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Suing Cities

ABSTRACT. Our biggest social problems tend to manifest themselves in small ways—on the streets where they affect people’s daily lives. Local governments, who govern the streets and thereby are closest to the people, often find themselves on the front lines of combatting those problems. Accordingly, local governments are now promoting reforms to address climate change and homelessness, to reinvent education and transportation, and to remedy ingrained inequities.

Any government instituting change can and will face headwinds, which, in America perhaps inevitably, will at some point assume the form of lawsuits. But for various legal and functional reasons, city action is even more susceptible to litigation than federal or state action. Moreover, cities are particularly vulnerable to litigation instigated by the economically and politically powerful, who choose litigation when they fail to get their way from the political process. Consequently, suing cities has become a tool to stop local progress in its tracks.

This Article is the first to call attention to these trends. It shows how, with little scholarly analysis or legal pushback, American law has come to accord special standing rights to private plaintiffs suing local governments. It also demonstrates how this regime systemically exacerbates existing inequalities and unjustifiably interferes with local democratic governance.

But all is not lost. This Article identifies potential changes to the law that could rebalance the relationship between private plaintiffs and local governments. These changes will channel anti-city litigation toward more socially beneficial uses, while discouraging the kinds of litigation that are, almost by nature, obstacles to progress. Current law famously makes it hard to sue federal and state governments. Much less famously, it makes it easy to sue local governments. By recognizing the problems each of the extremes portends, we can hopefully move closer to a democratically sound regime for suing governments.

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INTRODUCTION

It is notoriously difficult to sue American governments. Even when sovereign immunity does not shield a government,¹ courts find ways to bar plaintiffs from contesting the government's illegal acts. Through rules associated with "standing," courts confine the right to bring suit to persons who have experienced an individualized harm caused by the government's illegal act.² Because most policy decisions affect the general public as a whole rather than target specific individuals, courts can use standing law to stop many suits against government actors from ever being litigated.³

Yet, as this Article will show, one specific set of governments can easily be hauled into court. For plaintiffs challenging the core work of *local* governments—including land-use regulation, education provision, and general local lawmaking—courthouse doors are wide open. In America, suing cities, and only cities, is easy.⁴

Three interrelated developments have generated this heretofore unacknowledged reality. First, while federal courts reject the claim that taxpaying alone generates a general right to sue federal and state governments for alleged misuse of

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1. See, e.g., Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1185, 1187 (2023) (finding that it is "extremely" difficult for plaintiffs to succeed in suits against municipalities under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 58-61 (2018) (describing how "qualified immunity is now applied 'across the board' to all constitutional claims"); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519-1524 (2016) ("Perhaps a more fundamental barrier to holding police officers accountable in the civil process is the doctrine of qualified immunity.").
 2. See, e.g., *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 195-197 (1989) (holding that the Due Process Clause does not "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means").
 3. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); see also Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 388 (2011) ("The aim [of modern standing law] was to minimize what some members of the Court perceived to be an 'amorphous general supervision of the operations of government.' Jurisdictional limits were important in this public law setting as a mechanism to prevent the courts from reaching any and all actions of the federal government, and from exercising plenary power over policymaking and implementation.").
 4. Consistent with scholarship in local government law, we use the term "city" to refer to local governments of any legal organization and any size—including counties, townships, villages, school districts, special districts, and countless others. Some of what we describe in this Article disproportionately affects large cities or, conversely, small local governments, and we say so when that is the case. Other trends affect all types of local governments.

tax funds,⁵ they have consistently acknowledged a special doctrine of municipal taxpayer standing.⁶ State courts similarly recognize this special rule, even if in some states it appears against the backdrop of an already more relaxed standing regime. As a result, local taxpayers can challenge almost any effort to spend municipal funds. The tool is so effective in disciplining cities that taxpayers can sometimes benefit from it without even actively resorting to it. For example, the mere possibility of a taxpayer suit discouraged Washington, D.C., from replacing the lead pipes providing water to its poorest residents.⁷

Second, over the past decades state courts have expanded property owners' power to sue governments. An owner need not show that a government decision they seek to challenge in court actually applies to their property; the government decision might apply only to a nearby property, but as long as the value of the owner's property might be affected, they can sue.⁸ Beginning with zoning laws and then extending to other doctrinal realms, courts have created a new category of standing—what can be dubbed “neighbor standing”—that turns alleged harms to property values into a near-automatic right to sue the government. While neighbor standing in theory affects all levels of government, in practice it mostly impacts local governments because those are the governments whose daily work regularly affects individuals' property: they control public spaces, regulate land uses, and more. Thus, almost any imaginable local decision—to authorize affordable housing, to construct a bike lane, to accommodate the homeless—can, and has, become the subject of a lawsuit.⁹

Third, the culture wars are generating yet another opening for suits against municipal governments and officials. State legislatures hostile to municipal

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5. We say a “general” right to sue because the Supreme Court recognized a limited right of federal taxpayers to sue in federal court specifically for certain violations of the Establishment Clause of the First Amendment. See *Flast v. Cohen*, 392 U.S. 83, 102-103 (1968).
 6. See *infra* Section I.A. We speak of “standing” throughout to include both those rules formally labeled “standing” as well as related doctrines that control court access. We also speak of “standing” in both federal and state courts. Federal standing doctrines are well known; state standing rules receive less attention, in part because they can be quite varied. While many states track federal standing rules, others depart in various ways. See generally Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1842-76 (2001) (describing the various and varying models of justiciability doctrine throughout the states and how they differ from the Article III model). Where relevant, we note those departures throughout.
 7. Tiffany Stecker, *Federal Law Makes Lead-Pipe Removal Anything but a Cinch*, E&E News (July 7, 2016, 1:07 PM EDT), <https://www.eenews.net/stories/1060039790> [<https://perma.cc/8KCP-PATJ>] (discussing Washington, D.C.). For a full discussion of the effect on suits against cities on efforts to replace lead pipes, see *infra* notes 219-224 and accompanying text.
 8. See *infra* Section I.B.
 9. See *infra* notes 111-124 and accompanying text.

power—most commonly, conservative state legislatures hostile to progressive city power—are passing laws preempting local regulation of issues ranging from guns to immigration to education. The latest versions of these laws often empower any resident (sometimes, any person) to sue cities or their officials for defying the state’s orders, using what we call “preemption standing.”¹⁰ Under a Tennessee statute, for example, a resident may now sue a local government or official if they simply “believe” the government or official violated the state’s anti-sanctuary-city law.¹¹

Separately, and even more forcefully because they work in tandem, these three developments have set city governments apart from all other government defendants. When in 2023 the federal government renamed Fort Lee and other Confederacy-honoring army bases, no one sued.¹² When in 2020 Mississippi replaced its state flag that had incorporated the Confederate battle flag into its design, no one sued.¹³ But when cities attempt to remove Confederate monuments, they are sued under all three bases we identify.¹⁴

Courts occasionally note the peculiarities of the liberal regime for suing local governments. In the past two years alone, multiple state supreme courts confronted head-on the issue of special standing in suits against cities, struggling to explain existing doctrines and stumbling in attempts to reform them.¹⁵ Slightly earlier, in a testament to the perplexing nature of the issue, the highest court of Maryland felt obliged to affix a table of contents to its opinion on the matter,

10. See *infra* Section I.C.

11. See *infra* note 177 and accompanying text.

12. See *DoD Begins Implementation of Naming Commission Recommendations*, U.S. DEP’T DEF. (Jan. 5, 2023), <https://www.defense.gov/News/Releases/Release/Article/3259966/dod-begins-implementation-of-naming-commission-recommendations> [https://perma.cc/D7WV-JUBE]. The law also empowered the naming commission to call for the removal of monuments. When the Secretary of Defense proceeded to remove a confederate memorial from Arlington National Cemetery, a lawsuit was filed in two different courts. Within a matter of days both judges dismissed the lawsuit, in harsh terms, as lacking any potential legal basis. *Defend Arlington v. United States*, No. 23CV1730, 2023 WL 8788956, at *9 (E.D. Va. Dec. 19, 2023); *Defend Arlington v. U.S. Dep’t of Def.*, No. CV 23-2094, 2023 WL 8600567, at *14 (D.D.C. Dec. 12, 2023).

13. 2020 Miss. Laws Ch. 427. The new flag was then adopted in MISS. CODE ANN. § 3-3-16 (West 2016).

14. See *infra* notes 65, 114, 184, 386 (citing cases and statutes). Contrast these cases with *McMahon v. Fenves*, 946 F.3d 266, 270-271 (5th Cir. 2020), where the Fifth Circuit found that plaintiffs did not have standing to contest a decision of a state body, the University of Texas, to remove Confederate monuments.

15. See, e.g., *Saugatuck Dunes Coastal All. v. Saugatuck Twp.*, 509 Mich. 561 (2022); *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs*, 315 Ga. 39 (2022); *City of Pikeville v. Kentucky Concealed Carry Coal., Inc.*, 671 S.W.3d 258 (Ky. 2023).

explaining that “[e]very novella-length appellate opinion warrants one.”¹⁶ The novella, though, proved too short: the following year the court reengaged the issue, without a table of contents but with almost sixty more pages.¹⁷ The ease of suing cities has bewildered federal judges too. Then-Judge Barrett referred to one standing doctrine allowing suing cities as a “relic,”¹⁸ and Judge Sutton elsewhere called it “curious.”¹⁹ Yet scholars of local government law and of procedure, who recently began drawing attention to related phenomena such as local courts,²⁰ cities as plaintiffs,²¹ and “municipal immunity,”²² have failed to attend to the special regime governing suits against cities.²³

This neglect is unfortunate because there are strong normative reasons to care about the ease of suing cities. Relenting on the individualized-injury requirement in anti-city suits involving taxpayer, neighbor, or preemption challenges systematically favors very specific types of litigants with very specific types of claims. It enables those with resources to head to court whenever they are unhappy with a decision the popularly elected local government adopts, even if that decision does not clearly injure them. Conversely, these doctrines do nothing to aid those unquestionably injured by government action, for whom establishing standing is consequently not the problem. For those plaintiffs, the hurdle is not standing but something else. For example, if they are to be compensated for the local government’s interference with their constitutional rights, they must prove the violation resulted from an official policy or custom.²⁴ If they are to recover such compensation from individual local officials, they must overcome those officials’ “qualified immunity.”²⁵ The result is that while victims of police

16. *State Ctr., LLC v. Lexington Charles Ltd. P’ship*, 438 Md. 451, 610 (2014).

17. *Anne Arundel Cnty. v. Bell*, 442 Md. 539, 539-594 (2015).

18. *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 733 (7th Cir. 2020).

19. *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 222 (6th Cir. 2011) (en banc) (Sutton, J., concurring).

20. *E.g.*, Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020).

21. *E.g.*, Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018); Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351 (2023).

22. *E.g.*, Schwartz, *supra* note 1, at 1181; Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J. F. 136, 136 (2022); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 409 (2016).

23. *Cf.* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 611 (2017) (noting that there might well be an undertone of skepticism in courts’ dealing with local administrative agencies).

24. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

25. *See generally, e.g.*, Schwartz, *supra* note 1 (comparing the difficulty of proving *Monell* claims against municipalities and the difficulty of defeating qualified immunity); Baude, *supra* note 1 (questioning the lawfulness of qualified immunity); Smith, *supra* note 22 (attributing the

misconduct still find it nearly impossible to sue local governments for violations of their constitutional rights,²⁶ a U.S. Senator's spouse,²⁷ prominent law professors,²⁸ and the NRA²⁹ have all been able to pursue their general or political grievances through suits against cities. Indeed, were a city to decide to respond to police violence with a new police training program, the Senator's spouse, the law professors, or the NRA could sue to stop the city from spending funds on the program.³⁰

The values normally associated with suits against governments are simply not promoted by the special standing regimes for suing cities.³¹ In this Article we explain why. Unlike in the prototypical suits against federal or state governments, plaintiffs in these suits against cities are, because of the law's design, likely to be well-resourced. Unlike in suits against federal or state governments, these plaintiffs sue cities not because they lack political options, but because they choose courts over the democratic process. And unlike in suits against federal or state governments, in these suits against cities the judicial process replaces a political process close to, and open to the influence of, the relevant community.³²

As a result, while many view expanded opportunities to sue federal and state governments as, policy-wise, neutral or even progressive,³³ the special allowance

accountability gap in cases involving local officials' violations to qualified and absolute immunities that have roots in sovereign immunity). *Cf. infra* Section I.C (discussing no-injury standing for preemption claims).

26. See, e.g., Schwartz, *supra* note 1, at 1187-88.
27. See *In re Seniors for Safety v. N.Y.C. Dep't of Transp.*, 957 N.Y.S.2d 710, 712 (App. Div. 2012); Michael M. Grynbaum, *Lawsuit Seeks to Erase Bike Lane in New York City*, N.Y. TIMES (Mar. 7, 2011), <https://www.nytimes.com/2011/03/08/nyregion/o8bike.html> [<https://perma.cc/3H3K-3G3K>]. Iris Weinshall, wife of Senator Chuck Schumer (and herself a former New York City Department of Transportation Commissioner) had close ties to the group suing. See Grynbaum, *supra*; Selina Cheah, *Prospect Park West Bike Lane Antagonists Finally Drop Lawsuit*, CURBED N.Y. (Sept. 28, 2016, 6:00 PM EDT), <https://ny.curbed.com/2016/9/28/13098378/prospect-park-west-bike-lane-lawsuit-dropped> [<https://perma.cc/SX48-KT2E>].
28. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 728 (7th Cir. 2020) (Richard Epstein for Plaintiffs-Appellants); *Brown v. Phoenix*, No. CV 2022-010439, slip op. at 2 (Ariz. Super. Ct. Mar. 27, 2023) (Ilan Wurman for Plaintiffs).
29. *Nat'l Rifle Ass'n of Am., Inc. v. City of South Miami*, 812 So.2d 504, 504-05 (Fla. Dist. Ct. App. 2002).
30. See *infra* notes 225-227 and accompanying text.
31. See *infra* Part II.
32. See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1791-94 (2021) (contrasting local and state majoritarianism).
33. See, e.g., Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1282-92 (1961); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 472-511 (1996); Heather Elliott, *The Functions of*

for suing cities firmly pushes against progress. Most often these suits against cities engender political inaction (as when they block gun control efforts or affordable housing projects).³⁴ Sometimes they even mandate affirmative steps backwards (such as removal of the homeless or more aggressive policing).³⁵ These regressive results are baked into the rules. The special standing rules apply when cities tax and spend, adjust land-use policies, or regulate rather than sit on their hands.³⁶ They thus mostly target cities when they choose to act. Indeed, suits against cities need not even be successful on their merits to interfere with local initiatives. The mere threat of litigation works to deter cities from action; lengthy litigation may suffice to delay if not frustrate action, irrespective of a suit's eventual resolution.

This dynamic might appear to have a specific political tilt. That is because in our current political environment, “progressive” city voters and officials are those normally agitating for spending, building, and regulating. But special standing rules could just as well frustrate the aspirations of politically conservative local governments seeking change. These rules are not inherently partisan.³⁷ They simply, and blindly, act to fortify the status quo.

The lamentable function many suits against cities serve does not mean that litigation against local governments, even when instigated by those who did not suffer a personal injury, has no role to play. Special solicitude *should* be accorded to individuals attempting to sue government if they truly seek to remedy a real public injury. Operationalizing this principle does not mean equating the rules for suing cities with those governing suits against other governments. That approach would assume (wrongly) that we have optimized standing rules for suing

Standing, 61 STAN. L. REV. 459, 507-16 (2008); see also Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 645-47 (2010) (concluding, based on an empirical analysis of case outcomes, that for “a discrete period around the New Deal, voting blocs substantiate the liberal reliance on standing to insulate administrative agencies”).

34. See *infra* notes 61, 91-98 and accompanying text.

35. See *infra* notes 126-128, 178-180 and accompanying text.

36. In this way, a local sanctuary-city ordinance is local *activity* because it involves a city adopting the ordinance, even though in practice such an ordinance requires local officials not to act in cooperation with federal officials.

37. As noted, we count among our allies in questioning the special rules for suing cities two notably conservative jurists. See, e.g., *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 733 (7th Cir. 2020) (then-Judge Barrett); *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 222 (6th Cir. 2011) (en banc) (Sutton, J., concurring).

federal and state governments,³⁸ and it would flatten (wrongly) the differences between different levels of government.³⁹

Cities should be more vulnerable to lawsuits than other governments when something meaningful about their distinct nature as *local* governments justifies such special treatment. In some – but not all – circumstances, that might be the case, due to cities’ historical and enduring corporate characteristics, the discrete nature of their lawmaking powers and processes, their status vis-à-vis the state legislature, or the enforcement difficulties that their sheer number can generate. Adherence to this principle will ensure that the practice of suing cities does not undermine democracy – by mechanically and mindlessly operating to suppress change – but rather supports it.

The balance of this Article proceeds as follows. Part I identifies and describes the three classes of special standing rules for suing cities: taxpayer, neighbor, and preemption. Taken together, these special rules create a powerful force against local action. Part II shows why that force is malign. We explain that while litigation economics and political economy might augur in favor of expanding the right to bring suits against federal and state actors, the opposite is true for suits against cities. We also explore the strong case for insulating local governance specifically from unnecessary judicial interference. Part III then applies these insights to develop reforms realigning the practice of suing cities with institutional reform litigation’s normative goals.

Current law allocates powers to sue cities in an oft ignored, and more importantly, unfair, manner. The problem is not with the plaintiffs in suits against cities, who are easily portrayed as selfish enemies of progress.⁴⁰ They might well be that, but plaintiffs are merely using tools the law makes available. The law’s own rules, not the individual plaintiffs, represent a continual assault on city operations. It is time to reckon with the law – and its consequences.

I. DESCRIBING SUITS AGAINST CITIES

Lawsuits are a part of everyday life for American governments. Federal and state reporters are filled with page after page of cases with names like *Smith v. United States* and *Jones v. State*. Municipal governments, too, are frequently the

38. See, e.g., Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992) (“[T]he very notion of ‘injury in fact’ is not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake.”).

39. See *infra* Section II.C (discussing the normative case for local government); see also Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351, 1422-28 (2023) (discussing three theories of municipal governance).

40. See Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1611 & nn.1-5 (2021).

subject of lawsuits. In 2022, the City of New York answered more than eight thousand cases sounding in tort alone.⁴¹

Tallying up the lawsuits or claim types involving city governments would be of little use. This Part aims to do something different. We seek to identify categories of cases that present special issues to municipalities – special because they differ qualitatively or quantitatively from litigation against federal or state governments. We isolate and categorize the doctrinal moves rendering municipal governments more susceptible to suit than other governments.

We identify three categories of cases in which courts' doors have been opened, by legislatures or by courts themselves, to private plaintiffs suing cities in ways that would not be possible if they were suing other governments. We denominate these categories as distinct types of "standing." We use that word colloquially (rather than solely doctrinally) to suggest that these are circumstances where people hold an entitlement to have their complaint addressed in court. To be sure, none of these special regimes for suing cities is *unlimited*, and where relevant we discuss those limits. But all three categories represent departures from the law as applied to other government defendants. An important theme that will emerge through the discussion is how each type of standing connects directly to regressive policy outcomes.

Section I.A explores the special federal- and state-law rules of taxpayer standing applicable to suits against local governments. In short, while taxpayer standing is extremely limited in suits against federal and state governments, it is capacious when it comes to suing cities. Merely paying taxes is often sufficient table stakes for a plaintiff to sue a municipal government when it attempts to use city funds. The result is that, more than other levels of government, cities are under constant threat of litigation whenever they spend money to pursue policy goals.

Section I.B turns to what we call "neighbor standing." This term refers to state courts' broad interpretation, in different doctrinal settings, of the property interest necessary to support standing to sue. The idea here is that individuals who own some property can frequently concoct a connection between their property and a city policy sufficient to drag the city into court – and to delay, if not defeat, any change to the built environment. While property interests also can be used for standing to sue federal and state governments, what differentiates property-based suits against cities is the quintessentially local nature of city action. Local governments are close to the people. They are on the ground. Their work – around public spaces, land use, education, and transportation –

41. 2022 *Annual Report*, N.Y.C. L. DEP'T (2022), <https://www.nyc.gov/site/law/news/annual-reports.page> [<https://perma.cc/T6QB-JLDD>].

constantly butts against individuals' property. City policies, therefore, might be challenged in court by neighbors virtually daily.

