motives of the plaintiff in bringing suit are immaterial . . . .").

395 The fact that legislative authorization is insufficient for standing in some courts, including the federal courts, does not undermine our claim that cities have a right to sue based on an interest in delegated law enforcement. Because these limits on standing apply equally to all plaintiffs—including private corporations and public ones—we think they are better conceptualized as limits on the judicial power, not on the power of cities.

396 A somewhat related question is what remedies the city may pursue. Some remedial questions are really standing questions in disguise. For those, the analysis of this section provides an answer. Other times, the remedial question is really a question about what the relevant substantive law allows. For those, the city should be able to pursue the remedies available for similarly situated entities, no more and no less.

397 *See, e.g.*, Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493–94 (2012).

398 458 U.S. 592 (1982).

when the state had no separate interest in the dispute.[399] "In order to maintain [a parens patriae] action, the State must articulate an interest apart from the interests of particular private parties . . . ."[400] The Court went on to explain that a "quasi-sovereign interest" may suffice, including an "interest in the health and well-being—both physical and economic—of its residents."[401]

Given the foregoing discussion, cities should not be allowed to make such parens patriae claims.[402] The logic of this tool, as well as the specific "quasi-sovereign interests" the Court identified in *Snapp* as potentially giving it rise, is clearly grounded in the special, wholly governmental, nature of the state.[403] The Court listed two sovereign interests in *Snapp*: the state's general lawmaking power and its concern with preserving its rightful status in the federal system.[404] Given the strictures of modern local government law, cities do not hold such interests. The city's right to sue, as this Article established, is grounded in its corporate nature and interests, not in governmental powers. As imagined by the Supreme Court, parens patriae claims are not interchangeable with corporate ones.

The only court decisions contending with cities' parens patriae claims accord with this Part's treatment—they both rejected the claims—though their reasoning is somewhat incomplete.[405] The Fifth and Ninth Circuits rejected city parens patriae actions using the all-too-common move of denigrating the city as subservient to the state.[406] But as shown in Part I, this characterization is irrelevant to the right to sue, which forms part of the city's corporate, rather than governmental, powers. So, while this Article supports the outcome in these courts, a better route to those decisions would have travelled through the city suit's corporate history. The bar on parens patriae suits is not due to a city's lack of power to sue—that power, as Part I showed, is inherent. Instead, it reflects the idea that the city is an inappropriate claimant for this specific form of litigation

399 *Id.* at 607.

400 *Id.*

401 *Id.*

402 If a state legislature (or Congress) expressly authorized cities to sue parens patriae, then such a suit would be permissible as delegated law enforcement.

403 *Snapp*, 458 U.S. at 607.

404 *Id.* at 607–08.

405 *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973) ("[P]olitical 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."); City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1256 n.7 (5th Cir. 1976).

406 *See supra* note 405.

because parens patriae litigation by definition does not involve city corporate interests.

3. Court Access

This Part's analysis should also help judges when asked to exercise their discretion to open the courthouse doors for city plaintiffs seeking to join lawsuits others bring. Across various doctrines, courts must assess whether, as a prudential matter, an extra party is permitted to participate in a case. For example, federal courts may deny a nonparty the right to intervene in a case if the nonparty's interests are being represented by an existing party.[407] For cities, it is easy to imagine cases brought by city residents in which the city might seek to intervene. In deciding whether to permit such intervention, the court should verify that the city's interests are distinct from its residents' interests. Cities may seek to intervene in other cases as well, and the test should be the same: whether the city has a distinct corporate interest it seeks to protect in the ongoing litigation. So, for example, when a federal court was considering limiting its injunctive relief in Chicago's sanctuary city suit to that city alone, other cities should have been able to intervene to support wider relief to further their own corporate interests in resisting outsider interference by the federal government.[408]

Questions with respect to intervention also arise when cities and states seek to participate in the same lawsuit. Here, again, courts should avoid reflexive reliance on the trope that the "city is a mere political subdivision of the State." Cities may have distinct, corporate interests in a dispute in which their host state is involved. In those cases, a city should be permitted to intervene.[409] Thus, for example, cities should be able to intervene in law-enforcement-type cases

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[407] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Corbett, 296 F.R.D. 342, 349 (M.D. Pa. 2013). *See generally* WRIGHT & MILLER, 7C FED. PRAC. & PROC. CIV. § 1913 (3d ed.), Westlaw (database updated Apr. 2023).

[408] City of Chicago v. Sessions, No. 17 C 5720, 2017 WL 5499167, at *1 (N.D. Ill. Nov. 16, 2017) (discussing U.S. Conference of Mayors); *see also* Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1035 (N.D. Cal. 2004) (enjoining Attorney General from enforcing the Partial-Birth Abortion Ban Act of 2003 against intervenor city); Complaint in Intervention, Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004) (No. 03-4872 PJH), 2003 WL 23109226, at ¶¶ 1, 9, 10 (seeking to intervene to prevent harm from enforcement of the Partial-Birth Abortion Ban Act of 2003).

[409] *See, e.g.*, United States v. U.S. Steel Corp., No. 2:18-cv-127-JEM, 2018 WL 6573164, at *2 (N.D. Ind. Dec. 13, 2018) (permitting the City of Chicago to intervene in a case brought by the United States and the State of Indiana under the Clean Air Act).

brought by state governments under state laws when the city is seeking to enforce a valid separate city ordinance on the same facts.[410]

4. Res Judicata

Res judicata is the principle that a cause of action may not be relitigated once it has been judged on the merits. The doctrine bars claims where one suit follows another if, among other conditions, the same parties, or those in privity, are involved in both cases.[411] A court, therefore, may bar a new suit if the new plaintiff's interests were fully represented in the earlier case.[412] Res judicata may present a challenge to a city suit when that suit follows a similar state suit. The defendant may argue that the city was represented by the state in the prior suit, and thus the city suit is now barred. In the few cases where such a res judicata defense was raised against a city suit, courts have ruled against the city. The courts barred the city suit based on their conclusion that the city is effectively controlled, or at least represented, by the state.[413]

Under the framework this Part proposed, this approach is mistaken. Courts' attempts to rely on an alleged general pattern of city-state relationship are counterproductive.[414] When a res judicata argument is made, courts should focus instead on whether in the given case the state was, in its earlier suit, indeed representing the city's corporate interest. If the city in its current suit is pursuing a city corporate interest that is distinct from the general public interest the state pursued in its earlier claim, the state by definition could not have fully represented the city's interest in those previous proceedings.[415]

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[410] Courts face similar questions when applying various other doctrines. *See, e.g.*, WRIGHT & MILLER, 13A FED. PRAC. & PROC. JURIS. § 3531.7 (3d ed.), Westlaw (database updated Apr. 2023) (regarding prudential standing); *id.* at 6A FED. PRAC. & PROC. CIV. § 1543 (regarding real party in interest); *id.* at 7B FED. PRAC. & PROC. CIV. § 1792 (regarding lead counsel in a class action); *id.* at 9A FED. PRAC. & PROC. CIV. § 2385 (regarding lead counsel in other consolidated proceedings). As with our example of intervention, in these areas, the city's corporate interests should be the guiding light.

[411] Montana v. United States, 440 U.S. 147, 153–55 (1979). The earlier judgment must also be by a competent court, final, and involve the same cause of action.

[412] Headley v. Bacon, 828 F.2d 1272, 1277 (8th Cir.1987).

[413] *E.g.*, County of Boyd v. US Ecology, Inc., 858 F. Supp. 960, 969 (D. Neb. 1994) (noting that the county is "closely related" to the state and stressing that both are "political bodies"), *aff'd*, 48 F.3d 359 (8th Cir. 1995); Nash Cnty. Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 494 (4th Cir. 1981) (holding that the state's attorney general "has complete authority as the representative of the State or any of its political subdivisions" and thus the school district was in privity with it).

[414] *See supra* Part I.

[415] Courts have applied this test to determine whether a state suit precludes later private suits. *See, e.g.*, Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464, 1470 (10th Cir. 1993)

Two decisions, one we would deem decided wrongly and the other correctly, illustrate the point. In the case we believe decided wrongly, the state first brought a suit against a waste facility's developer for breaching a statutory requirement of "community consent."[416] A federal district court in Nebraska then employed this state suit to preclude a later county tort suit for the developer's allegedly fraudulent claim that the county board's initial expression of interest in the facility would not be binding.[417] Although both lawsuits were concerned with the waste facility's faulty siting procedures, the litigation interest each suit pursued was different. The state's interest was in prospective law enforcement (and accordingly it sought an injunction),[418] while the county's interest was in its existing proprietary interest (and accordingly it sought tort damages).[419] Conversely, a Fourth Circuit decision reflects the correct application of the doctrine as we suggest it here.[420] That court was right to bar a city suit making a federal antitrust claim following a failed state suit relying on an identical state antitrust claim.[421] The later city suit involved no distinct city corporate interest as it sought to enforce a law identical to the one the state had earlier acted upon.