Section I.C then explores how state legislatures have turned to suits against cities as part of their preemption agenda. "Preemption standing" exists where state governments deputize private citizens to sue local governments—and sometimes local officials personally—to enforce state bans on specific local policies. While preemption itself is relevant to any tiered system of government, states are far more willing to authorize private preemption suits in their relationship with cities than the federal government is in its relationship with the states. The recent efforts to empower private parties to sue and enforce preemption laws against cities tend to center on culture war issues, though preemption standing can be employed more broadly. Here, the regressive nature of the litigation is written on its face; the whole point of these laws is to stop city action. Preemption standing does differ from municipal and neighbor standing in one important way: it is the product of a conscious (and mostly recent) legislative design. But it shares with them the exaggerated effect on cities and the asymmetric effect on city action as compared to inaction.

A. *Taxpayer Standing*

Plaintiffs seeking to challenge government action sometimes seek to establish standing on the theory that the government action harms them as taxpayers.⁴² A critic of U.S. foreign military adventurism, for instance, might sue on the theory that their tax dollars are being used for what they think is an improper purpose.⁴³

The classic case on taxpayer standing is *Frothingham v. Mellon*.⁴⁴ Frothingham sued to challenge the federal Maternity Act of 1921, which provided federal grants to states to reduce maternal and infant mortality.⁴⁵ Frothingham argued that, because it was likely to lead to increased taxation, the Act took her property in violation of the Fifth Amendment's Takings Clause.⁴⁶ The Supreme Court rejected her suit unceremoniously. The Court explained that the complaint's target, a statute whose administration is "likely to produce additional

42. See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 771-80 (2003).

43. Cf. *United States v. Richardson*, 418 U.S. 166, 167-68, 179-80 (1974) (dismissing, on standing grounds, a suit by a taxpayer for publication by the Treasury Department of the Central Intelligence Agency's budget during the Vietnam War).

44. 262 U.S. 447 (1923).

45. *Id.* at 479 (citing Act of Nov. 23, 1921, ch. 135, 42 Stat. 224 (repealed 1929)).

46. See *id.* at 480.

taxation . . . upon a vast number of taxpayers” was “essentially a matter of public and not of individual concern.”⁴⁷ Frothingham suffered no cognizable injury, as her interest as a taxpayer “in the moneys of the Treasury” was too “remote, fluctuating and uncertain” to qualify as such an injury.⁴⁸

More than eighty years after *Frothingham*, the Supreme Court in *DaimlerChrysler Corp. v. Cuno* confirmed that the bar on taxpayer standing announced in *Frothingham* applied with equal force to state taxpayers.⁴⁹ Taxpayers, the Court held, could not challenge Ohio’s decision to award tax benefits to encourage the expansion of a Jeep factory in Toledo.⁵⁰ These cases stand for the proposition that federal and state taxpayers “have no standing under Article III to challenge [federal or] state tax or spending decisions simply by virtue of their status as taxpayers.”⁵¹

But this simple rule does not apply to municipal taxpayers. In *Frothingham* itself, the plaintiff adverted to a series of earlier cases supporting taxpayer standing to challenge the spending of funds on government projects in the District of Columbia.⁵² In response, the Supreme Court observed that *municipal* taxpayer standing is an unrelated matter. The Court referred to “the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation.”⁵³ In other words, municipal taxpayer standing exists in federal court in many circumstances where federal or state taxpayer standing would not.⁵⁴ Thus, in *DaimlerChrysler*, the Court noted that while taxpayers could not challenge Ohio’s award of benefits to the Jeep factory, their standing to challenge the benefits that the city of Toledo granted the factory, a challenge the lower court had denied on the merits, was never questioned.⁵⁵

State courts, of course, can establish their own standing doctrines. In general, many states track federal Article III law, while some provide for more liberal

47. *Id.* at 487.

48. *Id.*

49. 547 U.S. 332, 345-46 (2006).

50. *Id.* at 337-38, 346.

51. *Id.* at 346.

52. 262 U.S. at 476 (argument for Frothingham) (citing, *inter alia*, *Bradfield v. Roberts*, 175 U.S. 291, 295 (1899)); *see also id.* at 486 (majority opinion) (addressing these cited cases).

53. 262 U.S. at 486. The Court was drawing an analogy to the derivative suit, a topic we take up in detail in Section III.A, *infra*.

54. Further, we have seen no indication that recent changes in Article III standing doctrine have taken a bite out of municipal taxpayer standing. *See, e.g.*, *Protect Our Parks v. Chi. Park District*, 971 F.3d 722, 733-734 (7th Cir. 2020) (observing that the Supreme Court has not, as of yet, brought municipal taxpayer standing in line with other threads of Article III jurisprudence).

55. 547 U.S. at 349.

standing along various dimensions too multifarious to describe in detail here.⁵⁶ Consistent with the pattern that general state standing rules are hardly ever more demanding than the federal ones, when it comes to municipal taxpayer standing, state courts recognize liberal rules of municipal taxpayer standing,⁵⁷ sometimes specifically referring to *Frothingham* as justification.⁵⁸ Although most states also have special regimes facilitating taxpayer suits against the state,⁵⁹ that is not always the case. And even where recognized, taxpayer standing in suits against the state is not always as robust as in suits against municipalities.⁶⁰ In the vast

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56. See generally Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842-76 (2001) (describing the various and varying models of justiciability doctrine throughout the states and how they differ from the Article III model); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 434-438 (2018) (explaining that "state courts may entertain state and federal suits even if plaintiffs would lack Article III standing in federal court"). E.g., *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 853 S.E. 2d 698, 727 (N.C. 2021) (holding that the North Carolina Constitution does not impose an injury-in-fact requirement for standing).
57. See, e.g., Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1274-1283 (2012); cf. *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 898 (1960) (suggesting that state-law municipal taxpayer standing dates to the mid-nineteenth century). Though mostly judicially created, in some states municipal taxpayer standing is now codified. 18 MCQUILLIN MUN. CORP. § 52:7 (3d ed. 2023) (summarizing state statutory provisions granting taxpayer standing and collecting cases construing these statutes).
58. See *W. Farms Mall, LLC v. Town of West Hartford*, 901 A.2d 649, 659 (Conn. 2006); *Pettibone v. Ho-Chunk Nation Legis.*, 4 Am. Tribal Law 330, 345-347 (Ho-Chunk Trial Ct. May 15, 2002) (analogizing tribal citizens to municipal, rather than federal, taxpayers and relying on *Frothingham* for the proposition that taxpayer standing is therefore appropriate); *Rohde v. Ann Arbor Pub. Schs.*, 737 N.W.2d 158, 171 (Mich. 2007) (Kelly, J., concurring) (citing *Frothingham* as the basis for dissenting from the majority's determination that plaintiffs lacked standing, a decision later overruled by *Lansing Schools Education Ass'n v. Lansing Board of Education*, 792 N.W.2d 686 (Mich. 2010)); see also 18 MCQUILLIN MUN. CORP. § 52:16 (3d ed. 2023) (collecting cases).
59. See, e.g., Urquhart, *supra* note 57, at 1274-1283.
60. For example, it appears that municipal taxpayer standing in Texas state courts may be easier to obtain than state taxpayer standing. See *Lone Star Coll. Sys. v. Immigr. Reform Coal. of Tex.*, 418 S.W.3d 263, 278-79 (Tex. App. 2013) (Christopher, J., concurring); *Williams v. Lara*, 52 S.W.3d 171, 181 (Tex. 2001). The same appears to be true for Maine, New York, and Vermont. See *Common Cause v. State*, 455 A.2d 1, 11 (Me. 1983) (expressing doubt that "a simple extension of the entire doctrine of [municipal taxpayer standing] to state taxpayers' suits would be desirable" but nonetheless finding plaintiffs had taxpayer standing to sue the State); cf. N.Y. GEN. MUN. LAW § 51 (McKinney 2023) (codifying municipal taxpayer standing but making no mention of state taxpayer standing). Compare *Paige v. State*, 205 A.3d 526, 532 (Vt. 2018) (finding that plaintiff lacked taxpayer standing in a suit against the State), with *Taylor v. Town of Cabot*, 178 A.3d 313, 316-17 (Vt. 2017) (applying a less stringent test to find that plaintiffs had taxpayer standing in a suit against a municipality).

majority of states, therefore, municipal taxpayers can sue cities in state courts in ways that depart from typical standing rules.

So, for example, municipal taxpayers in Columbus, Ohio, could sue the city government to enjoin its gun control regulations, while non-taxpayers could not.⁶¹ A New Jersey court held that only municipal taxpayers may challenge the promotion of local police officers.⁶² An Omaha, Nebraska, citizen could challenge a local redistricting plan not because he was a voter but because he was a taxpayer. Taxpayer standing was available because “[e]mployees in the office of the Douglas County Election Commissioner have spent and will spend in the future public time and money to implement the new district boundary lines.”⁶³ Corporations, too, may obtain municipal taxpayer standing provided they pay municipal taxes. Accordingly, because it was a taxpayer, a gas station company in Connecticut could sue the local zoning board over its decision to allow a grocery store to sell beer and gasoline.⁶⁴ The Supreme Court of Georgia would have allowed the Sons of Confederate Veterans to bring a lawsuit against a county’s decision to remove a confederate memorial had the entity been able to show it paid municipal taxes.⁶⁵ This broad standing available to municipal taxpayers – persons or entities – is not necessarily available to all taxpayers, because in some states only *property tax*-payers may qualify for municipal taxpayer standing.⁶⁶ The Supreme Court of South Dakota, for example, did not allow a prisoner to challenge the constitutionality of a special appropriations bill for correctional facilities because he only paid sales taxes.⁶⁷

Given the logic of taxpayer standing, all courts originally required that a municipal (property) taxpayer plaintiff also claim that the challenged city action would result in lost funds – the waste of tax revenue.⁶⁸ But over time both federal

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61. *Ohioans for Concealed Carry v. City of Columbus*, 140 N.E.3d 1215, 1229 (Ohio Ct. App. 2019).
 62. *N.J. State Lodge-Fraternal Ord. of Police v. Aaron*, 121 A.2d 402, 404-405 (N.J. Super. Ct. App. Div. 1956) (finding that the plaintiff association lacked standing as it conceded that it was not a taxpayer).
 63. *Chambers v. Lautenbaugh*, 644 N.W.2d 540, 547-48 (Neb. 2002).
 64. *All. Energy Corp. v. Plan. & Zoning Bd. of Milford*, 815 A.2d 105, 113 (Conn. 2003).
 65. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs*, 880 S.E.2d 168, 188-89 (Ga. 2022) (holding that the organization was not a stakeholder – resident, citizen, voter, or taxpayer).
 66. See 18 MCQUILLIN MUN. CORP. § 52:13 n.29 (3d ed.) (collecting state judicial decisions).
 67. *Stumes v. Bloomberg*, 551 N.W.2d 590, 592-594 (S.D. 1996).
 68. See, e.g., *Morris v. City Council of Augusta*, 40 S.E.2d 710, 712-13 (1946) (suggesting that standing turn on whether “the party suing as a taxpayer was in danger of injury through loss of public funds or property”); *Blanton v. Merry*, 42 S.E. 211, 212-13 (1902) (concluding that taxpayers lacked standing to enjoin public officials from operating a dispensary allegedly in violation of the town charter because the dispensary was being operated at no cost to the

and state courts watered down this requirement. They now tend to hold that a municipal taxpayer may have standing even if the contested city policy cannot be shown to deplete city funds. A plaintiff need not allege that the policy is wasteful—merely that it is illegal.⁶⁹ The D.C. Circuit explained that because a municipal taxpayer's injury is not the payment of taxes, but rather an illegal use of funds, they need not show that a favorable judgment would reduce their tax bill. It then allowed a suit claiming that a city was not authorized to print flyers urging residents to vote “no” on a citizens' initiative that the city reasonably predicted would increase tax expenditures.⁷⁰ A few years later, the Second Circuit found municipal taxpayer standing even after concluding that the lawsuit stood “no chance” of affecting plaintiffs' tax bills.⁷¹ State courts have similarly allowed taxpayers to sue for generalized grievances that do not imperil tax dollars or public property.⁷² In Connecticut, for example, courts apply an “automatic aggrievement rule” under which “any taxpayer in a municipality has automatic standing to appeal from a zoning decision involving the sale of liquor in that community.”⁷³

One result of a broad municipal taxpayer standing doctrine is that sometimes individuals can use municipal taxpayer standing to redress their own private grievances for which traditional injury-based standing would seem to be a better fit. An illustrative example is *Smith v. Jefferson County Board of School Commissioners*.⁷⁴ In 2003, as part of wider budget cuts, a Tennessee county school board decided to close a public alternative school and contract with a private alternative school.⁷⁵ In the process, some teachers and administrators from the public school were let go. Three fired teachers sued the board claiming that the decision violated their due process rights and the Establishment Clause, seeking a

town); *Mayor & Council of Gainesville v. Simmons*, 23 S.E. 508, 508-09 (1895) (holding that city taxpayers lacked standing to challenge the county's payments to the city for support and maintenance of public schools because the funds would reduce local taxes).

69. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 211 (6th Cir. 2011); see Urquhart, *supra* note 57, at 1268-1274; Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After Cuno and Winn*, 40 HASTINGS CONST. L.Q. 1, 36-46 (2012).
70. *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988).
71. *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992). For a broader study of these cases, see generally Staudt, *supra* note 42, at 825-834.
72. *Comm'rs of Manchester v. Montgomery*, 153 S.E. 34, 34-35 (Ga. 1930) (allowing taxpayers to bring suit to compel city commissioners to perform the duty of selecting a city manager).
73. *All. Energy Corp. v. Plan. & Zoning Bd. of Milford*, 815 A.2d 105, 109 (Conn. 2003) (quoting *Jolly, Inc. v. Zoning Bd. of Appeals*, 676 A.2d 831, 834 (1996)).
74. 641 F.3d 197 (6th Cir. 2011).
75. *Id.* at 202-203.

declaratory judgment and \$1 million per plaintiff in compensatory damages.⁷⁶ The Sixth Circuit held that the teachers' due process claims failed, and that as individuals they lacked prudential standing to pursue the Establishment Clause claims.⁷⁷ The court, however, went on to hold that the teachers had standing to pursue the latter claims *as municipal taxpayers*.⁷⁸

Smith is interesting not only because the teachers used municipal taxpayer standing to pursue their claims where individual standing was not available, but also because it featured a concurrence by Judge Sutton questioning municipal taxpayer standing.⁷⁹ He observed that general standing law has tightened since *Frothingham* and disputed the practical distinction between state and local budgets that allegedly justified separate standing rules.⁸⁰ Less than ten years later, in a decision addressing a challenge to Chicago's decision respecting the siting of the Obama Presidential Center, then-Judge Barrett cited approvingly to Sutton's opinion, and called municipal taxpayer standing a "relic."⁸¹

Municipal taxpayer standing might be an anomaly, but, as both Judge Sutton and then-Judge Barrett admitted, it is still the law of the land.⁸² And what both found surprising about it is also still true: municipal taxpayer standing means that virtually any action a municipality takes can be challenged in federal or state court by any disgruntled citizen, provided they pay (property) taxes.

B. Neighbor Standing

Lawsuits are oftentimes premised on a harm the defendant allegedly inflicted on the plaintiff's property. It is hardly surprising, therefore, that if a city physically intrudes on a person's land, that person can sue that city. And while the development of the relevant doctrines has proven rather fraught, it is also now clear that the intrusion on the defendant's property need not be physical to support a claim against the city: a regulation limiting an owner's use of property can

76. *Id.* at 204-205.

77. *Id.* at 216-19 (holding that due-process claims failed); *id.* at 206-09 (holding that the teachers did not have individual standing).

78. *Id.* at 209-16.

79. *Id.* at 221 (Sutton, J., concurring).

80. *Id.* at 221-222.

81. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 733 (7th Cir. 2020).

82. Other courts have similarly questioned the logic of the doctrine while still resigning to its continued validity. *See, e.g.*, *Vining v. Exec. Bd. of D.C. Health Benefit Exch. Auth.*, 174 A.3d 272, 279 (D.C. 2017); *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988) (Williams, J., concurring).

suffice.⁸³ Even if the government did not physically intrude on the land, by regulating what the owner can do with it, the government did something to the land.⁸⁴

But through a hardly noted procedural move, courts have further empowered owners in their relationship with government. Courts did away with the requirement that the defendant government actually did something, physical or otherwise, to the land of the plaintiff now suing. Governments now can be sued for something they did (or more often, did not do) to someone else's land nearby. This basis for suing – which we dub “neighbor standing” – portends major ramifications for local governments.⁸⁵

The law here first developed in the zoning context. The most natural challenge to a zoning ordinance is one brought by the property owner whose land's use the ordinance restricts.⁸⁶ Yet, quickly after zoning was first introduced, property owners began turning to the courts to challenge zoning decisions related not to their own properties, but to other people's properties. They sought recourse when those other owners were allowed to put their lands to uses the plaintiffs disliked. Such suits should have faced a major hurdle. Courts tend to insist that members of the general public do not have standing to bring challenges to zoning decisions respecting others' property.⁸⁷ The appropriate remedy to such general harms, courts reckon, lies with the legislative branch and administrative agencies that extensively plan and regulate development's effects.⁸⁸ Thus, courts demand that a plaintiff suing a city on account of its zoning decision “suffer a special injury beyond that which shall affect him in common with the remainder of the public.”⁸⁹

83. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that a regulation that limits a property owner's use of their property can be classified as a taking if it “goes too far”).

84. *Id.* at 414.

85. These suits, by their nature, almost invariably occur in state courts, so we need not tarry in the rules of federal standing here.

86. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 382-84 (1926).

87. See, e.g., *Fla. Rock Props. v. Keyser*, 709 So. 2d 175, 177 (Fla. Dist. Ct. App. 1998) (holding that a property-owner plaintiff who “never demonstrated any specific injury, only that the county would not be as bucolic as it once was[,] . . . is a citizen with an interest in the environment and nothing more”).

88. See, e.g., *Garner v. Cnty. of Du Page*, 133 N.E.2d 303, 304 (Ill. 1956); *Bullock v. City of Evanston*, 123 N.E.2d 840, 846 (Ill. 1954) (“It is not proper for this court to constitute itself a zoning commission and substitute its judgment for that of the legislative body charged with the primary duty of determining when a variation use should be permitted.”); *Spiek v. Mich. Dep't of Transp.*, 572 N.W.2d 201, 210 (Mich. 1998) (“Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby.”).

89. *Tallon v. Mayor of Hoboken*, 37 A. 895, 896 (N.J. 1897).

But from early on, courts understood this injury requirement to still allow challenges to zoning decisions raised by individuals who did not own the pertinent property—as long as those individuals owned neighboring property. Courts concluded, often following only cursory analysis, that property adjacency supplied a plaintiff with the necessary “special injury” setting them apart from other members of the public. The Hawai’i Supreme Court’s reaction to a city’s assertion that neighbor plaintiffs suffered no special injury from a zoning determination respecting some adjoining land is typical:

Plaintiffs’ interest in this case is that they “reside in very close proximity” to the proposed development. In fact, two of the plaintiffs apparently “live across the street from said real property” upon which defendants plan to build high rise apartment buildings, thus restricting the scenic view, limiting the sense of space and increasing the density of population. Clearly this is a “concrete interest” in a “legal relation.”⁹⁰

Neighbors’ right to challenge a city’s zoning decision has become the norm throughout the country. In some rare instances, the relevant zoning statute itself designates proximity as generating standing.⁹¹ But mostly, zoning laws merely state that any “aggrieved” person can challenge a zoning decision. Courts then treat a party as “aggrieved” if that party can demonstrate proximity and some associated harm from the zoning decision.⁹² The harm to the proximate owner that courts require is normally defined as decreased property values.⁹³ Yet, neighboring owners do not need to actually prove such a decrease. Some courts hold that a neighbor’s own “feeling” that property’s value will decrease suffices.⁹⁴ Many courts now simply assume that a neighbor will experience such harm, and thus nothing beyond owning property nearby is needed to establish standing.⁹⁵

90. *Dalton v. City & Cnty. of Honolulu*, 462 P.2d 199, 202 (Haw. 1969).