Res judicata can threaten a city suit even when, unlike in the two cases just discussed, a court did not resolve the earlier state suit. The logic of res judicata implicates instances where states settle a claim and (allegedly) release claims on behalf of their cities as well. As noted earlier, a state should not be able to settle city claims without express authorization under state law.[422] Yet, even if such authorization to release city claims exists, courts should be cautious about concluding that a specific state settlement *in fact* released city claims. The allegedly released city claims often arise and represent distinct city corporate interests—that are distinct from any state interest the state settlement purported to address. For example, it should not be assumed that a settlement agreement in the opioid litigation between the states and the consulting firm McKinsey[423] necessarily included releases of city claims arising from the plaintiff cities' own corporate interests. Indeed, the presumption should run the other way.

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416 *County of Boyd*, 858 F. Supp. at 971–73.

417 *Id.* at 969.

418 Nebraska *ex rel.* Nelson v. Cent. Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1208 (D. Neb. 1993), *aff'd*, 26 F.3d 77 (8th Cir. 1994).

419 *County of Boyd*, 858 F. Supp. at 966.

420 Nash Cnty. Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981).

421 *Id.* at 495.

422 *See supra* Section I.C.2.

423 *See, e.g.*, Amanda Bronstad, *"McKinsey Bargained for Closure." Consultant Moves to Dismiss Opioid Lawsuits*, LAW.COM (Mar. 24, 2022, 1:05 PM), https://www.law.com/2022/03/24/mckinsey-bargained-for-closure-consultant-moves-to-dismiss-opioid-lawsuits/?20230017164737.

5. Anti-State Suits

A final impediment to some city suits is found in local government law. Some courts have barred cities from suing when the defendant is the state.[424] This de facto state immunity can be traced to *Hunter*'s view of the city as mere organ of the state.[425]

Doctrinally, *Hunter* probably should not form much of an obstacle in such cases—*Hunter* was a decision about federal law and thus it has no effect on the treatment of city suits under state law, which is the issue in almost every city suit.[426] Conceptually, though, *Hunter* does seem to raise a problem for the city's power to sue the state. The case draws on the image of the city as an organ of the state. It would be nonsensical to permit an organ to attack its body. Consequently, given the organ image's prevalence, some state courts have categorically rejected city suits against the state.[427]

This Part's analysis exposes a flaw afflicting this absolutist stance. When cities sue to pursue their own corporate interest, they are not suing on behalf of a state interest, and thus, the metaphor of a dependent organ suing its host is misleading.[428] The general hostility toward anti-state city suits, therefore, is misplaced.

Even where courts insist on retaining this general bar on anti-state city suits, this Part's analysis suggests a narrow opening for some such suits. Courts already concede that even if these suits are generally prohibited, specific state authorization is sufficient for an anti-state city suit: the state can essentially waive its immunity in a given class of cases.[429] The task, therefore, becomes one

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[424] *E.g.*, Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trs. of State Univ. of N.Y., 713 N.Y.S.2d 908, 910–11 (Sup. Ct. 2000) (citing City of New York v. State, 655 N.E.2d 649 (1995)), *aff'd as modified*, 723 N.Y.S.2d 262 (2001)).

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

[426] Even as far as federal law is concerned, *Hunter* might be read as a decision on the merits as opposed to a decision about the right to sue. *See* Morris, *supra* note 11, at 18–19.

[427] City of New York v. State, 86 N.Y.2d 286, 290 (1995) ("Viewed, therefore, by the courts as purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.").

[428] *Cf.* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1221–22 (2013) (arguing that inter-agency suits are allowed when one agency claims that another caused it a proprietary harm, but not when it asserts a "sovereign interest"—its vision of the public interest—because having the government assert that interest against itself is nonsensical in theory, and in practice amounts to a difference of opinion among agencies).

[429] *City of New York*, 86 N.Y.2d at 291.

of statutory interpretation, figuring out whether a given state statute permits an anti-state city suit. In light of this Part's analysis, courts should interpret a state statute interfering with city powers (or threatening to do so) as permitting such a suit. As noted, a statute interfering with a city's powers acknowledges the city's separate corporate existence.[430] For this reason, such statutes give rise to the city's corporate interest in resisting interference, and should thus be read as granting the city a right to sue the interfering state.

III. THE NORMATIVE LOGIC OF THE CITY SUIT

The foregoing analysis demonstrated the city's inherent right to sue in American law, bounded by the city's specific corporate interests. That analysis resolved the doctrinal questions currently associated with the city suit. In this concluding Part we demonstrate that this account of the city suit is not merely historically and doctrinally coherent but is also consistent with the values that should animate the debate over city suits. For that purpose, we engage the academic wrangling over the city suit. We highlight the normative flaws of the two contending—and more extreme—positions commentators have heretofore embraced in the contemporary debate over affirmative city litigation. Those who denigrate city suits as political fail to attend to the city's corporate interests at stake. Those who justify city suits in purely representational terms fail to attend to the legal division between the city and its residents.