91. *See, e.g.*, CONN. GEN. STAT. § 8-8(a)(1) (2023) (defining “aggrieved person” to include “any person owning land . . . that abuts or is within a radius of one hundred feet of any portion of the land involved” in a zoning decision); MONT. CODE ANN. § 76-3-625(3)(b) (West 2021) (granting standing to, among others, “a landowner with a property boundary contiguous to the proposed subdivision”).

92. *See, e.g.*, *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 743 S.E.2d 132, 135-37 (Va. 2013); *Knight v. City of Yelm*, 267 P.3d 973, 982 (Wash. 2011); *Moore v. Maloney*, 321 S.E.2d 335, 337 (Ga. 1984).

93. *See, e.g.*, *Appley v. Twp. Comm.*, 24 A.2d 805, 806 (N.J. 1942), *aff’d*, 28 A.2d 177 (N.J.).

94. *See, e.g.*, *Chatham Corp. v. Beltram*, 251 A.2d 1, 4 (Md. 1969) (finding that the plaintiffs’ proximity to reclassified land and their “feeling that the increased density would depreciate their property values” were sufficient to confer standing).

95. *See, e.g.*, *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 508 N.E.2d 130, 134 (N.Y. 1987) (“[A]n allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual

This trend mirrors the process we described with respect to taxpayer standing: factual elements (namely, economic impact) that plaintiffs were required to establish for standing have been watered down. Here, not only did courts lessen the aggrievement requirement to mean mere proximity, but they also have read the proximity demand flexibly and often broadly.⁹⁶ Courts have explicitly refused to set a “bright-line rule for exactly how close a property must be” to sustain a suit.⁹⁷ It is not unheard of, therefore, to find owners of property located 1,000 feet away or more granted standing as “neighbors.”⁹⁸

Because standing here is based on property proximity, courts have made it clear that plaintiffs need not even be city residents to sue a city: if their adjoining property is on the other side of a municipal boundary, or if the plaintiff is a non-resident owner, they can still sue.⁹⁹ The one, unyielding, precondition for neighbor standing is property ownership. The Supreme Court of Georgia would not even allow a spouse who lived with the title owner to sue (unless they divorced and the spouse got formal title as part of the settlement).¹⁰⁰ Neighbor standing is not grounded in citizenship or even tax payment; it is wholly and exclusively grounded in private property values.¹⁰¹

In this fashion, courts’ doors have been opened to neighboring owners suing cities that, through zoning changes, have tried to introduce new forms of

injury.”); *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. Dist. Ct. App. 1985); *Bd. of Cnty. Comm’rs v. City of Thornton*, 629 P.2d 605, 609 (Colo. 1981); *Allen v. Coffel*, 488 S.W.2d 671, 675 (Mo. Ct. App. 1972) (“[I]t is now well established that an adjoining, confronting or nearby property owner has standing, without further proof of special damage”); 120 W. Fayette St., LLLP v. Mayor of Balt., 964 A.2d 662, 672 (Md. 2009) (“Such property owners are granted prima facie aggrieved status due to the sheer proximity of their property”).

96. That, of course, is not an option where the requirement is legislative, as in Connecticut. See *supra* note 91 and accompanying text.
97. *Ray v. Mayor of Balt.*, 59 A.3d 545, 550 (Md. 2013); see also *Evans v. Teton Cnty.*, 73 P.3d 84, 88 (Idaho 2003) (“[T]his Court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing”).
98. See, e.g., *Knight v. City of Yelm*, 267 P.3d 973, 982-83 (Wash. 2011); *Chatham Corp.*, 251 A.2d at 2.
99. See, e.g., *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441, 446 (N.J. 1954); *Koppel v. City of Fairway*, 371 P.2d 113, 116 (Kan. 1962); *Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 100 (Colo. 1963); *Allen*, 488 S.W.2d at 679; *Scott v. City of Indian Wells*, 492 P.2d 1137, 1140-42 (Cal. 1972); *Whittingham v. Vill. of Woodridge*, 249 N.E.2d 332, 333-34 (Ill. App. Ct. 1969).
100. *Miller v. Fulton Cnty.*, 375 S.E.2d 864, 865 (Ga. 1989).
101. See, e.g., *Becker v. Litty*, 566 A.2d 1101, 1109 (Md. 1989) (explaining that there is no standing “where the concerns expressed deal with a changing neighborhood and an interference with wholesome atmosphere for children, as opposed to property devaluation”).

development into single-family areas, including multifamily dwellings,¹⁰² commercial endeavors,¹⁰³ planned developments,¹⁰⁴ mobile home parks,¹⁰⁵ additional homes,¹⁰⁶ a church,¹⁰⁷ a church community kitchen,¹⁰⁸ and group homes.¹⁰⁹

While the neighbor standing rule first emerged in the zoning context—that is, when owners contested a change to a neighboring property’s zoning designation—its phrasing and logic easily lent themselves to application elsewhere. Many government activities, not solely zoning changes, can be claimed to devalue surrounding properties. Accordingly, courts have come to allow neighboring property owners, but not other community members,¹¹⁰ to sue cities for these many other municipal decisions, citing the special injury the neighboring owners allegedly endure.

Neighbors have been authorized to sue cities over almost any imaginable decision: an ordinance designating a neighboring area as “blighted” and thus approving redevelopment;¹¹¹ the city’s choice of developer for public land;¹¹² and the design requirements for a neighbor’s bridge.¹¹³ Other recent claims have involved neighbors’ objection to Philadelphia’s decision to remove a statue of

102. *Wolpe v. Poretzky*, 144 F.2d 505, 507 (D.C. Cir. 1944).

103. *Roosevelt*, 384 P.2d at 100 (shopping center); *Herzog v. City of Pocatello*, 356 P.2d 54, 56 (Idaho 1960) (gas station); *Borough of Cresskill*, 104 A.2d at 442 (business district); *Coates v. City of Cripple Creek*, 865 P.2d 924, 925-26 (Colo. App. 1993) (same); *Morgan v. Bd. of Supervisors*, 883 S.E.2d 131, 134 (Va. 2023) (distribution and warehouse facility).

104. *Scott v. City of Indian Wells*, 492 P.2d 1137, 1138 (1972).

105. *Allen v. Coffel*, 488 S.W.2d 671, 673 (Mo. Ct. App. 1972).

106. *Save Calusa, Inc. v. Mia.-Dade Cnty.*, 355 So. 3d 534, 536 (Fla. Dist. Ct. App. 2023) (challenging rezoning of defunct golf course to allow for 550 single-family homes); *Moore v. Maloney*, 321 S.E.2d 335, 336 (Ga. 1984) (challenging the development of seven townhouses).

107. *Abel v. Plan. & Zoning Comm’n*, 998 A.2d 1149, 1153 (Conn. 2010).

108. *Allen v. City of Burlington Bd. of Adjustment*, 397 S.E.2d 657, 660 (N.C. Ct. App. 1990).

109. *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 24 (Minn. 1981).

110. *Loughborough Dev. Corp. v. Rivermass Corp.*, 131 A.2d 461, 463 (Md. App. Ct. 1957) (holding, in an action brought by a landowner, that the evidence is insufficient to prove special damage because the property is too remote and thus cannot show decrease in value); *Howe v. City of St. Louis*, 512 S.W.2d 127, 133 (Mo. 1974) (reasoning that four landowning plaintiffs lacked standing in a challenge to the city’s antiblockbusting ordinances because the plaintiffs failed to prove they specifically lived in the districts to which those ordinances applied).

111. *Schweig v. City of St. Louis*, 569 S.W.2d 215, 223 (Mo. Ct. App. 1978) (reasoning that since nearby property owners have standing to challenge zoning ordinances, plaintiffs had standing to challenge municipal redevelopment project).

112. *120 W. Fayette St., LLLP v. Mayor of Balt.*, 964 A.2d 662, 665 (Md. 2009).

113. *Becker v. Litty*, 566 A.2d 1101, 1109 (Md. 1989).

Christopher Columbus;¹¹⁴ neighbors' opposition to Evanston's approval of Northwestern University's plan for a new football stadium;¹¹⁵ a neighbor's challenge to the city's addition of a bike lane in Park Slope, Brooklyn;¹¹⁶ a challenge to San Francisco's bike-lane plan in its entirety;¹¹⁷ Upper West Side owners' challenge to the most recent expansion of the Natural History Museum in Manhattan;¹¹⁸ Plaza Hotel condo owners' complaint over the location of a New York City bike-share station in front of the Hotel;¹¹⁹ condo owners' similar complaint in Lakeview, Chicago;¹²⁰ SoHo neighbors' suit to stop New York from converting a city-owned empty lot they used as a garden into affordable housing for seniors;¹²¹ Nantucket's approval of the opening of a clam shack;¹²² a Cape Cod town's refusal to order the shutting down of a school's pickleball courts;¹²³ and a Cape Ann town's failure to enforce an anti-scuba-diving ordinance in the public

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114. *In re Friends of Marconi Plaza*, 287 A.3d 965, 968 (Pa. Commw. Ct. 2022). Even more recently, Louisville's decision to remove a statue of a Confederate general was similarly, and successfully, challenged. *Friends of Louisville Pub. Art, LLC v. Louisville/Jefferson Cnty. Metro Historic Landmarks & Pres. Dists. Comm'n*, 671 S.W.3d 209, 211 (Ky. 2023).
115. Dan Mihalopoulos, *Opponents of Northwestern Stadium Sue City of Evanston*, CHI. SUN-TIMES (Nov. 30, 2023, 12:28 PM CDT), <https://chicago.suntimes.com/business/2023/11/30/23982789/opponents-sue-city-evanston-approving-northwestern-ryan-field-stadium-concert-plans> [https://perma.cc/J5HA-Z9AG].
116. *Seniors for Safety v. N.Y.C. Dep't of Transp.*, 957 N.Y.S.2d 710, 711 (N.Y. App. Div. 2012).
117. *Anderson v. City & Cnty. of San Francisco*, No. A143974, 2020 WL 7866340, at *1 (Cal. Ct. App. Dec. 30, 2020), *as modified on denial of reh'g* (Jan. 26, 2021).
118. Caroline Spivack, *American Museum of Natural History Clears Final Legal Hurdle for Planned Expansion*, CURBED N.Y. (Apr. 19, 2019, 11:24 AM EDT), <https://ny.curbed.com/2019/4/19/18507592/american-museum-natural-history-clears-final-legal-hurdle-expansion> [https://perma.cc/D47H-KHEG].
119. *Bd. of Managers of Plaza Condo. v. N.Y.C. Dep't of Transp.*, 14 N.Y.S.3d 375, 375 (N.Y. App. Div. 2015).
120. John Greenfield, *Divvy NIMBYS' Bike-Share Nightmare Is Over: Lakeview Station Relocated*, STREETS BLOG CHI. (May 8, 2014, 4:49 PM CDT), <https://chi.streetsblog.org/2014/05/08/divvy-nimbys-long-nightmare-is-over-lakeview-station-relocated> [https://perma.cc/UL5U-XAER].
121. *Elizabeth St. Garden, Inc. v. City of New York*, 192 N.Y.S.3d 102, 104 (N.Y. App. Div. 2023).
122. Madlin Mekelburg, *Billionaire Fights Nantucket Clam Shack 18 Inches from His Home*, BLOOMBERG (Aug. 21, 2023, 9:09 AM EDT), <https://www.bloomberg.com/news/articles/2023-08-21/billionaire-fights-nantucket-clam-shack-18-inches-from-his-home> [https://perma.cc/2L6D-BJK3].
123. Calli Remillard, *Lakeview Avenue Residents File Appeal to Stop Noise from Pickleball Courts*, FALMOUTH ENTER. (Feb. 11, 2022), https://www.capenews.net/falmouth/news/lakeview-avenue-residents-file-appeal-to-stop-noise-from-pickleball-courts/article_39472550-df6c-54c8-9b95-bdab6540a391.html [https://perma.cc/EU3D-8LEX].

beach closest to the owners' properties (among other affronts to property values, the divers allegedly engaged in "public nudity" while changing).¹²⁴

Of course, as with all the suits surveyed in this Part, not all of these challenges eventually succeeded on the merits. The point is that they were allowed into court – and as we will discuss later, that is often enough for the plaintiffs in these specific challenges to succeed in achieving their goals.¹²⁵

A particularly impactful strand of litigation expanding the realm of neighbor standing beyond its provenance in zoning decisions has emerged in the last couple of years: attacks on cities' attempts to accommodate those in need of shelter. Residents of the Financial District of New York City sued to stop the city from moving homeless people into a neighborhood hotel.¹²⁶ Owners in Chicago's Ukrainian Village sued to stop the city from converting a neighborhood building into housing for asylum seekers, who had been bused to Chicago by Texas Governor Greg Abbott.¹²⁷ In downtown Phoenix, business owners successfully sued the city forcing it to remove homeless persons that had encamped in their neighborhood.¹²⁸

124. *Back Beach Neighbors Comm. v. Town of Rockport*, 63 F.4th 126, 129 (1st Cir. 2023) (making an equal protection claim that the Town singled out the beach close to them for nonenforcement of anti-diver ordinances).

125. See *infra* note 236 and accompanying text.

126. Andy Newman, *Homeless Men Lose Court Battle to Stay in Upper West Side Hotel*, N.Y. TIMES (June 3, 2021), <https://www.nytimes.com/2021/06/03/nyregion/lucerne-hotel-homeless-shelter.html> [<https://perma.cc/58DY-GLDJ>]. Earlier, similar New York cases were *W. 58th St. Coal., Inc. v. City of New York*, 130 N.Y.S.3d 436, 438 (2020), *aff'd as modified*, 170 N.E.3d 446 (N.Y. 2021) (involving Park Savoy Hotel); *Manupella v. Troy City Zoning Bd. of Appeals*, 707 N.Y.S.2d 707, 709 (2000) (involving vacant, partially burnt-out hotel).

127. Quinn Myers, *Ukrainian Village Neighbors Suing Mayor, City Officials to Block Migrant Shelter*, BLOCK CLUB CHI. (Oct. 27, 2023), <https://blockclubchicago.org/2023/10/27/ukrainian-village-neighbors-suing-mayor-city-officials-to-block-migrant-shelter> [<https://perma.cc/W8XM-5MP7>].

128. *Brown v. City of Phoenix*, No. CV 2022-010439, at 22 (Ariz. Super. Ct. Mar. 27, 2023) <https://s3.documentcloud.org/documents/23727144/phx-homeless-lawsuit-3-27-ruling.pdf> [<https://perma.cc/6LJT-QMVH>]. The New York and Chicago suits had more complicated results. In New York, the court eventually dismissed the claim against moving the homeless persons into a neighborhood hotel – because the claim had been rendered moot. *Downtown New Yorkers Inc. v. City of New York*, 195 A.D.3d 442, 442 (N.Y. App. Div. 2021). As the litigation dragged on for more than a year, the relevant homeless persons found other housing and the City was therefore no longer relocating them to the hotel. Indeed, by that late point, the City had announced an intention to move homeless people out from hotels. Newman, *supra* note 126. In Chicago, while the plaintiffs' request for a TRO was originally denied, litigation is still ongoing at the time of writing. Docket Sheet, *Cole v. City of Chicago*, No. 2023CH09012 (Cook Cnty. Ct. Ch. Div. June 14, 2024). The City has already altered its original plan of housing single men in the shelter – announcing that it will be a shelter for families. Quinn Myers, *Upcoming Ukrainian Village Migrant Shelter Will Now House Families, City Says*, BLOCK CLUB CHI. (Oct. 26, 2023).

In a sense, the Phoenix suit is the apogee of the law's transformation—and not necessarily because it culminated in a court order mandating that the city expel the homeless.¹²⁹ The neighbors' cause of action there was public nuisance: they alleged that by not removing the unhoused, Phoenix was liable for the tort of public nuisance,¹³⁰ which is defined as an “unreasonable interference with a right common to the general public.”¹³¹ The classic example of a public nuisance is an individual obstructing a public road.¹³² For centuries, private parties could not sue someone causing a public nuisance.¹³³ Such nuisances, as they affected the whole public, could only be pursued by the public's representative: the city.¹³⁴ By the twentieth century, however, courts began allowing some private parties to sue for a public nuisance but required that the individual plaintiff show a special injury separating them from other members of the general public.¹³⁵ This test granted neighbors, but no one else, standing to sue for a public nuisance. The Phoenix case represents one further, and dramatic, step in this transformation. Now the neighbors could sue the city for doing nothing about what those neighbors deemed a public nuisance. From being the sole potential plaintiff in a public nuisance case, the city has become a convenient defendant.

Convenience is key to understanding why these neighbor suits are filed against cities. For the Phoenix neighbors, the option of suing the homeless was, at the very least, inconvenient. Such a move would have involved not only obvious practical difficulties, but also doctrinal ones. American law generally does not recognize aesthetic nuisances.¹³⁶ The neighbors therefore could not sue the unhoused arguing they are unsightly. Suing the city for a purported illegal failure to do something about the unhoused allowed the neighbors to seek remedy for a wrong the law did not recognize before. Suits against cities in the zoning context, already described, often perform a similar function.¹³⁷ If Jane adds a second floor to her house which blocks her neighbor John's views, John has no common

129. Jack Healy, *Phoenix Encampment Is Gone, but the City's Homeless Crisis Persists*, N.Y. TIMES (Nov. 4, 2023).

130. *Brown v. City of Phoenix*, No. CV 2022-010439, at 2.

131. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

132. *Id.* cmt. a.

133. See J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 66-72 (1989).

134. The reason was that originally a public nuisance was an offense against the Crown. It was a crime, rather than a tort, and thus, naturally, only the government could prosecute it. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-99 (1966).

135. JOSEPH WILLIAM SINGER, PROPERTY 125 (4th ed. 2014).

136. JAMES CHARLES SMITH & DONALD J. KOCHAN, LAW OF NEIGHBORS § 2:10 (2023).

137. See *supra* notes 86-109 and accompanying text.

law claim against her: property law does not recognize an implied easement for light and air.¹³⁸ But, as the law has developed, John might be able to sue the city for allowing Jane to build the second floor.

This role neighbor standing has come to play accounts for its importance in the local context, which far outweighs its role in the federal and state contexts. As a purely doctrinal matter, neighbor standing, unlike taxpayer standing, does not specifically single out local governments for special treatment. A small number of federal statutes establish a federal version of what we deem here neighbor standing. For example, under the National Environmental Policy Act (NEPA), an Environmental Impact Statement (EIS) must be issued prior to any major federal action significantly affecting the quality of the human environment.¹³⁹ Courts have allowed neighbors to sue to enforce this mandate.¹⁴⁰ Residents have thus sued federal agencies for failure to issue an EIS when a post office was expanding,¹⁴¹ when the Government Services Administration decided to occupy a building,¹⁴² when it abandoned another,¹⁴³ and when a highway extension was planned.¹⁴⁴

These examples are telling. They illustrate the limited place of neighbor standing in suits against federal agencies. In whatever guise, neighbor standing arises, by definition, when a government does something close to an individual's property. The federal government does not do much in that space. It operates post offices. In collaboration with the state, it constructs highways.¹⁴⁵

The city, on the other hand, is constantly working up to the property line. It is responsible for almost all the public spaces that surround property owners: it situates and maintains streets, parks, parking, schools, police stations, etc. And still, it does more. The local government polices other actors' uses of their land.

138. *E.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

139. 42 U.S.C. § 4332(C) (2018).

140. The National Environmental Policy Act (NEPA) affords no explicit rights of private action, but courts have recognized such a right under the Administrative Procedure Act, 5 U.S.C. § 702 (2018). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (observing that "'procedural rights' are special").

141. *Morgan v. U.S. Postal Serv.*, 405 F. Supp. 413, 415 (W.D. Mo. 1975).