Criticizing these two opposing positions, we unpack the normative backdrop of the city suit in two steps. We first explain why a wholesale denial of any city suit that might serve a representational interest misaligns with normative understandings of the suit. We then explain why our insistence that all city suits, even those representing resident interests, must serve some distinct corporate interest of the city is a necessary outgrowth of the normative theories of the city.

A. The Suit

Critics of city suits often malign lawsuits they deem, perhaps accurately, as "political" in nature.[431] They suggest that any purported city interests found in such suits are mere cover for what we deemed here representational concerns.[432]

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[430] *See supra* note 426 and accompanying text.

[431] *E.g.*, Gifford, *supra* note 9, at 947–50 (arguing that such actions are political questions and should thus be deemed nonjusticiable).

[432] *E.g.*, Ausness, *supra* note 9, at 900–01 (explaining that suits enable officials to pursue their political goals while avoiding accountability for those acts' costs).

These commentators would thus bar any city suit that reflects, or could be read as reflecting, residents' interests, regardless of any associated city corporate interest.[433]

A charitable reading of this argument suggests that city litigation should not pursue political or social goals, as those are detached from the true goals the law has allegedly set for lawsuits—for access to the courts. Those goals, so the argument goes, can include only the vindication of some formal legal right the litigant (in this case, the city) holds.[434] This stance thus insists that a sharp, impenetrable demarcation line exists between the city's legal rights and the political, economic, and social preferences of its residents or officials.[435]

We have shown above why this position fails doctrinally. But our rejection of this position is also born of its normative deficiencies. This extreme position expresses a harshly constrained view of the function of court litigation. Ideologically, the claim espouses a notion of litigation as somehow apolitical.[436] Of course, that idea was discredited by the legal realists more than a century ago.[437] In the intervening decades, the alleged distinction between law and politics, or between the common law and policy, has collapsed.[438]

Beyond its naïve and outdated understanding of the legal process in general, the claim that a city suit must be foreclosed if it somehow promotes residents' interests is also out of line with current law's treatment of similar private suits. Reflecting values such as commitment to due process and the day in court ideal,[439] a private litigant seeking to pursue a claim is normally not asked to show

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433 Dan M. Kahan, Donald Braman & John Gastil, *A Cultural Critique of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 105 (Timothy D. Lytton ed., 2005) (arguing that such suits are "culturally obtuse").

434 *E.g.*, Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 160–61 (Timothy D. Lytton ed., 2005) (contending, in criticizing lawsuits against gun manufacturers, that it is wrong to assert a claim, even a legally viable one, if the motive for doing so is to "circumvent the legislative process" by obtaining a court ruling that contradicts legislative policy choices).

435 Ausness, *supra* note 9, at 900 (arguing that public litigation "amounts to an interference by members of the executive branch with the legislature's powers").

436 *See* Gifford, *supra* note 9, at 956–57 (arguing that the function achieved through government lawsuits seeking to solve complex social powers expands the role of litigation beyond its traditional role into regulatory functions).

437 *See, e.g.*, O.W. HOLMES, JR., THE COMMON LAW 1 (1887) (asserting that the law is influenced by the same things that influence people, including "moral and political theories").

438 *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 2, 11, 76 (1985).

439 *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 762 (1989) (referring to "our 'deep-rooted historic tradition that everyone should have his own day in court'" (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL

that they are the one person whose individual interests were harmed the most by the defendant.[440] Neither are their motivations for bringing the suit usually scrutinized.[441] If the plaintiff were harmed, they would have the right to seek remediation through the court system—any other use they seek to make of their lawsuit notwithstanding. Thus, for example, individuals and organizations now routinely bring lawsuits against governments for miniscule financial harms explicitly in order to promote their broader agenda of undermining the regulatory state.[442] No court or commentator has ever questioned the legitimacy of such suits.

Plaintiffs of all stripes assert concrete interests to justify lawsuits that also serve other goals. City officials can do the same.

Many of the city suits that form part of the current wave of affirmative litigation—which are the most anathema to city suits' critics—follow this template. For example, after Hurricane Sandy, New York City filed a lawsuit against oil companies alleging (among other claims) that their contributions to climate change amplified the damage the storm wrought.[443] Opponents called the suit a "political stunt," suggesting that it was purely symbolic.[444] Many of the city officials involved seemingly conceded that they were representing New York's residents—both in the sense of protecting private residents' property and in the sense of representing those residents' political interests in the fight over climate change.[445] For example, after an early setback, a spokesperson for the Mayor's office said that the City would "keep fighting for New Yorkers who will bear the brunt of climate change."[446] Yet, according to the filed complaint,

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PRACTICE AND PROCEDURE § 4449 (1981)); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 232–36 (1992).