142. *S.W. Neighborhood Assembly v. Eckard*, 445 F. Supp. 1195, 1196-99 (D.D.C. 1978).

143. *R.I. Comm. on Energy v. Gen. Servs. Admin.*, 397 F. Supp. 41, 43-52 (D.R.I. 1975).

144. *Joseph v. Adams*, 467 F. Supp. 141, 145-47 (E.D. Mich. 1978).

145. For similar reasons, neighbor standing in suits against states is also limited. For example, courts have made it hard for neighbors to sue states for the placement of highways, denying takings claims because noise and similar harms are too generalized. *See, e.g.*, *Friends of H St. v. City of Sacramento*, 24 Cal. Rptr. 2d 607, 610-11 (Ct. App. 1993); *Dep't of Transp. v. Rasmussen*, 439 N.E.2d 48, 54 (Ill. App. Ct. 1982); *State v. Schmidt*, 867 S.W.2d 769, 781 (Tex. 1993); *Spiek v. Mich. Dep't of Transp.*, 572 N.W.2d 201, 210 (Mich. 1998).

The federal government enjoys no police powers, and state governments have mostly delegated theirs to local governments.¹⁴⁶

The difference highlighted here is not necessarily that the federal and state governments do less than the local government or adopt policies that are less impactful. Rather, it is that their policies and actions, plentiful and impactful as they might be, normally lack the direct effect on an owner's land value that can so easily be ascribed to local government action. Consequently, while it is marginal in challenges to federal or state action, neighbor standing, especially in light of its ever-expanding conception, places the core of city government—indeed, almost everything the city does—at courts' doorsteps.

C. Preemption Standing

Taxpayer and neighbor standing are mostly judicial creations. The third standing category, preemption standing, is different. This category consists of state statutes specifically authorizing suits against municipalities.¹⁴⁷

The concept of a legislature allowing for private actions against a lower-level government is not alien to American law. Congress has, on occasion, authorized private lawsuits against state governments or officials. The Fair Labor Standards Act,¹⁴⁸ the Family Medical Leave Act,¹⁴⁹ and various environmental laws¹⁵⁰ all list state government actors among potential defendants.¹⁵¹ Such congressionally enacted causes of action may also list local governments as potential defendants. These federal statutes render state and local governments vulnerable to private suit, but only to a very limited degree. They often regulate these lower governments when they act in a private capacity (e.g., as employers or polluters) and, at least in federal court, any plaintiff suing under them must show an injury from the government action.¹⁵² Equivalent state laws traditionally have had a

146. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876 (2015).

147. As with neighbor standing, these suits rely on state law and typically invoke state, not federal, jurisdiction. Thus, Article III limits on standing only apply in those states that have adopted them as matters of state constitutional law. See *supra* notes 6 & 56 and accompanying text. In some states, meanwhile, the enactment of a statute including a cause of action may be sufficient to establish standing. See *infra* notes 385-387 and accompanying text.

148. 29 U.S.C. § 203(d), (e), (x) (2018).

149. 29 U.S.C. § 2611(4) (2018).

150. See, e.g., 42 U.S.C. § 7604(a) (2018).

151. The important civil rights statute, Section 1983, also permits suits against government officials. 42 U.S.C. § 1983 (2018).

152. See *supra* notes 148-150. While the laws are about “causes of action,” they are functionally equivalent to standing in that, without them, private suits would not be possible. Federal

similar effect and logic: indeed, it would be odd if state employment laws, for example, did not apply to local governments as employers.

But in recent years state legislatures' endorsement of private lawsuits against local governments has expanded dramatically, in both degree and kind, beyond these traditional and natural precincts. The new state statutes that form the concern of this Section not only increase the potential number of private suits against local governments, but also revolutionize those suits' function. While older statutes empowered individuals to sue cities to vindicate their own individual rights—for example, as city employees—these new efforts authorize private suits to enforce what are in essence public, rather than private, entitlements. They combine two key attributes of American law—the idea of the “private attorney general” and the practice of preemption—to create preemption by litigation.

“Private attorney general” provisions play a major role in American law.¹⁵³ In a wide range of areas, Congress and state legislatures empower private parties to sue to enforce entitlements that seem like public rights—to ensure that such rights are effectively enforced.¹⁵⁴ The statutory provisions allowing for environmental citizen suits, for example, deputize “any person” to sue to enforce environmental laws, thereby sparing the government the need to bring every case.¹⁵⁵ To encourage such private enforcement, legislatures may include litigation subsidies, most commonly by shifting attorneys' fees.¹⁵⁶

Preemption, for its part, is an inescapable attribute of American local government law. Modern law perceives local governments as mere creatures of the state, and, therefore, even when local governments hold a power to act, the state

courts will add their own, allegedly constitutional, standing requirements when the suit is brought, but the statutorily created cause of action is still a requirement for any such suit. The same would be true in a state whose courts adopt the federal standing tests.

153. See, e.g., Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 643-48 (2013) (discussing factors that contributed to the rise of private enforcement); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1145-53 (2012) (providing a history of the role of private enforcement in American regulatory law); cf. William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130-33 (2004) (justifying the creation of a taxonomy for different meanings of the concept of a “private attorneys general” based on the phrase's frequent usage).

154. See *supra* note 153.

155. See, e.g., 42 U.S.C. § 7604(a) (2018).

156. See, e.g., Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2132 (2000); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 799-810 (2011); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 61-68 (2010).

legislature can take that power away or undo local actions.¹⁵⁷ Local ordinances, in other words, can almost always be preempted.¹⁵⁸ In the last decade or so, preemption laws have proliferated and grown more aggressive. Such “new preemption” is particularly prevalent in conservative states where major cities are much more liberal (and diverse) than the state as a whole.¹⁵⁹

Normally, for a court to hold a contradictory local ordinance preempted by a state law, the city must attempt to enforce that ordinance. At that point, the enforcement target will raise preemption as a defense.¹⁶⁰ If the court agrees, it will refuse to enforce the ordinance.¹⁶¹ Courts might also occasionally allow facial challenges to allegedly preempted ordinances, but those are in limited circumstances and typically require the plaintiff to satisfy the usual standing test.¹⁶²

The new preemption laws, however, sometimes attempt to short circuit this usual course. These laws empower state officials, such as the attorney general, to sue cities that adopt allegedly preempted ordinances,¹⁶³ and, moreover, they resort to the private attorney general model to empower private individuals to sue cities whose lawbooks contain allegedly preempted ordinances. Indeed, under some of these new laws, plaintiffs may have standing even when the city has not

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157. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 173 (1907) (“A city is nothing but a municipal corporation of the State, made by the State for the purpose of administering and governing a certain locality. There is no contract relation between the city and the State; as the State made, she can destroy or take away . . .”).
158. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2008 (2018).
159. See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1494-1504 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1181-84 (2018).
160. *E.g.*, *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1192-95 (N.Y. 2014) (describing how holders of oil and gas leases contested the town’s fracking ban by claiming it was preempted by state oil and gas laws).
161. *E.g.*, *Am. Fin. Servs. Ass’n v. City of Oakland*, 104 P.3d 813, 824 (Cal. 2005) (holding that the city’s predatory lending ordinance was preempted).
162. *E.g.*, *Holt’s Cigar Co. v. City of Philadelphia*, 10 A.3d 902, 904-05 (Pa. 2011) (issuing an injunction against an anti-tobacco ordinance and a declaratory judgment that the ordinance was preempted in response to a facial challenge). Such suits, if they were to proceed under 42 U.S.C. § 1983, also would be subject to the various and powerful limits associated with that law. See generally Schwartz, *supra* note 1 (analyzing the effectiveness of claims against municipalities under Section 1983); Baude, *supra* note 1 (discussing how qualified immunity operates as a defense to civil rights lawsuits under Section 1983); see *e.g.*, *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 206-16 (6th Cir. 2011) (assessing the standing of plaintiffs in a Section 1983 claim).
163. *E.g.*, Fla. Stat. Ann. § 166.241(4)(a) (West) (empowering the Office of the State Attorney to sue a city that reduces its police budget in defiance of an anti-defund preemptive law).

actually adopted an ordinance – the traditional province of preemption¹⁶⁴ – but merely refrained from acting in a way the state desires.¹⁶⁵

A few examples will highlight how states have borrowed from the private-enforcement model to create “preemption standing.” Perhaps the leading edge of preemption standing relates to firearms. Starting in the early 1980s, gun rights organizations pushed states to preempt local regulation of firearms.¹⁶⁶ More recently, some of these preemption statutes have begun to include private rights of action. Kentucky, for example, empowers any person or organization affected by a local firearm regulation to sue the local government and its officials for declaratory and injunctive relief, plus attorney fees and expert fees.¹⁶⁷ In similar contexts Florida and Arizona statutes additionally authorize actual damages up to \$100,000;¹⁶⁸ Ohio and Oklahoma laws do not even cap the damages;¹⁶⁹ and a Mississippi statute provides for personal liability of municipal officials while prohibiting the use of public funds to defend or reimburse them.¹⁷⁰

Another area in which states have turned to preemption standing is immigration. In response to aggressive federal immigration policies, a number of localities declared themselves to be “sanctuary cities,” meaning that they were ending their cooperation with federal immigration enforcement efforts.¹⁷¹ Some states – typically red states – have cracked down on sanctuary cities, including by preempting sanctuary ordinances or policies, and by cutting off funds in retribution for their adoption.¹⁷² In several states, legislatures also provide for civil liability against local governments and officials supporting sanctuary policies. Arizona’s famous S.B. 1070, other aspects of which were litigated in *Arizona v.*

164. *Garcia v. Dicterow*, No. G039824, 2008 WL 5050358, at *7 (Cal. Ct. App. Nov. 26, 2008) (“Plaintiffs overstate the preemption doctrine, which does not apply to all actions of a state or locality but only to its laws and regulations . . . Because plaintiffs argue the City’s *conduct*, i.e. its support of the Center, is preempted by federal law, as opposed to any specific ordinance, they fail to state a preemption claim”).

165. See, e.g., IND. CODE ANN. § 5-2-18.2-4 (“A governmental body or a postsecondary educational institution may not limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.”); FLA. STAT. ANN. § 768.28 (discussed *infra* note 180 and accompanying text).

166. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 133 (2013).

167. KY. REV. STAT. ANN. § 65.870(4)

168. FLA. STAT. § 790.33(3)(f)(1); ARIZ. REV. STAT. ANN. § 13-3108(K)

169. OHIO REV. CODE ANN. § 9.68(B); OKLA. STAT. § 1289.24(D).

170. MISS. CODE ANN. § 45-9-53(5)(c).

171. See, e.g., Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1736-1752 (2018).

172. See, e.g., Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848-50 (2019).

United States,¹⁷³ includes such a provision. The statute allows suits for civil penalties and attorney fees whenever a municipal government “adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law.”¹⁷⁴ South Carolina authorizes any resident to sue their city if it adopts a policy that limits the enforcement of immigration laws, restricts the communication of a person’s immigration status to federal officials, or permits employment of unauthorized immigrants.¹⁷⁵ Indiana’s more recent anti-sanctuary city law empowers any state resident – even if she does not reside in the city – to sue a city that does not comply with the law.¹⁷⁶ The Tennessee law allows any local resident who “believes” the local government violated the anti-sanctuary city law to sue.¹⁷⁷

Anti-sanctuary city laws are only one subset of preemption laws facilitating private suits against cities’ potential choice to underenforce certain state laws or policies. Texas’s anti-defund the police law¹⁷⁸ allows residents of certain areas to demand de-annexation from a city that has reduced its police budget.¹⁷⁹ A new Florida law requires cities to “respond appropriately to protect persons and property during a riot or an unlawful assembly,” and if a city does not, the law removes its sovereign immunity, allowing private tort suits for the damage sustained during “riot[s].”¹⁸⁰

Yet another culture war issue in which states have turned to preemption standing is education. A 2022 Florida law limits school instruction related to “sexual orientation or gender identity,” and gives parents a private right of action, with fee shifting, against a school failing to accommodate their concerns.¹⁸¹ New Hampshire’s laws banning the teaching of Critical Race Theory empowers any person “claiming to be aggrieved” by a teaching that an individual “is inherently

173. 567 U.S. 387, 400-10 (2012).

174. ARIZ. REV. STAT. ANN. § 11-1051(H)-(J).

175. S.C. CODE ANN. § 6-1-170(E)(1).

176. IND. CODE ANN. § 5-2-18.2-5.

177. TENN. CODE ANN. § 4-42-104(a). A Colorado legislator also proposed a bill providing criminal and civil liability for local officials who implemented sanctuary policies. See Gulasekaram, Su & Cuisson Villazor *supra* note 172 at 883 n.234.

178. For more on Texas’s law and other similar laws, see Rick Su, Anthony O’Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1214-17 (2022).

179. TEX. LOC. GOV’T CODE ANN. § 43.1465 (mandating that cities that have defunded their police hold a vote in all areas annexed by the defunding city in the past thirty years, allowing those annexed areas to vote to secede).

180. FLA. STAT. ANN. § 768.28.

181. H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022), <https://legiscan.com/FL/text/H1557/id/2541706> [<https://perma.cc/V85V-MT2Q>].

racist, sexist, or oppressive, whether consciously or unconsciously” to bring a civil suit against the offending school district.¹⁸²

Laws adopted to stop cities from altering or removing historical monuments, mostly concerned with Confederate monuments, can also generate private suits. Georgia’s law allows any person to sue a city or its officials for interfering with a monument, and makes the city and its officials liable for treble the cost of repair or replacement plus exemplary damages.¹⁸³ Tennessee’s law protecting memorials to the “War Between the States” grants standing to any entity, group, or individual with an “aesthetic, architectural, cultural, economic, environmental, or historic” interest in a statue to sue a city that removes or alters it in violation of the law.¹⁸⁴

Not all preemption-standing provisions are found in statutes that relate to culture war issues. Several represent “deregulatory preemption”¹⁸⁵: they empower business interests in their attempts to subdue local governments. Arizona authorizes a private right of action against municipalities that add their own business or occupational licensing requirements.¹⁸⁶ In June 2023, Texas adopted a law not only preempting any local ordinance touching on agriculture, labor, business, commerce, finance, insurance, and natural resources, but also removing cities’ governmental immunity from suit for any costs potentially caused by such preempted regulation.¹⁸⁷ A North Carolina preemption law awards attorney fees and costs automatically to land developers that successfully challenge a city permitting decision as preempted. The law also provides for the payment of such costs and fees to any party successfully challenging any local law if that law was “unambiguously” preempted.¹⁸⁸ In its generality, this law, enacted in 2019, highlights the point of these new preemption laws: to encourage suing cities.

Whatever its political purpose, preemption standing is a legislative intervention that creates standing where it did not exist before – often without requiring that the individual plaintiff endure any injury whatsoever. While taxpayer and neighbor standing broaden the notion of private or special injury that an individual can use to justify suing the local government, preemption standing completely, and in some states, explicitly, abandons the notion of injury. To sue a city that allegedly violated a state preemption law, the citizen need not show that the contested breach had any effect on herself; indeed, under many of these laws,

182. N.H. REV. STAT. ANN. § 193:40.

183. GA. CODE ANN. § 50-3-1(b)(4).

184. TENN. CODE ANN. § 4-1-412 (West 2023).

185. Schragger, *supra* note 159, at 1182 (crediting the term to Richard Briffault).

186. ARIZ. REV. STAT. ANN. § 9-834(A), (E) (2023)

187. H.B. 2127, 88th Leg. (Tex. 2023).

188. N.C. GEN. STAT. § 6-21.7 (2023).

the plaintiff need not even be a resident, taxpayer, or property owner, in or near the relevant city.

Hardly anything thus limits the identity of those who can resort to preemption standing in suing cities. Anyone can sue. Promoters of these statutes specifically and unequivocally seek to encourage the *filing* of these challenges, even when they might be meritless. The only counterexample we find is included in Texas's new deregulatory preemption law, which would force a plaintiff to cover the city's costs and attorney fees if a court concludes that the suit was "frivolous."¹⁸⁹ That is, of course, merely a deterrent, and a puny one at that: it requires the city to meet this high standard when demanding costs and attorney fees—while the plaintiff would be eligible for them automatically if they win.

Preemption standing clearly and intentionally puts cities at a marked procedural disadvantage. The very different procedural treatment afforded to those individuals attempting to vindicate city power against the state provides a stark illustration. Where individuals have alleged that a state law preempting local governance was unconstitutional, courts have erected all sorts of procedural barriers. Residents in Birmingham, Alabama, persuaded an Eleventh Circuit panel that the state law preempting local minimum wage ordinances violated the Equal Protection Clause because it targeted their majority-minority city.¹⁹⁰ But the full court reversed, arguing that the individuals lacked Article III standing.¹⁹¹ Without a direct injury, they could not sue the state for adopting the (unconstitutional) law. In another case, the same court held that organizations aiding immigrants similarly lacked standing to challenge Florida's sanctuary city preemption law (as violative of the Fourteenth Amendment) because their injury solely "rests on their highly speculative fear."¹⁹²

In short, preemption laws create special standing to sue cities while those trying to sue the state adopting these laws remain subject to traditional standing rules. Preemption standing's bias against city action is obvious. Quite explicitly,

189. H.B. 2127 § 7, 88th Leg. (Tex. 2023) (proposing the addition of Civil Practice and Remedies Code § 102A.003).

190. *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1295 (11th Cir. 2018), *aff'd in part and remanded en banc*, 944 F.3d 1287 (11th Cir. 2019) (holding that the plaintiff asserted a plausible claim that the local ordinance violated the Equal Protection Clause).

191. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1298 (11th Cir. 2019). For what it's worth, had this case been filed in Alabama state court, the state court would have applied the same standing rules as the federal court. *Hanes v. Merrill*, No. SC-2022-08692023, 2023 WL 2818541, at *3 (Ala. Apr. 7, 2023) (noting that "to determine whether a party has standing, we employ the test set forth in *Lujan v. Defenders of Wildlife*") (citation omitted).

192. *City of South Miami v. Governor of Fla.*, 65 F.4th 631, 637 (11th Cir. 2023) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).

a major aim of the laws creating it is to chill local lawmaking on issues of public concern.

* * *

Cities are a clear exception to the rule whereby modern American law makes it exceedingly hard for individuals to sue governments. Taxpayer standing allows suing cities, but not other governments, in federal courts, and it allows cities to be sued more easily than states in state courts. Neighbor standing facilitates suing cities on an almost daily basis, while it is rarely relevant to suits against federal agencies or state governments. Preemption standing is a tool for suing cities and only cities. Thanks to these tools, suing cities is relatively easy.

These easy-to-bring suits almost always serve pro-status quo causes. Taxpayers (and only taxpayers) can sue when the city spends money. Property owners (and only property owners) can sue when the city, while promoting some public good, devalues their holdings' market value. And at least in some states, anyone can sue when the city pursues a locally popular liberal policy that the state has decided to quash. So, while progressive lawyers probably can, in specific instances, employ the doctrines reviewed in this Part in creative ways to promote their own causes, on balance these suits are mostly anti-action and, as a result, anti-progress.

II. ANALYZING SUITS AGAINST CITIES

Taxpayer, neighbor, and preemption standing combine to create a litigation environment that can frustrate city progress. But simply pointing out that litigation exists, even at volume, even with a specific ideological tilt, would not qualify as meaningful criticism. The question is whether principled criticisms can validly be levelled against the anti-city litigation described above.

Potentially relevant criticisms of litigation in general abound. In recent decades, litigation critics have focused on damage awards in torts,¹⁹³ class actions,¹⁹⁴ and so-called institutional-reform litigation.¹⁹⁵ Critics have worried that such

193. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823, 1889-1904 (2008) (describing the history of and responses to tort reform while summarizing relevant sources).

194. See, e.g., Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575 (2007) (arguing for the unconstitutionality of class actions).