[440] For example, the shareholder derivative action in *Shaffer v. Heitner*, 433 U.S. 186 (1977), was brought by the owner of a single share of company stock. *Id.* at 189.

[441] *See also* Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. UNIV. L. REV. 357, 402 (2016) (explaining why the law is often not concerned with intents).

[442] The pattern is particularly apparent in regulatory takings cases. *E.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021) (a labor dispute disguised as a takings claim); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 634 (2013) (successful plaintiff could not be awarded damages even under terms of their own claim).

[443] Amended Complaint at 1–2, 5–6, City of New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021) (No. 1:18-cv-00182-JFK), 2018 WL 8064051.

[444] *See, e.g.*, Linda Kelly, *De Blasio's Climate-Change Lawsuit a Political Stunt*, CRAIN'S: NEW YORK BUS. (Feb. 8, 2018, 11:00 PM), https://www.crainsnewyork.com/article/20180209/OPINION/180209929/op-ed-de-blasio-s-climate-change-lawsuit-a-political-stunt.

[445] *Id.*

[446] John Schwartz, *Judge Throws Out New York Climate Lawsuit*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/climate/climate-lawsuit-new-york.html.

this was a pedestrian suit about city property and expenses incurred—a city suit grounded in, and validated through, a concrete corporate interest.[447]

The same moves characterized New York's more recent climate-related lawsuit. Speaking in representational terms, then-Mayor Bill DeBlasio announced the suit by saying: "Our children deserve to live in a world free from climate change, and we must do everything in our power to give them hope and stop climate change in its tracks . . . . My Earth Day message to Big Oil: See you in court."[448] But the lawsuit itself was not grounded in an alleged interest in the representation of New Yorkers' political views or personal interests.[449] Instead, the suit was grounded in the City's law enforcement interest arising from a duly enacted consumer protection ordinance.[450] This Article could go on, using many of the examples from Part II to show how highly-publicized suits with obvious representational aspects—e.g., suits respecting guns, lead paint, subprime mortgages, opioids, sanctuary cities, e-cigarettes, and social media—also clearly protect or promote cities' corporate interests.[451]

The main point is that elsewhere the law does not, and should not, demand that a lawsuit otherwise vindicating a plaintiff's concrete interest also be shown to not express broader concerns of that plaintiff or the general public. City suits should not be treated differently. Indeed, we would go further to suggest that although an alignment between a potential city suit and residents' interests does not alone legitimize the suit, it is a positive attribute that should be applauded.[452] Aside from the rather obvious democratic appeal of city suits that concurrently promote residents' interests, cities also have certain practical advantages that might make them particularly good candidates to sue in a quasi-representative

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[447] *See* Amended Complaint at 62–64, City of New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021); *see also Chevron Corp.*, 993 F.3d at 86.

[448] *New York City Sues ExxonMobil, Shell, BP, and the American Petroleum Institute for Systematically and Intentionally Deceiving New Yorkers*, NYC.GOV (Apr. 22, 2021), https://www1.nyc.gov/office-of-the-mayor/news/293-21/new-york-city-sues-exxonmobil-shell-bp-the-american-petroleum-institute-systematically.

[449] *See id.*

[450] *See id. See generally* N.Y. CITY ADMIN. CODE §§ 20-700 to -706.5 (Consol. 2022) (containing New York City's consumer protection law, specifically prohibitions on unfair trade practices).

[451] *See supra* Sections II.A–C. For yet another example, the City of San Francisco's suit challenging the Trump administration's sanctuary cities policies made important political statements, but the suit was also grounded in San Francisco's position as an object of government regulation. *See* City & County of San Francisco v. Trump, 897 F.3d 1225, 1235–36 (9th Cir. 2018) (finding that the suit was based on the potential for economic harm from the loss of federal grants). Had a neighboring city sued San Francisco only because that neighboring city wanted to express support for harsh immigration policies, then that would qualify as purely representational—and thus an inappropriate subject for a city suit.

[452] *See, e.g.*, Lemos, *supra* note 397, at 493–94.

capacity.[453] Cities, especially big ones, often have large and sophisticated legal departments.[454] Cities may have the best information about potential claims and remedies.[455] Cities may be motivated to achieve good, transparent outcomes, rather than taking a quick and sometimes secretive payday, because city lawyers lack the personal financial incentives that, at times, create agency problems between private lawyers and clients.[456] And city suits that result from a participatory democratic process might enhance democracy more broadly. They can generate meaningful exchanges of opinions among community members.

Weighing potential benefits (and potential costs) of pursuing a city's corporate interest through a city suit that coincidently also promotes representational goals is exactly the sort of thing that city officials are selected to do. In other words, it is, and must be, a political choice. But political motivation does not render a suit wholly political and thus somehow illegitimate.

B. The City

Acknowledging that city suits are often political in nature does not mean, however, that purely political city suits are allowable. Many commentators who support city suits appear to espouse such a broad reading. They celebrate the democratic and community building functions city suits perform as they stamp residents' preferences with the city's official public seal. History and doctrine,

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[453] For more reasons, see Savit, *supra* note 12, at 597–99; Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 390–91 (2006). *See also* David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2252 ("Cities are often fiscally strapped, but they may possess greater resources than individual private plaintiffs could draw upon if they alone were permitted to bring suit. The protection of a city's constitutionally vested policymaking powers should not be left solely to private individuals who may lack the capacity or incentive to defend them vigorously. In addition, the presence of a local governmental plaintiff can help to reframe the constitutional issue from one in which judges are being asked to invalidate the will of the majority to one in which they are being asked to protect a local democratic polity's freedom to make decisions for itself.").

[454] *See, e.g.*, *San Francisco Wins Landmark Opioid Trial Against Walgreens*, CITY ATT'Y OF S.F., https://www.sfcityattorney.org (last visited Jan. 21, 2023); *New York City Law Department: Service of Process*, N.Y.C. L. DEP'T, https://www.nyc.gov/site/law/index.page (last visited Feb. 27, 2023).

[455] *See, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 315 (2016) (discussing potential litigants' access to information as a challenge to case selection); Savit, *supra* note 12, at 597 ("[I]ssues of local concern will, in all likelihood, first come to the attention of cities, simply because of cities' 'relative closeness to local citizens.' . . . [C]ities often have an on-the-ground investigatory apparatus—a local police force, for example—that is costly for the state to replicate." (quoting Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 721 (2011))).

[456] *See, e.g.*, Lemos, *supra* note 397, at 491–92 (contrasting public and private representational suits). *But see* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 560–62 (2016). With respect to transparency, "[f]ull and complete disclosure of public affairs should be encouraged." 5 MCQUILLIN MUN. CORP., *supra* note 331, § 14:15.

as Part II showed, oppose this practice. But here, too, there is a normative case that accompanies our historical and doctrinal analysis. The position is not only doctrinally untenable, but also, this Article argues, normatively unappealing. To wit, envisioning the city as a separate litigant, distinct from its residents, sustains the values that support cityhood in the first place.

Over the past few decades, reacting to the legal weakening of local governments during the nineteenth and twentieth centuries as discussed above, the debate over the values cities could serve has only grown more sophisticated. Why does the law establish the city as an entity? What normative functions does city autonomy deliver?

The answers modern American judges and commentators have provided to these questions can be grouped under three overarching headings: efficiency, democracy, and community. While this Article does not endorse any one of these theories, it is meaningful that each, as this section shows now, is deeply invested in the distinction between the city as an entity and its members—the distinction that undergirds this Article's argument that the city suit must serve a distinct city interest, rather than merely represent residents' interests.

The first theory of local government, known as the Tiebout Model[457] (for the economist whose work suggests it), views local governments as necessary for the efficient provision of public goods.[458] Public goods are goods that the private market cannot efficiently deliver.[459] Once produced, it is impossible to exclude individuals from consuming a good such as national security or fire protection; additionally, one individual's consumption of a good of this type does not diminish others' ability to consume it.[460] Government is accordingly necessary for the production of public goods such as national security or fire protection. A troubling economic problem ensues, however. Individuals do not buy security or fire protection, and thus they do not communicate to the provider—government—how much of these goods they desire and how much they are willing to pay for it. In the absence of market signals, governments are prone to over- or under-produce public goods.

Under the Tiebout Model, the existence of cities as *wholly separate* units is a precondition for solving this problem and assuring efficient provision of public

457 Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 421–22 (1956).
458 HAL R. VARIAN, MICROECONOMIC ANALYSIS 415 (3d ed. 1992).
459 *Id.*
460 *Id.* at 414.

goods.[461] Each local government offers a menu of public services—policing, education, parks, etc.—for a price embodied in local taxes. Moving between cities, individuals "shop with their feet" for the package of public goods that best fits their preferences.[462] In this image the city relates to residents not through formal representation, but through its independent reactions to their moves.[463] Indeed, the separation of the city from its residents is one of the most striking elements of the theory: the Tiebout Model treats residents as shoppers, not citizens (or voters). The theory's denial of notions of representation thus supports our claim that as litigants cities should stand for something distinct from a resident's political stance.