195. See, e.g., Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 298 (arguing that some "consent decrees, if judicially enforced, would violate the structural provisions of the Constitution"); see also Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435, 1440-55 (2013)

suits result in over-deterrence, over-compensation, and the lining of the pockets of plaintiffs' lawyers.¹⁹⁶ They also worry about courts managing public affairs.¹⁹⁷

Suits against governments generate particularly intense attention and debate because such litigation is, often explicitly, a tool for reform. Consider, for example, the Supreme Court decision in *Brown v. Plata*.¹⁹⁸ California prisoners with serious medical conditions brought a class action against the State of California for constitutional violations related to their treatment.¹⁹⁹ The lower court accepted their claims and concluded that the only effective remedy would be to reduce the prison population.²⁰⁰ Accordingly, it ordered the release of up to 46,000 prisoners.²⁰¹ Critics charged that this case never should have found its way into a court—that management of the prison system should be left to the elected branches of state government.²⁰² But the Supreme Court affirmed, and many commentators praised the decision.²⁰³ *Plata* was a case where traditional concerns associated with institutional-reform litigation were overcome.

Although the litigation described in Part I shares some facial similarities with cases such as *Plata*—private litigants suing government defendants on issues of public concern—the cases described there are different in ways that, as this Part will explain, matter normatively. First, the cases described in Part I often involve well-resourced plaintiffs suing cash-strapped local governments. Thus, the usual *economics of litigation* are turned on their head. Second, in suits against local governments, the availability of state legislatures with plenary power over local governments means that plaintiffs have a plausible political alternative to litigation; indeed, they may be likelier than the local government to curry favor with the state legislature. Thus, the *political economy of legislation* means that litigation is not a last resort. Third, citizen “voice” in, and to some extent citizen “exit” from,

(describing institutional reform litigation). Other overlapping terms include public-law litigation and structural reform litigation. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284-85 (1976) (discussing the former); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (discussing the latter).

196. See, e.g., Purcell, *supra* note 193, at 1889-1904.

197. See, e.g., *Horne v. Flores*, 557 U.S. 433, 448-49 (2009) (citing scholars critical of institutional reform litigation).

198. 563 U.S. 493 (2011).

199. *Id.* at 499-500.

200. *Id.* at 500-01.

201. *Id.* at 501.

202. See, e.g., *id.* at 550 (Scalia, J., dissenting) (calling it “perhaps the most radical injunction issued by a court in our Nation’s history”); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 22-32 (2012).

203. *Brown*, 563 U.S. at 502. See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 178 (2013).

the polity are much more effective as tools to influence local policymaking than state or national policymaking.²⁰⁴ Thus, the *normative case for local governance* points strongly toward the political process and away from litigation. This Part will explore in order these three concerns, each of which points at the questionable normative value of the current practices facilitating suits against cities.

Of course, no generalized description of a wide category of cases – even in the drawn-out form of a law journal article – can account for the variation among individual disputes. The arguments we offer here may not apply to every lawsuit relying on taxpayer, neighbor, or preemption standing. Still, this analysis is consistent with a vast share of cases in each category. More important, this analysis helps identify the most problematic cases in each category, informing the reform proposals we will offer later.

A. *Economics of Litigation*

Litigation is, in many ways, an economic activity. Lawsuits frequently seek monetary relief and are motivated by economic considerations. Decisions made during litigation – such as when to settle and when to fight – are also often based on an economic calculation.²⁰⁵ For litigants, having more resources is an advantage not only because it pays for more and better representation, but also because it can pressure opponents into settling by running up the bills or delaying resolution.²⁰⁶

In the archetypical institutional-reform suit, the economics of litigation favor defendants. The defendants are large governments with substantial law departments.²⁰⁷ Defendant governments' expanded litigation resources make it easy for them to afford, and to sometimes intentionally cause, delays which benefit them because anti-government lawsuits typically seek to change the status quo.²⁰⁸ Plaintiffs, meanwhile, are individuals, often with limited means. They want relief immediately – such as medical care in prison, a desegregated school,

204. We invoke here, and in Section II.C *infra*, the discussion of “voice” and “exit” from the classic work ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30-31 (1970).

205. *See generally*, THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 278-334 (3d ed. 2017) (discussing the economics of legal procedure).

206. *See, e.g.*, Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 121 (1974).

207. According to the Justice Department itself, “[t]he Department of Justice is the world’s largest law office, employing more than 9,200 attorneys.” *Agencies*, U.S. DEP’T JUST., <https://www.justice.gov/agencies/chart> [https://perma.cc/3ABT-DC3R].

208. *See, e.g.*, Galanter, *supra* note 206, at 121.

or clean water.²⁰⁹ Legal devices like class actions or fee shifting are specifically designed to level the economic playing field, making it more financially plausible for these cases to proceed.²¹⁰ It is true that nonprofit organizations may sustain institutional reform cases, but this alternative is actually an admission that individual private plaintiffs alone will not be able to shoulder such litigation's financial burden.²¹¹

In the cases described in Part I, though, the economics of litigation often run in the other direction. Plaintiffs have the economic advantage over defendants.

Beginning with the defendant side, local government defendants are differently positioned than state- or federal-government defendants. Except for a few very large cities, most municipal governments are small and underfunded. Municipal fiscal distress has been a theme of American public finance for decades now.²¹² In fiscally-distressed cities – which Michelle Wilde Anderson aptly called “minimal cities”²¹³ – law departments, if they exist at all, are thinly staffed and overworked. Even affluent smaller communities, such as upper-middle-class suburbs, often do not have their own law departments. They rely on outside counsel, and thus, every lawsuit generates extra costs, which they naturally try to avoid.

The situation is even more extreme for lawsuits filed against individual municipal officials. Individual officials likely lack the personal resources to foot the bill in major litigation. Recognizing this fact, legislatures adopting preemption standing statutes have sometimes prohibited those officials from using government funds to cover their defense or liability (even though the suits arise within the scope of their employment).²¹⁴ Further, while some of the cited preemption standing statutes automatically provide for fee shifting against the city or its

209. See, e.g., *Brown v. Plata*, 563 U.S. 493, 499 (2011) (prisons); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954) (schools); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1120 (D.C. Cir. 1983) (water).

210. See Resnik, *supra* note 156, at 2145-47; Lemos, *supra* note 156, at 785-95. Many of the same problems plague public-interest litigation targeting private actors, and accordingly procedural reforms attempt to address them. See *supra*.

211. Many of the major environmental-law cases, for example, are filed by national nonprofits. See, e.g., *Citizens for a Better Env't*, 718 F.2d at 1117; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

212. See Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 633 (2008).

213. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1118 (2014).

214. See, e.g., MISS. CODE ANN. § 45-9-53(5)(c) (2015).

officials if they lose, none provide automatic fee shifting in their favor if they win.²¹⁵

Turning to the other side in these lawsuits, the plaintiffs suing a city or city official tend to be much better resourced than the archetypical plaintiffs in institutional reform cases brought against the federal or state governments. Across each of our three categories, the design of the law and the attendant incentives to sue encourage well-resourced plaintiffs to take the lead in suing cities.

First, municipal taxpayer cases, by definition, may only be brought by taxpayers — and in some states, only by property tax-payers.²¹⁶ It is almost as if there is an income or wealth test to sue, rather than the usual test for injury-in-fact.²¹⁷ As shown, these suits are tools for exercising power to affect public policy, and thus, taxpayer standing carries troubling echoes of eighteenth- and early-nineteenth-century taxpaying qualifications for participating in the political process.²¹⁸

This wealth effect somehow gets even worse. Not only is taxpayer standing only available to taxpayers; it also can be invoked solely in a suit demanding that the government stop spending money — never in a suit demanding that the government spend money. This type of standing thus empowers plaintiffs trying to stop redistribution. The classic federal-taxpayer lawsuit before the Supreme Court is illustrative: Frothingham sued to stop the federal government from using tax revenue to reduce maternal and infant mortality. The prototypical plaintiff satisfying the conditions for taxpayer standing will be an affluent individual (or entity) who wants courts to bar the government from sharing tax monies with the less fortunate.

The classist ramifications at the municipal level can be truly far-reaching. The problem of lead pipes provides a striking, and troubling, example. The water reaching many Americans still goes through lead pipes, although all experts

215. See *supra* Section I.C (collecting examples). It is possible that cities may be able to obtain fee shifting under general fee-shifting laws. The new Texas preemption law allows cities that win in court to demand that plaintiffs cover their fees — but only if they can show that the suit was frivolous. See *supra* note 189.

216. See *supra* notes 66–67 and accompanying text.

217. Cf. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (holding unconstitutional a requirement of property ownership to vote); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 630–33 (1969) (holding unconstitutional a requirement of property ownership or school-aged children to vote).

218. See, e.g., Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 *STAN. L. REV.* 335, 335–36 (1989) (discussing how in the early to mid-nineteenth century states adopted constitutional “pauper” exclusion clauses as they moved to eliminate formal property qualifications for the vote).

agree that such pipes present a risk of poisoning that cannot be mitigated.²¹⁹ To be effective, therefore, any pipe-replacement effort must encompass both the water mains (owned by local governments) and the service lines (owned by property owners) connecting each property to the water main.²²⁰ Because many owners, especially poorer ones, cannot afford to replace their service lines, most cities would need to replace the main lines and also at least partially subsidize individual service-line replacement.²²¹

Now consider the potential role of litigation in a city plagued by a lead pipes problem. If the city does nothing, poor residents cannot sue to demand city action. The basis of their claim, the city's lack of spending, by definition renders taxpayer standing irrelevant. Residents cannot even sue when the city has been granted federal funds for pipe replacement but refuses to spend the money.²²² Poor residents may be able to sue the city under general-standing law once they are harmed—that is, sustain an injury-in-fact—by lead leaching. Even then, however, they must pinpoint a specific recent local decision (distinct from the historical decision to use lead) causing the injury, and they must somehow find a lawyer willing to take a low-probability case on a contingency-fee basis.²²³ Conversely, if the city decides, of its own volition, to expend resources on lead-pipe replacement, it could easily be sued. In this situation, wealthy taxpayers would have taxpayer standing to sue to stop the use of funds to aid the poor. Indeed, major cities have claimed that the specter of such suits holds them back from funding the replacement of private service lines.²²⁴

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219. Erik Olsen & Kristi Pullen Fedinick, *What's in Your Water? Flint and Beyond*, NAT. RES. DEF. COUNCIL 21 (2016), <https://www.nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf> [<https://perma.cc/4ERR-K3DF>]; David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 793 (2019); David A. Dana, *Escaping the Abdication Trap When Cooperative Federalism Fails: Legal Reform After Flint*, 44 FORDHAM URB. L.J. 1329, 1333 (2017).
220. Dana & Shoked, *supra* note 219, at 795-97. Partial replacement of lead pipes does not reduce poisoning risk and might even increase it. *Id.* at 797.
221. Matthew Dolan, *U.S. Could Face a \$300B Lead Pipe Overhaul, Agency Warns*, DETROIT FREE PRESS (Mar. 4, 2016, 11:07 PM ET), <https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/03/04/flint-crisis-could-cost-us-300b-lead-pipe-overhaul-agency-warns/81316860> [<https://perma.cc/NYN9-NBSD>].
222. See Mike De Socio, *A US City Received \$500,000 to Remove Lead Pipes—and Still Hasn't Spent It*, GUARDIAN (Apr. 6, 2023, 6:00 EDT), <https://www.theguardian.com/us-news/2023/apr/06/troy-new-york-lead-pipes> [<https://perma.cc/XR3Y-SQVC>].
223. That is only possible in cases where the city recently actively did something to worsen the levels of lead in the water. Flint is the only suit of this type to succeed, and it did so because the city affirmatively switched water sources. *In re Flint Water Cases*, 960 F.3d 303, 314 (6th Cir. 2020). Even if a specific recent city act can be identified, a court might still reject the claim if the owner can show only an increased risk of harm from lead exposure. *See Berry v. City of Chicago*, 181 N.E.3d 679, 689 (Ill. 2020).
224. *See, e.g., Stecker, supra* note 7.

Another extreme example of the distributive dynamics of municipal taxpayer suits can be drawn from litigation related to police misconduct. Adolph Lyons was stopped by Los Angeles police officers and, despite offering no resistance, was put in a “chokehold” injuring his throat.²²⁵ Lyons sued the city seeking, among other remedies, an injunction barring the use of chokeholds.²²⁶ In *City of Los Angeles v. Lyons*, the Supreme Court held that a federal court could not issue such an injunction against Los Angeles to stop officers’ use of chokeholds because Lyons – who, recall, had been injured by a chokehold – did not establish a sufficient likelihood that he would be choked again.²²⁷ Paradoxically, had the city directed city funds toward police training to ensure that chokeholds were not used indiscriminately, in most states, *any taxpayer* could have sued to stop the training on the theory that it was a misuse of city funds.

Taxpayer standing’s function is to expand the notion of injury necessary to sue so as to include the harm derivatively arising to an individual when the government uses the tax monies to which the individual contributed. Taxpayer standing, thus, can hardly aid those suffering a real injury from the city’s inaction, while it aids those who would rather not have the city actively address that injury.

True, the taxpayer’s right to sue arises whenever the city spends funds – irrespective of whom receives those funds. Thus, assuming a willing plaintiff, taxpayer standing can be used to challenge redistribution from the city to business interests as well. Yet the law as understood in most states limits this option. It does so in ways that specifically isolate this form of redistribution from taxpayer suits while preserving potential challenges to more benevolent forms of redistribution. Corporate welfare, especially on the local level, mostly takes the form not of direct grants but of reductions in tax liability (often called tax subsidies, tax credits, or tax expenditures). Conveniently enough, courts have read taxpayer standing as unavailable in situations where the city forgoes (rather than, as the doctrine requires, “spends”) money.²²⁸ This formalistic (and rather silly)

225. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983).

226. *Id.*

227. *Id.* at 105-110.

228. *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011); *McCall v. Scott*, 199 So. 3d 359 (Fla. Dist. Ct. App. 2016); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Gaddy v. Ga. Dep’t of Revenue*, 802 S.E.2d 225 (Ga. 2017); *Duncan v. State*, 102 A.3d 913 (N.H. 2014). Other courts reach the same result even without announcing the rule. *See, e.g., Corboy v. Louie*, 283 P.3d 695 (Haw. 2011); *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007); *see also Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (holding that tax credits do not qualify as appropriations/expenditures of public funds for the purposes of the state constitutional prohibition against appropriating public funds to religious schools). This is also the rule in federal court for the small category of First Amendment cases where taxpayer standing is allowed. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011). One court did go the other way: *Leichter v. Barber*,

distinction further highlights the fact that, due to its design, taxpayer standing suits normally aid the affluent opposing redistribution to the less fortunate.

Second, neighbor standing cases also carry almost automatic distributional effects.²²⁹ It is inevitably true that the affluent are likelier to resort to suing: litigation is costly, and information about potential legal claims is not randomly distributed. These circumstances surround any potential complaint. Neighbor standing intensifies the inequity. Because the lawsuit is grounded in loss of property values, suing is only worthwhile if that loss is large enough, which is much more likely if the original value of the plaintiff's property is high. We therefore find it hardly surprising that affluent condo owners sued Chicago immediately when their majestic Chicago River views were to be obstructed by a new high-end development,²³⁰ whereas it took federal government action to force Chicago to reform its planning processes that for decades had steered polluting businesses into Black and Latino neighborhoods.²³¹

Neighbor standing prominently and routinely has been used to block multi-family housing, or other intense land uses, from entering single-family neighborhoods.²³² The plaintiffs in such cases are often well-off suburbanites seeking to bar the introduction of developments that would allow poorer, and often nonwhite, residents into their "bourgeois utopias."²³³ These dynamics also prevail outside single-family-home neighborhoods. It was not a coincidence that Part I's review of neighbor standing cases offered a tour of some of New York City's poshest neighborhoods and of Massachusetts's toniest old-money vacation-house enclaves.²³⁴ Neighbor standing empowers the haves who seek to exclude the have-nots.²³⁵ The role of standing rules in promoting this exclusionary goal cannot be overstated. For standing to sue is often all that these affluent actors need to achieve their aim. They do not necessarily need an eventual victory

451 N.Y.S.2d 899 (N.Y. App. Div. 1982) (finding standing in challenge to tax credits granted against corporate-franchise taxes, implying that tax credits count as "revenue expending" for taxpayer standing purposes).

229. See *supra* Section I.B.

230. *Residences at Riverbend Condo. Ass'n v. City of Chicago*, 5 F. Supp. 3d 982, 984-85 (N.D. Ill. 2013).

231. Brett Chase, *Chicago, HUD Settle Environmental Racism Case as Lori Lightfoot Leaves Office*, CHI. SUN-TIMES (May 12, 2023, 3:13 PM EST), <https://chicago.sun-times.com/2023/5/12/23720343/hud-environmental-racism-lightfoot-general-iron-environmental-justice-housing-urban-development> [https://perma.cc/8DYC-2BE8].

232. See *supra* notes 102-109 and accompanying text.

233. See ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987) (first using this term).

234. See *supra* notes 116-124 and accompanying text.

235. The literature on exclusionary zoning is vast. See, e.g., ROBERT C. ELLICKSON, *AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING* 5 (2022).

in court. The filing of a lawsuit against the development, and the inevitable delay it brings, is often enough to accomplish their exclusionary goal. Elections might intercede, and perhaps more importantly, the developer might simply tire and decide to walk away.²³⁶

Third are the plaintiffs in preemption standing cases.²³⁷ While the conditions for preemption standing themselves do not limit the power to sue to plaintiffs of a particular socioeconomic class, the whole point of converting typical preemption into preemption standing is to allow anyone willing and able to foot the bill to sue.²³⁸ In practice, this should naturally empower well-resourced litigants. By allowing preemption standing, rather than requiring that challenges to preempted local ordinances be brought by the individuals actually subjected to them, these new preemption laws empower well-funded groups (such as the NRA) to sue.²³⁹ Some of the more recent preemption laws specifically enable businesses – and only businesses – to sue cities.²⁴⁰

In sum, while the economics of litigation in the cases of suits against governments favor government defendants, in suits against local governments, the economics might well work against government defendants. The potential consequences are straightforward: local governments will be chilled from action by the fear of litigation they can ill afford, and once sued, they may be compelled to give up programs rather than face drawn-out, expensive, litigation.

B. Political Economy of Legislation

Critics of “regulation through litigation” often argue that courts are not well positioned to handle public law cases because the legislative process is a better venue for adjudicating competing public interests.²⁴¹ According to these critics, the legislature, unlike courts, enjoys democratic legitimacy and can rely on expert advice. A more nuanced version of this anti-litigation position acknowledges this fact but still recognizes circumstances where regulation through litigation may

236. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2054 (2007).

237. See *supra* Section I.C.

238. See *supra* note 156 (collecting sources on private enforcement). This note suggests that this feature of preemption standing is consistent with other uses of private enforcement.

239. See, e.g., *Nat’l Rifle Ass’n of Am., Inc. v. City of South Miami*, 812 So.2d 504, 504-05 (Fla. Dist. Ct. App. 2002). Organizations dedicated to the “legacy” of the Confederacy are another example. E.g., *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs*, 880 S.E.2d 168, 171 (Ga. 2022).

240. See *supra* notes 186-187 (describing Arizona and Texas laws). These laws normally enable suits specifically for the recovery of business revenue allegedly lost due to the preempted law.

241. See, e.g., McConnell, *supra* note 195.

be desirable. Superior as it might be, the legislative process is not always equally available to all, and when such gaps form, litigation has an important role to play.²⁴² The Warren Court's celebrated moves to protect racial minorities, disfavored political groups' speech, and the procedural rights of suspects, and to equalize voting power within states are well-known examples.²⁴³ Even earlier, in the famous Footnote Four, Justice Stone in *Carolene Products* expressed particular concern with "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and with the "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of [] political processes . . ." ²⁴⁴ In other words, litigation is necessary when seeking legislative redress is futile.

This insight suggests a second way that the municipal litigation described in Part I differs from archetypal litigation against governments. Cases brought against state and federal governments often respond to political-process problems, while cases brought against cities often exacerbate them. The reason for this difference is local governments' distinct status in American law, which assures that those unhappy with a decision adopted through the local political process always have the option of turning to another political body. In other words, litigation is not their sole option.