This Article's framework sustains the promise of cities, as defined under efficiency theory, in another, more direct, way. For economic analysis the city has one, and only one, purpose: the provision of goods the private market cannot efficiently supply. Its right to sue should thus solely exist to facilitate its own functions as an economic actor supplying special goods: the public goods the private market can never provide. The city, under this reading of its normative function, should not provide services that can be attained elsewhere on the private market. Legal representation for a group of residents' interests or preferences is exactly such a service. Private law firms and public interest groups are readily available to supply representation in these cases.

The second theory of local government views it as serving democratic values—and this theory similarly stresses the importance of the city's separate existence.[464] Under this theory, which enjoys a long and esteemed provenance, cities are vital for meaningful political participation. Writers such as Jefferson and de Tocqueville extoled the values of small-scale government.[465] They feared that in larger scale polities—such as the nation or even the state—meaningful citizen participation is impractical.[466] For individuals to affect government, government must be smaller, and closer to the individual. Individuals can then much more easily engage with legislators or even join the legislature

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461 *See* Tiebout, *supra* note 457, at 421–22.

462 *See id.* at 419.

463 *See, e.g.*, Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1364–66 (2014) (discussing the issue in the context of education).

464 *See id.* at 1379, 1381.

465 *See* Letter from Thomas Jefferson to John Tyler (May 26, 1810), *in* 11 THOMAS JEFFERSON MEMORIAL ASS'N, THE WRITINGS OF THOMAS JEFFERSON, 391, 393–94 (Albert Ellery Bergh ed., 1907); *cf.* DE TOCQUEVILLE, *supra* note 3, at 331–32 (considering the jury a political being).

466 *See* DE TOCQUEVILLE, *supra* note 3, at 339 (discussing the jury as an example of citizen participation keeping larger-scale democratic power in check).

themselves.[467] Not only local legislatures, but also local agencies, prosecutors, judges, and police are more responsive to citizen engagement than state or federal actors flying in to enforce the law.[468]

The notion of democracy this theory espouses is thick: democracy here entails more than mere representation—more than the limited, efficiency-grounded idea that an entity should reflect its members' preferences.[469] The theory envisions residents being able to partake in the work of governing: beyond the casting of a vote once every four years, and beyond passively, if even contently, witnessing government reflecting their values. As Hannah Arendt famously explained, the idea is that meaningful participation in politics is central to a full human life—it affords the person "public freedom."[470]

Relatedly, and importantly, those who legitimize local government through appeals to democracy—as opposed to economic values—believe that the democratic process is geared toward identifying some general public interest.[471] They contend that an objective public good exists outside of, and independent of, the sum of the subjective preferences of the individual members.[472] Through meaningful participation, which is best possible in small-scale polities—where deliberation and persuasion are at least imaginable—the polity discovers that interest.[473]

For democratic theory the city exists, therefore, to facilitate participation in a fully political entity specifically for the goal of jointly identifying a separate public interest. The theory insists on the entity's distinctly separate, social nature—detached from its members and their individual preferences.[474] It abhors the more efficiency-grounded notion of representation whereby the city performs its political role when it accurately, if only passively, reflects residents' preferences. Voting is important even if everyone votes the same way; attending

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467 *See* Shoked, *supra* note 463, at 1382.

468 *Id.* at 1327–28. Some even argue that city governments legitimize government in general. As the theory goes, participatory small-scale governance units help in sustaining citizen's faith in the national system: through their experience impacting their local government, citizens see political power over their lives as flowing from themselves rather than from an external body. *See, e.g.*, *id.*

469 *See id.* at 1382–85.

470 HANNAH ARENDT, ON REVOLUTION 280 (1963).

471 Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148–49 (1977) (comparing the economic model of legitimizing local democracy and the public interest one).

472 *See id.* at 150.

473 *See id.* at 148–49.

474 *See* Shoked, *supra* note 454, at 1382.

and addressing a government board is important even if the board's decision is already destined to reflect the participants' values. From the perspective of this democratic theory, as was the case (if for other reasons) with the efficiency theory, the city must thus be separate from the sum of its individual residents.[475]

The third theory of local government connects it to values of community—and this theory is arguably the strongest in its insistence that the city be viewed as separate from, and not merely representing, its residents.[476] While the democratic theory of local government stresses the city's potential in promoting political goals, this theory of local government stresses still broader social goals. In the city, people of different backgrounds must interact with each other—in managing common problems, in using the same amenities, in randomly meeting in public spaces, etc. City life is, as Iris Young memorably put it, the "being together of strangers."[477]

This theory is defined by the importance it assigns to the city transcending any individual resident's interests. It assumes, and embraces, the conflicting interests and identities disparate city residents hold.[478] The city in this vision generates a collective identity and attachment that does not reflect, or fully replace, any individual identity or interest of the individual resident.[479] It brings individual identities together to form a new collective.[480]

At the heart of this communitarian view is the notion that the city is not merely, or even primarily, constituted by its residents, but also constitutive of them.[481] The New York court's allusion in the second Cornell & Clark case to the city's "benevolent and patriotic purpose" gave voice to this community-building view of cities that philosophers and social scientists developed much later in the postwar decades.[482] These later commentators highlighted the importance of protecting the city as a group entity—as an intermediate body

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475 *See, e.g.*, Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 419–20, 422–23 (2017).

476 GERALD E. FRUG, CITY MAKING 115 (1999).

477 IRIS MARION YOUNG, GENDER JUSTICE AND THE POLITICS OF DIFFERENCE 237 (1990).

478 *Id.* at 152–55.

479 FRUG, CITY MAKING, *supra* note 476, at 115.

480 JOHN STUART MILL, ON LIBERTY 212 (7th ed., Boston, James R. Osgood & Co. 1871).

481 *See, e.g.*, Frug, *supra* note 34, at 1154.

482 Town of Guilford v. Cornell & Clark, 18 Barb. 615, 638 (N.Y. Gen. Term 1854), *aff'd sub nom*. Town of Guilford v. Bd. of Chenango Cnty. Supervisors, 13 N.Y. 143 (1855).

standing between the state and the individual.[483] The city, for communitarian theory, must be a body distinct from both.

The three theories thus each show why this Article's insistence on the city's status as an independent litigant is normatively desirable. Correspondingly, they undermine the case for the more expansive reading of the city suit advocated elsewhere. Endorsing purely representational suits amounts to equating the city with its residents, a move that belittles the values cities are meant to sustain in our public lives.

Supporters of representational suits have probably relied the most, in making the normative case for their position, on communitarian notions of local government.[484] They celebrate the city suit's supposed beneficial effects in expressing community values. City suits, they instruct, aid in city-level "state building"[485] and in creating a "common world of imaginations" among residents.[486] Through such suits cities can become "instruments of social progress" and entrench "their communities' vision of justice."[487]

But, ironically, perhaps the most normatively troubling element in the pro-representational stance is that in arguing that a city is meant to represent the preferences of the majority of its residents, this stance ignores the key insight of communitarian theories of cityhood. These theories are committed to the notion that the city should be an arena for interaction between different people and tastes, not for subsuming all of them into the majority ones. Such social theories insist that the city eclipse (without wiping out) the identity and interests of one resident group or another—that the city do more than merely represent someone or some group. Though the supporters of the purely representative city suit seek to espouse communitarian values, the policy they are advocating stands in stark contrast to those values. The city litigant these writers imagine is not any

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[483] *C.f.* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 294 (1996) (highlighting the importance of "forms of community—families and neighborhoods, cities and towns, civic and ethnic and religious communities—that situate people in the world and provide a source of identity and belonging").

[484] The related argument they make focuses on the city being the government closest to the People. *See, e.g.*, Swan, *supra* note 11, at 1232.

[485] *Id.*

[486] *Id.* at 1280 n.367 (citing Tove Dannestam, *Rethinking Local Politics: Towards a Cultural Political Economy of Entrepreneurial Cities*, 12 SPACE & POLITY 353, 365–66 (2008)).

[487] Habig & Pearl, *supra* note 12, at 1192.

different from a private (or public interest) law firm.[488] That is simply not the city that theories of local government—communitarian ones, but also economic and democratic ones—promote.

In sum, important values reject both extreme positions—that city suits should never be allowed if serving representational interests or that they should always be allowed even if merely serving such interests. Instead, they demonstrate that city suits in their current form, as identified in this Article, are not merely doctrinal accidents, but the result of centuries of principled thinking about local government and civil procedure.

CONCLUSION

In courts around the country, with added gusto over the past few years, the city suit has continued its march forward. Yet its proponents and opponents seem stuck, mainly preoccupied with the city suit's political potential. Proponents laud city suits as representing city residents' views and preferences, especially when in conflict with big business or big government. Opponents lambast city suits as political stunts, designed to burnish city officials' reputations and to transform courthouses into arenas for symbolic gestures.[489]

Both of these views miss what is special about the *city* and what is special about the *suit*. The *city*, for centuries, has been defined by its existence as a separate entity—separate from residents and officials. The city thus has its own interests. The *suit*, for centuries, has operated as the right of persons, natural or legal, to protect their interests. A suit may further other goals, as long as it is tied to the suing person's legally protected interests. That, not pure politics, is what the city suit is all about.

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[488] One writer explicitly endorses this view, "permitting—even encouraging—localities to engage in constitutional and other public interest litigation would give local constituents (that is, all of us) the sense that our local public law offices are, at least in part, public interest law firms." Morris, *supra* note 12, at 40.

[489] *See, e.g.*, Kelly, *supra* note 444.