Since at least the late nineteenth century, the rule in American law has been that the city is subservient to the state.²⁴⁵ States typically can "commandeer" local governments in a way that the federal government cannot commandeer states.²⁴⁶ Sometimes, states can replace local leaders or restructure local governments to get the results they want.²⁴⁷ Even in states where cities enjoy "home

242. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (emphasizing the need for the judiciary to protect minority rights related to the political process).

243. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE*, at xii, 76-82 (1998).

244. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

245. See JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 101-02 (1872); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); 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).

246. Compare *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 191 (5th Cir. 2018) ("Texas can 'commandeer' its municipalities."), with *New York v. United States*, 505 U.S. 144, 161 (1992) (rejecting the federal government's ability to commandeer states). See also Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1217 (2018) ("[S]tates can control, commandeer, or entirely eliminate their local governments.").

247. See, e.g., *Hunter*, 207 U.S. at 178; Matt Dixon, *DeSantis Suspends State Attorney Who Vowed Not to Enforce Florida's New Abortion Law*, POLITICO (Aug. 4, 2022),

rule” powers, those powers are limited and almost everywhere can be further restricted by state law.²⁴⁸ Consequently, disgruntled local residents always have access to the *state* political process. When there is something rotten with local politics – which, again, could theoretically justify a turn to litigation – the state political process remains available.

Consider a simple comparison. An individual wants to challenge a new federal or state statute as unconstitutional. In that situation, it would be nonsensical to suggest that the individual seek a legislative fix first, since that would require going back to the legislature that just adopted the law. But when an individual challenges a local ordinance, the policy that the city council endorsed is not necessarily going to enjoy the support of the state legislature. That legislature can block or reverse the ordinance.²⁴⁹ The political process is thus a viable alternative for an individual unhappy with a local ordinance, and the justification to turn to litigation weakens.

The gun control cases and laws discussed in Part I can serve as an illustration. When Congress or a state legislature adopts a gun control regulation, the only realistic venue to which gun owners could turn with a claim that the regulation is unconstitutional is a court. When a city adopts the regulation, conversely, the gun owners’ protestation can be addressed at the state legislature, which might be receptive to their unconstitutionality claim. Often, as noted, state legislatures in fact proceed to reverse local gun regulations.²⁵⁰

Of course, while the state legislature is theoretically available to all who are upset with local action, practically it is available to some more than to others. Here, the story mirrors our earlier comments about litigation economics.²⁵¹ The model lawsuits against federal and state governments involve plaintiffs with limited political power – prisoners, consumers, students, etc.²⁵² Instructing *Brown v. Plata*’s prisoners to lobby the state legislature rather than go to court to address their serious medical conditions is insulting. But most plaintiffs suing cities are dramatically different from these prototypical litigants suing federal and state governments. As seen when litigation’s economic dynamics were discussed, those suing cities often have economic power.²⁵³ As they can wield their

<https://www.politico.com/news/2022/08/04/desantis-suspends-prosecutor-floridas-new-abortion-law-00049852> [<https://perma.cc/SB94-PX7U>].

248. See, e.g., Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER U. L. REV. 1337 (2009).

249. See *supra* notes 245-248 and accompanying text.

250. See *supra* notes 166-170 and accompanying text.

251. See *supra* Section II.A.

252. See *supra* notes 198-203.

253. See *supra* notes 216-240 and accompanying text.

economic power in court, they are also likely capable of employing it, through lobbying and otherwise, in the legislative process.

Throughout American history, when the powerful lost out in the local political arena, they have been able to turn to the state legislature to overrule the local decision. In the late nineteenth century, when native Protestant élites were losing clout in urban centers as the number of mostly Catholic immigrants exploded, they routinely convinced state legislatures to undo city decisions. In the most extreme examples, nativist-dominated state legislatures, on WASP élites' behalf, took over local parks and even local police forces.²⁵⁴ More recently, when Austin mandated background checks for rideshare drivers in an ordinance later affirmed via city referendum, Uber and Lyft successfully pushed the Texas legislature to undo the rule.²⁵⁵ Battles between local and state legislatures are often in fact battles between different local stakeholders, where the more powerful ones are capable of enlisting the state legislature to their cause. Simply, and inevitably, well-resourced individuals fare better in the lobbying game than those without resources.

These dynamics surround each of the categories of suits against cities we identified in Part I. Taxpayer or neighbor suits often overtly substitute for the available option of pursuing state legislative intervention. The local taxpayer who wants to stop local redistribution can turn to the state legislature. State legislatures can, and often do, constrain the spending power of local governments.²⁵⁶ When the taxpayer then instead, or also, turns to a court, they are supplementing one process where they already enjoy certain advantages with another, even less democratic, process. A recent taxpayer suit filed against Austin's investment in public transit tells this story. The opponents who brought it had first lost at the polls when city voters approved the spending in a referendum. Then after the local government made plans for implementation, those opponents were able to bring their cause to the attention of the state legislature, which took on a bill to block the local spending. But somehow, they lost there,

254. DAVID JOHNSON, *AMERICAN LAW ENFORCEMENT* 157-58 (1981) (discussing takeover of Boston police).

255. Ryan Kocian, *New Texas Rideshare Law a Victory for Uber and Lyft*, COURTHOUSE NEWS SERV. (May 30, 2017), <https://www.courthousenews.com/new-texas-rideshare-law-victory-uber-lyft> [<https://perma.cc/7S95-CHUR>].

256. More than half the states have enacted, through legislation or constitutional amendment, a general limit on local government's power to raise revenue or spend it, meant to restrict local government spending growth. These are known as Tax and Expenditure Limits (TELS). Kim Reuben & Megan Randall, *Tax and Expenditure Limits*, URB. INST. (Nov. 2017), https://www.urban.org/sites/default/files/publication/94926/tax-and-expenditure-limits_4.pdf [<https://perma.cc/5RKK-AJHP>].

as the state legislature declined to pass the bill.²⁵⁷ Then—after having their position heard and debated in multiple democratic arenas—they sued. Taxpayer standing in this case was a tool the economically powerful wielded to undo the work of a popular referendum, local-government implementation, and state legislative review. It was everything but the taxpayers’ only option.

The plaintiffs in neighbor-standing cases are also heading to court in spite of readily available legislative redress. The neighboring property owners who do not like a city’s measure promoting low-income housing, or any other development or land-use policy, can go to the state legislature to seek redress.²⁵⁸ Their efforts have often bore fruit: for decades, states have routinely preempted rent control, inclusionary zoning, and other means to promote affordable housing.²⁵⁹ Property owners do not *need* the courts to battle the local measures they dislike. For plaintiffs relying on neighbor standing, as for those relying on taxpayer standing, the choice to sue is just that: a choice, not a last resort.

Preemption standing, too, reflects this dynamic, though perhaps less clearly. Preemption standing derives from preemption laws, meaning that by definition, the plaintiffs have already persuaded the state to overrule city action on their behalf. Indeed, they even convinced the state legislature to empower them to bring private lawsuits. In a sense, therefore, it would be inaccurate to characterize any ensuing litigation as displacing the legislative process, as it derives from it. But the blessing of the legislature does not render the turn to courts fair or equitable. The legislature empowers only some actors to seek further institutional reform via litigation—those same actors who can attain, and have attained, such reform through the political process. These are also the actors who in all

257. See Plaintiffs’ Original Petition for Injunctive Relief, *Dirty Martin’s v. Watson*, No. D-1-GN-23-008105, 2023 WL 7928024 (Tex. Dist. Ct. Nov. 6, 2023); Ryan Autullo, *Austin’s \$7 Billion Transit Project Faces Legal Tax Challenge*, BLOOMBERG L. NEWS (Nov. 6, 2023). According to a news story:

Bringing the lawsuit are five Austin taxpayers including former Democratic state senator Gonzalo Barrientos, former Democratic city council member Ora Houston, and current Democratic county commissioner Margaret Gomez. Joining them is Dirty Martin’s Place, a near 100-year-old burger restaurant near the University of Texas campus that would be demolished to accommodate the light rail. They’re represented by Bill Aleshire, the county’s former Democratic tax assessor-collector and its one-time judge.

Id.

258. See, e.g., Solomon Greene, Kriti Ramakrishnan & Jorge Morales-Burnett, *State Preemption of Local Housing Protections: Lessons from a Pandemic*, URB. INST. (Sept. 30, 2020), <https://www.urban.org/research/publication/state-preemption-local-housing-protections> [<https://perma.cc/KYD2-HGAB>].

259. *State Preemption of Local Equitable Housing Policies*, LOC. SOLS. SUPPORT CTR., <https://www.supportdemocracy.org/equitablehousing> [<https://perma.cc/9966-BKA4>]. See generally Nadav Shoked, *American Courts’ Idea of a Tenant*, 117 NW. U. L. REV. 251 (2022).

likelihood enjoy special access to state executive officials who can enforce the preemption laws through government suits. Granting these actors special standing in court is further empowerment of the powerful. It doubles down on existing inequalities. Justifying a preemption standing suit against a city through the traditional argument that judicial intervention is necessary when the political process has failed the plaintiff is silly: these specific plaintiffs are the ones who have won that process.

The political economy of legislation is also relevant to the post-judgment environment—and its effects there further weigh against the legitimacy of many suits against cities. Sometimes a court decision against a government kicks off a political process, jolting the government out of stasis by changing the status quo.²⁶⁰ Some even suggest that this interface between the judicial and legislative processes is a positive good.²⁶¹ Litigation in this reading is not an inferior replacement for the legislative process, but rather, an element necessary to ignite it.

But not all court decisions equally reinvigorate the political process in this way. Matthew R. Christiansen and William N. Eskridge have shown that Congress is especially likely to override a Supreme Court statutory interpretation decision when the executive branch was on the losing end.²⁶² In these cases, the executive goes back to the drawing board to find another way to achieve the policy objective the Court has stunted, and Congress is often willing to enact the necessary reform.²⁶³ We suspect a similar dynamic at the state level: when state executives lose cases, they appeal to the state legislature for redress, where they have special access, at least informally.²⁶⁴

Cities, on the other hand, may not have the same special access when in search of a legislative remedy. Certainly, in the context of preemption standing, a city's plea to the state legislature to change the law after a court loss is likely to

260. See generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014) (analyzing the frequency of congressional statutes overruling Supreme Court decisions); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (evaluating Congress's override of judicial statutory interpretation and associated dynamics).

261. See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 435-36 (2010) (suggesting that the courts might adopt "de-liberation-inducing" review of statutes).

262. Christiansen & Eskridge, *supra* note 260, at 1323.

263. *Id.* at 1376-77 ("The primary take-home point is that the Executive Branch of the federal government is the biggest player, and usually the big winner, in the override process.")

264. To be fair, Christiansen and Eskridge find that state governments are reasonably successful at obtaining congressional overrides in Congress, but markedly less so than the federal government. *Id.*

go unheeded. It was, after all, the legislature who provided preemption standing in the first place.²⁶⁵ Even in other litigation categories, it seems fair to assume that a city executive will have less access to the state legislature than would a state executive. The latter has a statewide constituency and jurisdiction. The former's are limited. The latter is physically located in close vicinity to the state legislature and interacts with it constantly. The former normally does not.

To summarize, the classic public law cases involve courts stepping in when the political process is unavailable to plaintiffs (and favorable to defendants), and these cases' results may spur dialogue with the political branches when the government defendants lose. In these cases, litigation often reinforces democracy. The cases described in Part I, however, look quite different. Taxpayer, neighbor, and preemption standing involve courts stepping in when the political process is available to plaintiffs (and unfavorable to defendants), and the ensuing cases' results are less likely to spur dialogue with the political branches when the government loses. In these cases, litigation tends to undermine democracy.

C. Normative Case for Local Governance

Public-law litigation upends the political process. In certain circumstances, such undermining is necessary—indeed, vital—to allow institutional reform. We just showed that such justifying circumstances rarely surround the suits against cities we described in this Article. This Section adds the observation that the local political process has distinct value, rendering its upending especially lamentable.

One of the most important functions of local government is to advance democratic participation.²⁶⁶ Arguably, a commitment to democratic values accounts for the relatively robust powers that local governments enjoy in the American scheme of governance.²⁶⁷ These governments' smaller scale facilitates citizen participation.²⁶⁸ When the arena is smaller, it is much easier for individuals to have their voices heard. A smaller number of participants means that fewer voices are muffled.²⁶⁹ Thus, local governments should be better at registering, and adjusting to, voters' preferences.²⁷⁰

265. See *supra* Section I.C.

266. Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1379, 1381 (2014).

267. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999).

268. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1069 (1980) (“[I]ndividual involvement in decisionmaking is impossible except on a small scale.”).

269. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 397 (1990).

270. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 156 (1977). For more on local

The democratic appeal of the local political process goes even further. Geographical closeness and fewer co-constituents enable a citizen to influence government in a way that extends beyond the periodic casting of ballots and that is unimaginable in the state or federal contexts.²⁷¹ A resident can, for example, attend public meetings or contact the alderperson (or even the mayor) and reasonably expect a reply. The local political process provides citizens with multiple intervention points, extending well beyond election day.²⁷²

Closeness and openness facilitate not only citizen intervention, but also deliberation. While voting is inherently individual and secretive, community meetings and communications with officials are communal and public.²⁷³ The local political process over the redesign of a road, for example, can and often does involve local officials and administrators, relatives of accident victims, drivers, bike riders, truck operators, and local business owners – all debating the issue at meetings, forming contesting organizations, and protesting to make their voices heard.²⁷⁴ The local political process is amenable to meaningful public debate, more so than higher-level political processes. It thus offers truly democratic treatment for the polycentric disputes that define public-law litigation.²⁷⁵

The latitude courts have shown toward those who would rather litigate these public concerns undermines this salutary local political process. It replaces an arena that is at least in theory open to all, with one that even in theory is open to the litigants alone. It replaces deliberation and community-building with lawyerly discourse and judicial fiat. Moreover, the turn to courts to settle local public disputes removes them not only from the *public* sphere; it also removes them from the *local* sphere. Federal public-law litigation takes place in federal courts; state public-law litigation can take place in state courts; but local public-law

innovation, see, for example, Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1266–67 (2014); and Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115, 115 (2016).

271. Frug, *supra* note 268, at 1068–70.

272. Foster & Glick, *supra* note 242, at 2022.

273. Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 559 (1987); see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 895–97 (1983) (praising these attributes of local politics in the context of land use).

274. See Kirstyn Brendlen, *Opponent to McGuinness Boulevard Redesign Cast Uncertain Light on DOT Plan*, BROOKLYN PAPER (June 19, 2023), <https://www.brooklynpaper.com/opponents-mcguinness-boulevard-redesign-dot> [<https://perma.cc/QKW4-PN78>].

275. See Noah M. Kazis, *Transportation, Land Use, and the Sources of Hyper-Localism*, 106 IOWA L. REV. 2339, 2362–63 (2021) (discussing planners turning to participatory local processes in reaction to failure of urban renewal edicts).

litigation takes place in state (or federal) courts. Litigation comes at a major cost in terms of localism.

To be sure, localism is not an unalloyed good. The alleged relative openness of the local process does not benefit all persons equally; its inclusiveness does not truly mean that all are always included. Specifically, small-scale political processes are particularly prone to tyranny of the majority. In larger-scale polities, the greater number of voters and interest groups breeds competition that, if only to a limited degree, may alleviate minorities' plight.²⁷⁶ On the local level, these political market protections for minorities might be lacking. The problem generates a certain (healthy) skepticism toward the democratic promise of localism and justifies the maintenance of some state control over city decision-making.²⁷⁷ It could also justify heightened judicial interventionism.

The special standing regimes described in Part I, however, do not aid those whom the local political process tends to fail. Taxpayer, neighbor, and preemption standing are not designed to do so. Quite the opposite: they are engineered to further support those who can best exploit the localness of local politics.

Neighbor standing is the most striking case. Neighbor standing empowers property owners, and only them, to sue a city whose decisions they dislike. Yet these are the same people who are often the most dominant interest group in the local political processes preceding such decisions. One of the clearest testaments to property owners' influence in those processes is the spread and persistence of local zoning ordinances that shield the economic interests of homeowners.²⁷⁸

The economist William A. Fischel famously offered the homevoter hypothesis, which states that homeowners control local politics.²⁷⁹ Often, they constitute the biggest and most economically and politically invested demographic group in a locale.²⁸⁰ Even in major cities, where the actual reality of local politics might be messier than Fischel's theory would predict, property owners' might in

276. ELY, *supra* note 242, at 135–36; THE FEDERALIST NO. 10, at 60–65 (James Madison) (Jacob E. Cooke ed., 1961).

277. GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 6, 107 (1966).

278. EINSTEIN, GLICK & PALMER, *supra* note 276, at 111–12; RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 17 (1966) (“No one is enthusiastic about zoning except the people.”); Shelia R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J. F. 480, 485 (2017) (“Part of the reason for such restrictive land policies . . . is the vested interest of existing homeowners who favor policies that preserve the status quo . . .”).

279. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 1 (2001).

280. *Id.* at 4.

local politics is undeniable.²⁸¹ Their knowledge and time permit them to participate in community meetings²⁸² and to form private organizations that are then afforded a quasi-formal role in the land-use permitting process.²⁸³ Even the accessibility of local officials tends to favor neighbors, particularly affluent ones. (Few could, like the actor Mark Ruffalo, express to NYC's Mayor his displeasure – shared with fellow celebrities, such as the rapper Common and the comedian Amy Schumer – with a struggling tiny congregation's plan to develop housing that will block views.²⁸⁴) The policies that local governments adopt therefore tend to reflect homeowners', especially affluent homeowners', preferences.²⁸⁵ In January 2024, the San Francisco Recreation and Parks Department removed pickleball courts from the Presidio Wall following a neighbors' campaign – led by an owner whose Presidio Heights house was listed for \$36 million (appropriately enough, among its draws was a private pickleball court).²⁸⁶ A (rich) neighbors' lawsuit against a city authorizing the courts, like the one filed in Cape Cod, mentioned in Part I,²⁸⁷ can hardly be seen as correcting for these owners' lack of access to local decision-making processes.

Judicial latitude to neighbors' claims when they happen to fail to get the local political resolution they desire simply amplifies the asymmetric power relationship.²⁸⁸ An affordable housing project that somehow makes it out of the winding

281. See also Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014) (exploring the power of home voters in urban, not only suburban, cities).

282. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, *NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS* 102-03 (2020) (finding that zoning hearing participants tend to live nearby and be overwhelmingly white and homeowners).

283. See, e.g., OFFICIAL CITY OF LOS ANGELES CHARTER § 904 (Sept. 30, 2023), https://codeli-brary.amlegal.com/codes/los_angeles/latest/laac/0-0-0-3785 [<https://perma.cc/44VQ-Y4BB>] (detailing the development for a citywide system of “neighborhood councils”); HILLSBOROUGH CNTY., FLA., LAND DEV. CODE § 10.03.02(F) (Oct. 5, 2022), https://library.municode.com/fl/hillsborough_county/codes/land_development_code?no-deId=ARTXAD_PT10.03.00PRAMOFZOATRE [<https://perma.cc/E3SX-W5QF>] (establishing neighborhood organizations within permitting process in Tampa).

284. Mihir Zaveri, *Why Mark Ruffalo and Wendell Pierce Are Fighting for a Crumbling Church*, N.Y. TIMES (June 26, 2023), <https://www.nytimes.com/2023/06/26/nyregion/west-park-presbyterian-church-manhattan.html> [<https://perma.cc/MR3Y-2HUK>].

285. FISCHER, *supra* note 279, at 1.

286. Christina Campodonico, *Activists Threaten ‘Pickle Disobedience’ as San Francisco Moves to Kill Popular Pickleball Courts*, S.F. STANDARD (Jan. 17, 2024).

287. See *supra* note 123.

288. Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1087 (2021) (“[W]hen it comes to land use decision-making, public participation is utterly dysfunctional – and poor people bear the brunt of that dysfunction.”).

resident-centric local political gauntlet geared toward accommodating any neighbor objection must meet the neighbors yet again in court. Years ago, one commentator described much of our land use political processes as putting local projects to “trial by neighborism.”²⁸⁹ Neighbor standing literalizes the quip.

Cases brought under taxpayer standing might not be so egregious, but they too target local political processes for little justifiable cause. Taxpayer standing empowers all taxpayers to litigate any concerns they might have with local spending policies, irrespective of whether those concerns can be effectively debated and decided through local political processes. Indeed, by empowering any cohort of wealthy taxpayers, no matter how small, to use the courts to upend local political processes, such suits might reduce incentives to participate in the local political process and weaken the legitimacy of its results.

Preemption standing could be said to have a somewhat principled reason for upending local political processes. A charitable reading ascribes to some recent preemption laws the notion that certain groups’ concerns do not receive a fair hearing in local politics, and thus the state legislature resolved to aggressively intervene to protect those groups. The pertinent losers in local governance are sometimes business interests,²⁹⁰ who, unlike homeowners, may not hold a special advantage in local politics.²⁹¹ Or they might be conservative movement actors, who do less well in blue cities than in red states.²⁹² Still, even if these groups

289. BABCOCK, *supra* note 278, at 141.

290. Cf. Saul Elbein, *Texas ‘Preemption’ Bills Escalate War Between Liberal Cities, Conservative Legislature*, THE HILL (Mar. 23, 2023, 6:00 AM ET), <https://thehill.com/policy/equilibrium-sustainability/3912877-texas-preemption-bills-escalate-war-between-liberal-cities-conservative-legislature> [<https://perma.cc/6J23-7Y7V>] (discussing the corporate sponsors of Texas preemption law).

291. Assessments of the relative strength of interest groups in local politics have undergone a transformation over the past decade or so. In an exceptionally influential thesis published in the 1970s, the sociologist Harvey Molotch argued that urban politics are dominated by business elites, especially developers. Given these actors’ goals in land-use policies, he termed them the “Growth Machine.” Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 309-10 (1976). More recent work has demonstrated, however, that homeowners, not business interests, dominate local politics. Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 415 (2021). Through its design, the local political process solves the collective action problems that normally weaken individual public members in the political competition with business interests. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81, 90-96 (2011). The financial advantages that business interests normally rely on in democratic elections are less marked in local elections. Ellickson, *supra*, at 417.

292. Accordingly, during the past few decades, many of the preemption laws adopted across the country were drafted and promoted by American Legislative Exchange Council (ALEC), a conservative, pro-business group. ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE:*

at times happen to lose locally, and even if one chooses to believe that therefore state legislative intervention is justified, that does not justify upending political processes altogether via easy recourse to courts. This is especially true because these groups are often those for whom it is realistic to leave the city in order to avoid its policies – or to threaten to leave in order to entice the city to change course.²⁹³

Importantly, taxpayer, neighbor, and preemption standing do not open the door for *anyone* to call into question the fairness of local political processes. These doctrines empower courts to easily displace the local political process in managing issues pertaining to spending, intensive development, or politically salient regulation – issues where complainants tend to represent mainstream and powerful voices not easily ignored. Conversely, these categories of anti-city litigation do not call on courts to manage issues pertaining to, say, police practices – issues where the voices of those most affected are easily and routinely ignored in the local political process. Courts are reluctant to reach the merits of police violence cases out of desire to avoid “unanticipated intervention in the processes of government,”²⁹⁴ yet paradoxically they evince no such concern when suits are brought by the people who can exploit those processes of government most easily.

In short, making it easier to sue cities as compared to other governments insinuates that local political processes should be distrusted. And yet, in theory and in reality, there is great cause to commend those local processes. It is important to stress how modest our contention here is. We by no means seek to argue that local political processes are faultless (they are not), or even that they are necessarily superior to state and federal ones (sometimes they are, sometimes they are not). Rather, our assertion is simply that there is no reason to automatically mistrust local political processes more so than other political processes. The current regime for suing cities does exactly that. Worse still, it is not geared toward remedying the (very real) potential ills of local political processes, but rather, it is aimed toward exacerbating them.

HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES – AND THE NATION 61-62 (2019).

293. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-31 (1970) (arguing that a person dissatisfied with the status quo has two primary responses: voice and exit). For example, when Uber and Lyft were unhappy with the Austin driver background checks regulation, they stopped operating in the city. Alex Hern, *Uber and Lyft Pull Out of Austin After Locals Vote Against Self-regulation*, THE GUARDIAN (May 9, 2016, 4:45 AM EDT), <https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation> [<https://perma.cc/MYN5-PNDT>].

294. Smith, *supra* note 22, at 452 (quoting *Alden v. Maine*, 527 U.S. 706, 750 (1999)).

* * *

When we described suits against cities, we found that they are not only easier to bring than suits against other governments, but also that they tend to promote inaction and reactionary policies. This Part showed how this attribute of suits against cities sets them normatively apart from suits against other governments. The legal regime facilitating these suits does not favor those who require judicial accommodation due to the failings of our public processes. Instead, it does the opposite: it further strengthens the hand of those who are already privileged in courts, state legislatures, and local politics.

III. IMPROVING SUITS AGAINST CITIES

What is the cure for the problems generated by rendering municipalities more vulnerable to private suits than federal and state governments? One could read our criticisms of the special rules for suing cities, and only cities, as a call for aligning the regime for suing cities with the law respecting suits against other governments. But the discussion of the normative value of local governance isolated the special promises – and dangers – of local government decision-making. Local political processes have a distinct nature and might therefore necessitate distinct forms of institutional reform litigation. Moreover, as seen earlier, the economics of litigation and the political economy of legislation may justify a different role for litigation in local, as compared to state or federal, governance.²⁹⁵

For similar reasons it would be misleading to read the preceding discussion as implying that any form of anti-city litigation is a problem. Litigation has an important role to play in correcting inequities that can plague local governance. True, much of the discussion in Part II highlighted the failures of the current special rules for suing local governments in achieving the goals normally associated with suing government. That does not mean, however, that special rules for suing local governments can never be justified. We thus do not advocate for the complete abolition of the three special regimes for suing cities identified in Part I.

Instead, we suggest reforms that attempt to assure that the rules for suing cities respond to the special challenges – the unique principal-agent problems, tyranny of the majority risks, and rule of law concerns – that may afflict local decision-making. This effort entails weeding out those suits that do not truly address these challenges but rather generate the normative problems laid out in

295. We also would not want to be read to endorse the existing law of standing as applied to federal and state governments. See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) ("[T]he very notion of 'injury in fact' is not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake.").

Part II. For each form of standing introduced in Part I, we devise ways to forestall those cases specifically.

Thus, for taxpayer standing, our proposed reforms aim to assure that plaintiffs actually, and effectively, represent a financial interest of the city in accordance with the unique corporate nature of local governments. For neighbor standing, our reforms aim to reconnect anti-city suits to the specific interests that the statutes authorizing them seek to promote. And for preemption standing, our reforms aim to limit the group of potential plaintiffs to those which the legislature explicitly ordained as necessary to assure the (formally) subservient nature of local governments in American law.

A. *Taxpayer Standing*

The first category of cases in which municipalities get special (detrimental) treatment is taxpayer standing.²⁹⁶ As shown in Part II, suits based on taxpayer status can be problematic when powerful interests try to end-run the democratic process by suing under-funded municipal governments, even when those private parties have ready access to political channels. In a sense, thus, we share Judge Sutton and then-Judge Barrett's discomfort with municipal taxpayer standing.²⁹⁷

But, in our view, not all municipal taxpayer cases suffer from these ailments. In both the Introduction and Part II, we noted the lack of normative justification for taxpayer standing to sue a city that directs city funds to police training on appropriate uses of chokeholds. Conversely, such normative unease probably dissipates when taxpayer standing facilitates a suit against a city's contract with a training firm led by the police chief's close friend.²⁹⁸ Unlike the suit against the training program, the suit against this contract does not appear to simply prioritize the political interests and preferences of one, probably economically advantaged, resident group.

But how do we tell apart the latter suit from the former in a principled manner? Here we think then-Judge Barrett had it backwards when she called municipal taxpayer standing a "relic."²⁹⁹ The problem is not that municipal taxpayer standing has outlived its historical use, but rather the opposite: taxpayer

²⁹⁶. See *supra* Section I.A.

²⁹⁷. See *supra* notes 79-81 and accompanying text.

²⁹⁸. Tom Schuba, *Chicago's Top Cop Ends Training Agreement with Texas Firm with Ties to Ex-police Superintendent*, CHI. SUN-TIMES (May 22, 2023, 11:14 PM EST), <https://chicago.suntimes.com/2023/5/22/23733572/chicagos-top-cop-ends-training-agreement-with-firm-with-ties-to-ex-police-superintendent> [<https://perma.cc/N87W-7XPU>].

²⁹⁹. See *supra* note 81, at 733.

standing has strayed too far from its origins. Recall that, in *Frothingham*, the Supreme Court rejected federal taxpayer standing while observing that municipal taxpayer standing is acceptable.³⁰⁰ The *Frothingham* court took a stab at justifying the distinction. Justice Sutherland explained that municipal taxpayer standing is justified because of “the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.”³⁰¹

The grounding for municipal taxpayer standing, in other words, was in the corporate roots and nature of the municipal government—roots and nature it did not share with other governments. Historically, municipal governments were corporations or corporation-like entities.³⁰² Accordingly, legal characteristics associated with the corporate form, both in *Frothingham*’s time and in our own, inhere to municipal governments—including many rules pertaining to litigation.³⁰³

Specifically, the corporate-litigation practice that Justice Sutherland embraced when recognizing municipal, but not federal, taxpayer standing was the derivative suit.³⁰⁴ This is the unique mode of litigation that most clearly manifests the “peculiar relation” between the stockholder and private corporation. Derivative suits are tools allowing shareholders to sue on behalf of the corporation when it fails to bring the suit itself.³⁰⁵ Derivative actions are especially important when the individuals in charge of the corporation (officers and directors) are complicit in the corporate injury, such that they are unwilling to order the corporation to sue to vindicate its rights.³⁰⁶ By the time Sutherland was writing, many states had formally recognized the ability of citizens to file derivative actions on behalf of their municipalities, viewing the municipal corporation as no

300. *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923); see *supra* Section I.A.

301. *Frothingham*, 262 U.S. at 487.

302. See Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351, 1365-79 (2023) (describing this connection and collecting sources).

303. See Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 598-600 (2018); Clopton & Shoked, *supra* note 302, at 1365-79.

304. *Frothingham*, 262 U.S. at 486-87.

305. See 2 JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS: INCLUDING UNINCORPORATED FORMS OF DOING BUSINESS § 15.03 (2d ed. 2003); FED. R. CIV. P. 23.1(a); 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1821 (3d ed. 2007).

306. See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547-48 (1949); *Levine v. Smith*, 591 A.2d 194, 205 (Del. 1991).

different from any other corporation.³⁰⁷ And Sutherland specifically cited approvingly to this practice.³⁰⁸ Municipal taxpayer suits were thus originally envisioned to function in the same way as derivative suits, permitting resident taxpayers (stockholders) to ensure the prudent management of municipal (corporate) assets by suing on behalf of the municipality (corporation) to prevent misuse of its funds.³⁰⁹

This purpose has continuing, perhaps even enhanced, vitality today.³¹⁰ Cities now are often acting not only as governments, but also as market participants – engaging the market through investments (for example, managing pension funds), private-public collaborations (for example, codeveloping housing), or the sale of their assets (for example, selling waterworks to private equity firms).³¹¹ Some of these measures result from the fiscal plight now common to local governments – and not other governments. Moreover, unlike the larger and better-funded federal and state governments, local governments often lack the professional expertise or infrastructure to assure that their market decisions are rational. They similarly lack the media and interest-group watchdogs that can closely monitor and publicize their missteps and misdeeds. This suggests a role for litigation – one that is absent when the relevant government is a federal or state government. Importantly, the litigation envisioned here does not implicate the concerns Part II highlighted about the usual political economy of legislation and the value of local governance because the questions pertinent to cities’ market activities are often not political in nature or salient enough for voters. Therefore, as historically understood – that is, as a version of corporate law’s derivative standing – municipal taxpayer standing has normative value.

307. See, e.g., *N. Tr. Co. v. Snyder*, 89 N.W. 460, 462–63 (Wis. 1902) (permitting a plaintiff-taxpayer to sue to prevent the county from paying bills for which the county was not liable); see generally Schanzenbach & Shoked, *supra* note 303, at 598–600 (explaining why derivative suits can be brought by taxpayers on behalf of municipalities).

308. *Frothingham*, 262 U.S. at 487 (citing 4 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1580 et seq. (5th ed. 1911)).

309. *Id.* at 486. The Supreme Court, in its earliest case, referred specifically to the “right of the resident-taxpayers” to bring suit, but then referred to the plaintiffs as simply taxpayers. *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879). John Dillon, in his famous treatise, similarly oscillates, at times referencing “the right of *property-holders* or *taxable inhabitants*” 4 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1579 (5th ed., 1911) and at others “property holders or taxpayers,” *id.*, “inhabitants,” *id.* § 1580, “any inhabitant and particularly any taxable inhabitant,” *id.* He also cites a case referencing the right to sue of “a citizen and a taxpayer of an incorporated city,” *id.* § 1582, another describing it as held by “residents and taxpayers of a city,” *id.* § 1583, and multiple ones simply naming taxpayers, *id.* § 1584.

310. See Schanzenbach & Shoked, *supra* note 303, at 598–600 (detailing derivative suits including modern examples).

311. *Id.* at 570–571 (listing examples).

Reconnecting municipal taxpayer standing to its origins in the derivative suit provides some guidance to both federal and state courts as to when taxpayer standing to sue cities is most appropriate. Derivative suits are a tool only to sue *on behalf of the corporation*.³¹² A derivative suit requires an injury to the corporation, not to the individual shareholder.³¹³ By analogy, municipal-taxpayer suits should be limited to cases where there is a financial injury to the municipality.³¹⁴ The municipal taxpayer's standing is *derivative* of the municipality's standing, so the municipality itself must suffer a real injury to provide that predicate. Thus, there is good reason to follow the traditional decisions requiring municipal-taxpayer plaintiffs to establish some financial injury to the municipal corporation. It is a misguided trend among some courts, described in Part I, to drop this test and merely demand that the plaintiff allege the violation of some law or legal duty.³¹⁵

For example, a city official who bypasses some technical requirement of government contracting to award a city contract to a firm offering the lowest price might subject the city to a competitor firm's suit.³¹⁶ But because there was no financial injury to the city, this decision should not subject the city to a taxpayer suit.³¹⁷ The New Jersey decision allowing taxpayers to oppose the city's choice to promote some officers rather than others was thus mistaken, as there was no financial injury.³¹⁸ And Connecticut's "automatic aggrievement" rule for liquor license challenges completely misses the point.³¹⁹ But some decisions get it right. Federal courts correctly denied standing where municipal taxpayers sued over drag queen story hour at a local public library and the painting of "Black Lives Matter" on a city street because, in both cases, plaintiffs failed to show any loss of municipal funds.³²⁰ Another federal court was right to recognize standing

312. See, e.g., WRIGHT ET AL., *supra* note 305, § 1821.

313. See, e.g., *id.* ("An action that is not for the benefit of the corporation but merely seeks to enforce the rights of one or more shareholders against the corporation is not a derivative action.").

314. For more on the injuries that support municipal standing, see Clopton & Shoked, *supra* note 302, at 1396-1402.

315. See *supra* notes 69-73 (collecting cases); *W. Farms Mall, LLC v. Town of West Hartford*, 901 A.2d 649, 660-63 & n.12 (Conn. 2006) (collecting cases going both ways).

316. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133-34 (2014) (describing standing when one competitor uses deceptive advertising that harms another's business).

317. See *Anne Arundel Cnty. v. Bell*, 113 A.3d 639, 656-67 (Md. 2015).

318. See *supra* note 62 and accompanying text.

319. See *supra* note 73 and accompanying text.

320. *Christopher v. Lawson*, 358 F. Supp. 3d 600, 610 (S.D. Tex. 2019) (denying standing over drag queen story hour suit); *Penkoski v. Bowser*, 486 F. Supp. 3d 219, 230-31 (D.D.C. 2020) (denying standing over Black Lives Matter painting).

when municipal taxpayers sued to stop the illegal detention of migrants: the plaintiffs had established the detention's major financial cost to the municipality.³²¹

The corporate roots of municipal taxpayer standing have more to say about when recourse to it, and by whom, is justified. The derivative suit's unmovable focus is on the corporate injury, and thus corporate law insists that shareholders may not use the derivative suit to pursue their interests *at the expense of* the interests of the corporation or other shareholders. Indeed, a derivative suit "may not be maintained" in federal court unless the plaintiff "fairly and adequately represent[s] the interests of [the] shareholders."³²² This requirement of fair and adequate representation has been understood, first and foremost, to mean that no conflicts of interests may exist between the plaintiff in a derivative suit and other shareholders.³²³ The same approach should apply to municipal taxpayer standing. A simple example of a conflicted plaintiff would be a taxpayer plaintiff's claim that city officials were wrong to allocate transportation funds to one neighborhood rather than to that taxpayer plaintiff's own neighborhood. Another example would be the Sixth Circuit *Smith* case discussed in Part I.³²⁴ The teachers' (understandable) interest there was that the school district rehire them, rather than hire replacement teachers, irrespective of what was in the best financial interest of the school district or its other taxpayers. The plaintiffs were highly unlikely to adequately represent the interests of those on whose behalf they were allegedly suing.

The law of derivative suits suggests another way to police the adequacy of representation the plaintiff provides to the city (whose alleged injury must serve as grounding for the plaintiff's suit). Starting with New York in 1944, some states have adopted "security-for-expense statutes" that require certain shareholders bringing derivative suits to post security for the reasonable costs of litigation.³²⁵ The idea is to discourage strike suits that, even without merit, extract

321. *We Are Am. v. Maricopa Cnty. Bd. of Supervisors*, 297 F.R.D. 373, 383-84 (D. Ariz. 2013). One way to read this Section, then, is as a qualified defense of municipal taxpayer standing with respect to the cases that meet the requirements and limitations we describe throughout.

322. FED. R. CIV. P. 23.1(a).

323. 7C WRIGHT ET AL., *supra* note 305, at § 1833 (2007) ("Perhaps the most important element to be considered is whether plaintiff's interests are antagonistic to those plaintiff is seeking to represent. If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed."). This adequacy requirement also serves a similar function in the law of class actions. See FED. R. CIV. P. 23(a)(4); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

324. See *supra* notes 74-80 and accompanying text.

325. See generally 7C WRIGHT ET AL., *supra* note 305, at § 1835 (describing security-for-expenses statutes).

a settlement.³²⁶ At least in Ohio, certain municipal-taxpayer suits already may not proceed without a bond.³²⁷ In our view, bonds are not necessarily appropriate in all municipal-taxpayer suits, but they may be of special utility in cases where the court is worried about the types of conflicts mentioned above.³²⁸

There is an additional aspect of the law of derivative suits that can provide useful guidance to ensure that municipal-taxpayer suits truly serve their goal of remedying injuries to cities. In corporate law, plaintiffs may not pursue derivative actions unless the corporation itself has previously failed to pursue its own interest in court. Often this requirement is met by showing that the board of directors was presented with a “litigation demand” and failed to act, or that it would be futile to make a litigation demand because the board is hopelessly conflicted.³²⁹ In its statute regulating municipal-taxpayer suits, Ohio has already adopted this requirement.³³⁰ Other states should consider it.³³¹

We should emphasize that all these limitations and requirements that the law of derivative suits imposes do not express some reflexive antagonism toward the derivative suit. Rather, they were established to cement the relationship between this procedural tool and the important, yet delineated, substantive aim it serves. Derivative suits are meant to stop management from misusing the corporation’s funds whose true owners are the shareholders.³³² These suits are not meant to remove from officers and directors the powers to manage the corporation and vest them in shareholders, let alone in courts.³³³ After all, the core attribute of

326. *Id.* at 166-67.

327. OHIO REV. CODE ANN. § 733.59 (West 1977). *See, e.g.*, *State ex rel. Sawyer v. Cendroski*, 885 N.E.2d 938, 940-41 (Ohio 2008) (discussing this provision).

328. Thus, we hope, a court would be wary about using a bond when the result would be imposing the kind of tax on litigation that only well-resourced litigants can pay.

329. *See, e.g.*, 7C WRIGHT ET AL., *supra* note 305, at § 1831.

330. OHIO REV. CODE ANN. § 733.59 (West 1977).

331. An additional, and even more aggressive, way to ensure that a given municipal-taxpayer suit is indeed effective for the promotion of the municipal interest can be drawn from another type of representational suit: the class action. In certain types of cases, a class may be certified only if the class action is “superior” to other modes of adjudication. *See, e.g.*, FED. R. CIV. P. 23(b)(3). The superiority requirement reflects the cost of class actions and the concern with prejudice to absent parties. Similarly, municipal taxpayer standing—a form of representational standing—may be less desirable when individual standing is possible. Thus, perhaps courts should consider staying taxpayer suits when in favor of (superior) pending individual actions.

332. *See* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (“Equity . . . allowed [the stockholder] to step into the corporation’s shoes and to seek in its right the restitution he could not demand in his own.”).

333. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1288 (1982) (“Courts (and shareholders) do not possess the experience, expertise, or information necessary to make complicated business decisions.”).

the corporate structure is the separation of ownership from management.³³⁴ The law thus shields most board decisions from judicial review through the business judgment rule, which, at most, allows for challenging decisions involving conflicts of interest or failure to abide by basic procedures for good decision-making.³³⁵ Under the rule, courts do not ask whether the corporation's decision was sensible as a business matter.³³⁶ They only ask whether the process generating that decision was sensible enough to offset concerns about corruption, mindlessness, or waste.³³⁷

When applying the procedural limitations suggested above for municipal taxpayer standing, courts should be guided by that basic notion animating the law of the derivative lawsuit, which inspired the *Frothingham* court to acknowledge taxpayer standing against municipalities. These are suits to effectively vindicate the city's financial interests when leaders abuse them.³³⁸ They thus perform an important function. Existing limitations on taxpayer suits that hinder their ability to serve this function should be removed. The current standing requirement that cities spend money (on, for example, redistribution to the poor) rather than forego money (mostly through corporate welfare) has nothing to do with these suits' goal. In both scenarios municipal funds can be wasted. Similarly, adequacy of representation for the city's interest in litigation does not turn on the amount or type of tax the plaintiff resident pays. Just as corporate-derivative standing is available to the smallest stockholder, municipal taxpayer standing should discriminate as little as possible among potential claimants, so long as they are seeking to remedy a corporate injury. Serious commitment to the taxpayer suit's goal might thus expand its availability.

But the function of the taxpayer suit also should define the limits of its reach. This form of standing is not intended to push into courts debates over policy, such as in suits over gun control or redistricting,³³⁹ where little distinguishes the city from the federal or state governments. It is geared toward tackling corrupt use of funds or (at most) gross incompetence in their management, where historically, and arguably still today, the city can be distinguished from the federal

334. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4-6 (1933).

335. MODEL BUS. CORP. ACT (Am. Bar Ass'n 2016).

336. Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 425 (2013) (suggesting that the business judgment rule should not require courts to "weigh in on the substantive soundness of director decisions").

337. See, e.g., *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (identifying "gross negligence" as the level of conduct that would "giv[e] rise to a violation of the fiduciary duty of care"); *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000); MODEL BUS. CORP. ACT § 8.30 cmt.

338. See *Frothingham v. Mellon*, 262 U.S. 447, 486-87 (1923).

339. See *supra* notes 61 and 63.

or state governments. A recent article accordingly suggests that courts apply the same restrictive standard of review that they apply when analyzing corporate management decisions (the business judgment rule) to the review of local governments' decisions.³⁴⁰ The approach should also inform which suits against cities to allow. For example, the question of whether training police officers to avoid the misuse of force is a bad policy is not the traditional province of derivative standing. But the question of whether the trainers hired are relatives of the official hiring them is. The line may prove more muddled than this neat distinction implies, but mindfulness of it is nevertheless vital.

B. Neighbor Standing

Neighbor standing empowers any property owner to drag the city into court whenever they feel something the city did (or did not do) caused their land to lose value. It is normatively troubling to provide property owners expanded standing in this manner because, as Part II noted, these actors are well-resourced in litigation and their interests are already well-served through multiple political outlets. Doing so invites private interests to trump public interests, including the public's interest in denser, economically fairer development. Any effort at recalibrating neighbor standing must address that problem.

As was the case with the reforms suggested for taxpayer standing, promising change can be effectuated through a return to neighbor standing's roots. Neighbor standing's doctrinal origins, as Part I explained, are in zoning laws. Yet in expanding its reach over the years, courts have unmoored neighbor standing from those origins. Courts should curb neighbor standing by reattaching it to its modest origins in zoning laws. The key move is for state courts to reinvigorate the requirement that a plaintiff actually show a special injury under the relevant substantive law—rather than merely show they are a neighbor. This doctrinal move is unfussy—indeed, blunt—because the target is clear. Neighbor standing strengthens the hand of already powerful actors: property owners. These are actors whom both the economics of litigation and the political economy of legislation tend to favor, and who are the least likely to be failed by local governance. Restricting their special right of court access to its statutory source is thus desirable.

The first step in this process is, straightforwardly, to require a relevant substantive law authorizing a suit. Many zoning laws specifically authorize private lawsuits challenging zoning decisions, and courts, of course, should honor those statutes. But many of the more outlandish neighbor claims mentioned in Part I—for example, demanding that a city remove pickleball players or refrain from

340. Schanzenbach & Shoked, *supra* note 303, at 574.

replacing open space with affordable housing—are not grounded in laws that provide private rights of action.³⁴¹ Instead, courts have read new rights of action into the common law or statutes that do not include them. The Virginia Supreme Court was right, therefore, to conclude that neighbors who might have standing to challenge zoning decisions do not have standing under other planning statutes that do not explicitly include a private right of action.³⁴²

The second move is to reconsider the definition of the “special injury” required for neighbor standing when a specific statute recognizes private standing. As described in Part I, courts early on sensibly concluded that even a statutory authorization for an “aggrieved” person to challenge a zoning decision does not mean that literally any unhappy person could sue. They consistently held that a “special injury” was needed to differentiate the individual plaintiff from the rest of the community.³⁴³ The problem, though, was that courts took it upon themselves to decide what constituted a special injury—and then proceeded to conclude that proximity, often alone, generates such an injury. That was a mistake because the legislature had already given guidance on this question in the underlying substantive zoning law giving rise to the private claim. An injury is special in the eyes of a statute if it falls into the class of harms that the legislature sought to battle through the statute.

The idea that statutory standing should relate to the governing statute’s overall goal is a basic premise of the law. Federal courts have explicated this principle when interpreting the Administrative Procedure Act’s grant of standing to challenge a federal agency’s decision.³⁴⁴ According to the Supreme Court, to bring a lawsuit alleging that an agency decision violated some specific statute, a plaintiff must show that the interest they seek to promote through their suit falls within the “zone of interests” that the pertinent statute recognizes.³⁴⁵ While the test undoubtedly introduces uncertainty to the already muddled field of federal standing rules,³⁴⁶ the requirement itself is quite intuitive. Any statute has specific goals

341. *See supra* Section I.B.

342. *Logan v. City Council of Roanoke*, 659 S.E.2d 296, 304-05 (Va. 2008). Even more recently, the Maryland court limited the spread of neighbor standing when it clarified that a neighbor cannot sue to contest a comprehensive plan decision, which it deemed legislative in nature. *Anne Arundel Cnty. v. Bell*, 113 A.3d 639, 649-61 (Md. 2015).

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

344. 5 U.S.C. § 702 (2018) (granting standing to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute”).

345. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

346. For an early critique, see, for example, Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 493-97 (1974).

and imagines specific types of litigation or litigants.³⁴⁷ The attendant notion that a person should not be able to exploit a statute to promote an interest alien to that statute even has grounding in traditional common law.³⁴⁸

A natural insight, then, is that courts hearing challenges under state zoning laws should ask whether the plaintiff has an injury that is within the “zone of interests” that the zoning laws seek to protect. We might call this a “zoning injury,” just as the federal courts require an “antitrust injury” to sue under the Clayton Antitrust Act.³⁴⁹

Because private suits under federal antitrust laws and private suits under state zoning laws are susceptible to the same manipulation, the Supreme Court’s treatment of the former type of suits should inform our understanding of the latter. The Clayton Antitrust Act empowers harmed private parties to sue violators,³⁵⁰ so a consumer can sue a corporation that attempted to monopolize the market.³⁵¹ A problem arises when the private party pursuing the alleged violator is not a consumer, but instead a competitor. A monopolizing scheme can undoubtedly injure a competitor: the allegedly illegal action perhaps pushed a competitor out of the market. But any suit a competitor brings is, naturally, motivated not by altruistic concerns with the competitive market, but rather, by their own position within it. The risk is, in other words, that the competitor suing a violator of the antitrust laws is doing so not to promote consumers’ interest in competition, but their own business interest instead. The Supreme Court therefore adopted a requirement that the competitor seeking standing show not just any injury but, specifically, an “injury of the type the antitrust laws were

347. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 239 (1988) (“The actual provision at issue must be the controlling authority, for the merits of a standing claim must always depend, in the end, on the meaning of the statute or constitutional clause upon which the plaintiff relies.”). See generally Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021) (explaining how the “mischief rule” can be useful for interpreting statutes by considering the problem that prompted the statute).

348. Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635–36 (1971) (arguing that the common law prevents plaintiffs from suing for violations of a statute when the “statute was not designed to protect [that plaintiff’s] interest”).

349. See Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273 (1998) (discussing the Supreme Court’s development and use of the standing requirement – and phrase – “antitrust injury”).

350. 15 U.S.C. § 15(a) (2018) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . .”).

351. 15 U.S.C. § 2 (2018).

intended to prevent.”³⁵² It accordingly did not allow a lawsuit against an alleged monopolist that had bought plaintiffs’ competitors out of bankruptcy, thereby assuring they stay in business (though under monopolistic control).³⁵³ The injury to the plaintiffs who now faced competition that would have otherwise disappeared was not the concern of the law; quite the opposite. “The antitrust laws . . . were enacted for ‘the protection of competition, not competitors.’”³⁵⁴

This key insight is relevant for neighbor standing under zoning laws: zoning laws are concerned with the general public welfare and the overall real estate market, not necessarily with a specific individual’s privileged position within it.³⁵⁵ Neighbors objecting to some nearby project are often in an analogous position to that of the competitor raising an antitrust claim.³⁵⁶ Just as a market actor’s (alleged) monopolistic behavior threatens the market share of the competitor plaintiff, the new activity in the nearby land would (allegedly) weaken neighboring owners’ position in the real estate market. At times, those neighbors’ stance is exactly that of the competitor: the new development would expand housing supply, thereby decreasing their houses’ market value. Additionally, neighbors are engaged in competition for the use of communal resources that local governments supply (parks, schools, etc.).³⁵⁷ At least with respect to some such resources, the more new owners use them, the less the current owner can enjoy them. When suing to restrict development, the neighbor could be simply seeking to promote their own selfish interest in preserving and increasing the market value of their real estate holdings, at the expense of public interests—arguably those interests the zoning law is invested in. As in antitrust cases, courts should verify that that is not so before allowing a private suit.

Unsurprisingly, when zoning laws were first introduced, state courts were quick to admonish plaintiffs who tried to sue to serve individual pecuniary interests distinct from zoning laws’ public purpose. In an early neighbor standing case, the Massachusetts Supreme Judicial Court followed a zone-of-interests approach without using that term. The court held that a restaurant owner had no standing to sue Boston for permitting another restaurant, allegedly in violation of the zoning law, because “[i]t was no part of the purpose of the zoning

352. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

353. *Id.* at 479-81, 489.

354. *Id.* at 488 (emphasis omitted) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

355. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (zoning ordinances “must find their justification in some aspect of the police power, asserted for the public welfare”).

356. There are also cases of straightforward attempts to limit competition, such as when a business seeks to block the granting of a permit to another business.

357. Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 58-61 (2011).

regulations to protect business from competition.”³⁵⁸ The court essentially required not just a “special injury,” but a “special zoning injury.” Still, aside from a few other courts that have similarly and specifically refused to recognize increased business competition as a relevant injury,³⁵⁹ courts have abandoned this notion in favor of a broad rule of neighbor standing, equating “special injury” with proximity.³⁶⁰

This was an error. Returning to the reasons that legislatures authorized zoning suits against cities in the first place, courts should require that a plaintiff suffer a special zoning injury before suing. Owning adjoining property is neither necessary nor sufficient for proving such a zoning injury. We now unpack both these prongs.

Zoning injuries are not the exclusive province of landowners—tenants, too, can experience zoning injuries.³⁶¹ The introduction of a polluting industry, the disappearance of open public spaces, the overburdening of a neighborhood school—these are but examples of instances where unregulated development could harm anyone living in the area, homeowner or tenant. There is no good explanation for the law’s current choice to award the homeowner, but not the tenant, a right to contest such moves in court.³⁶² Thus, emphasizing a zoning injury *expands* neighbor standing by removing its most explicitly classist attribute.³⁶³ In practice, of course, the bias might remain. Tenants might be granted the right to sue, but their financial standing is often weaker than that of owners, and thus they might be less capable of, or interested in, suing. The recent

358. *Circle Lounge & Grille v. Bd. of Appeal*, 86 N.E.2d 920, 922 (Mass. 1949).

359. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 508 N.E.2d 130, 134 (N.Y. 1987); *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 744-45 (Alaska 1993); *Lewis v. Swan*, 716 A.2d 127, 132-33 (Conn. App. Ct. 1998); *Riverfront Hotel LLC v. Bd. of Adjustment*, No. 440, 2019 WL 3884031, at *2 (Del. July 11, 2019).

360. *See supra* notes 90-95.

361. Last year the Michigan court overruled decades of rulings requiring ownership for being an “aggrieved” party under the zoning law. *Saugatuck Dunes Coastal All. v. Saugatuck Twp.*, 983 N.W.2d 798, 801-02 (Mich. 2022).

362. *See Sarah Schindler & Kellen Zale, The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267, 271-72 (2023) (coining the term “Anti-Tenancy Doctrine” to describe the unacknowledged ways through which different doctrines accord tenants second class status—below homeowners).

363. In a similar vein, Sarah Schindler and Kellen Zale have suggested reforms to ensure that neighboring tenants, who are affected by land use decisions just as neighboring owners, be granted equal notice of public hearings over such decisions that are meant to offer an opportunity for affected neighbors to air their opinions. *See generally* Sarah Schindler & Kellen Zale, *Neighbors Without Notice: The Unequal Treatment of Tenants and Homeowners in Land Use Hearing Procedures*, HARV. C.R.-C.L. L.J. (forthcoming 2024), <https://ssrn.com/abstract=4590383> [<https://perma.cc/MCA7-J99J>] (making this argument based on original empirical research demonstrating that tenants frequently do not receive notice of public hearings for land use decisions).

reinvigorated interest in tenant organizing might aid in overcoming some of these practical and collective action challenges,³⁶⁴ but we are hesitant to overstate the transformative nature of the reformation of formal law we suggest here. Still, real world inequities should not be enshrined, and further formalized, in the law's own rules. It should not legally matter whether an individual plaintiff is an owner or a tenant; it should only matter whether the interest they are attempting to promote falls within the "zone of interests" zoning laws protect.

Beyond this expansion to tenants, requiring a zoning injury most prominently *contracts* neighbor standing by rejecting suits grounded in proximity alone when they are based on injuries that are outside of—if not inconsistent with—the purposes of zoning. Zoning laws' original goal was to separate incompatible land uses, such as residences and industry, thereby allegedly promoting public health and efficient land development.³⁶⁵ Specific zoning laws may add on further purposes, such as protecting areas as open spaces.³⁶⁶ Where courts have gone astray is where they engrafted onto general zoning ordinances additional purposes that were neither part of those laws' text nor of their history. Two groups of cases stand out in this regard: where a neighbor's injury takes the form of some aesthetic harm, and where it amounts to mere inconvenience. Recommitting standing law to the purposes of zoning laws calls into question these two classes of cases, which have come to dominate neighbor-standing litigation.

First and foremost, aesthetic injuries, mostly lost views, are among the most common injuries neighbors cite when seeking standing to sue a city whose

364. See, e.g., Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 585-86 (2021). For an earlier exploration of tenant unions, see generally, Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368 (1968) (examining tenant unions as a viable intermediary alternative for problems related to low-income housing).

365. See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 28 (2009) ("The Progressive-era reformers who championed zoning . . . firmly believed . . . that order-construction regulations—that is, zoning rules that segregated commercial and industrial establishments from residences, and, importantly, single-family homes from all other uses—would curb the social disorders plaguing those cities."); Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 739 (2004) ("Euclidean zoning . . . operates on the principle, 'a place for everything, and everything in its place.'"); 8 MCQUILLIN MUN. CORP. § 25:21 (3d ed.) ("The ultimate and general purposes of zoning are those traditionally associated with the police power: The public health, safety, morals and general welfare; peace and order; and public comfort and convenience").

366. Perhaps the most famous example is Chicago's lakefront. The legal history of its protection is explored in Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417 (2011). The effective neighbor litigation there was grounded in the old public-dedication doctrine, which grants standing to abutting owners precisely in light of this assumption respecting the overlap between their interest and that of the doctrine. *Id.* at 1522-26.

approval of a project allegedly violated zoning laws. But zoning laws are not necessarily concerned with aesthetic harms.³⁶⁷ Assuring a neighbor pleasant views might often be an outcome of the separation of uses that zoning intends to institute,³⁶⁸ but unless the specific zoning law states otherwise, this is nothing but a coincidence.³⁶⁹ Occasionally legislators will adopt separate laws to protect aesthetic values, such as historic preservation laws.³⁷⁰ Laws specifically protecting an area with some special natural characteristic, say a shoreline, could also be seen as imagining those residing in properties facing that area as effective enforcers of an interest in maintaining it in its current state.³⁷¹ But when confronted with general zoning laws, courts should be suspicious of plaintiffs who claim that aesthetic injuries fall within the zone of interests those zoning laws protect.³⁷²

Another interest that might be an awkward fit for zoning laws' zone of interests can be termed neighbor inconvenience. Planning and zoning laws are undeniably concerned with promoting harmonious development. Hence their focus on separating (allegedly) incompatible land uses. Still, an owner's sense of discomfort with some neighboring use, the animating claim behind several of the suits reviewed in Part I, does not mean that the use is incompatible with their own. It follows that the zoning laws did not intend to allow the owner to challenge that neighboring use. Some neighbors' (biased) discomfort with migrants as opposed to tourists should not allow them to use zoning laws to challenge a hotel's temporary conversion into a shelter. Some annoyance with nearby pickleball noise is not an ill a general zoning law was meant to treat. Even neighbors' traffic concerns might not always amount to an interest that zoning laws protect.

367. *See also* Saugatuck Dunes Coastal All. v. Saugatuck Twp., 983 N.W.2d 798, 816 (Mich. 2022) (announcing that aesthetic harms do not establish standing).

368. *See supra* note 365 (collecting sources about zoning laws' original goal of separating uses).

369. "Zoning for aesthetic purposes alone is not even fully accepted in the state courts." FEDERAL LAND USE LAW & LITIGATION § 2:19 (2022 ed.).

370. Few cities also adopt building codes with detailed aesthetic guidelines. The best example is Santa Fe. *See* Santa Fe, N.M., Code of Ordinances Ch. 14, art. 14-5, § 14-5.2(A)(1) (2020) ("In order to promote the economic, cultural, and general welfare of the people of the city . . . it is deemed essential by the [city council] that the qualities relating to the history of Santa Fe . . . be preserved, some of these qualities being: . . . A general harmony as to style, form, color, height, proportion, texture and material between buildings of historic design and those of more modern design.") (emphasis removed).

371. *See supra* note 366 (discussing the Chicago lakefront).

372. We are by no means implying that aesthetic harms cannot give rise to standing, *see, e.g.*, Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) (finding that "the public interest in the aesthetic, conservational, and recreational aspects" can establish APA standing), but instead that not all zoning laws are meant to protect those values.

Unquestionably, zoning laws can be concerned with congestion.³⁷³ Yet still, that concern does not translate to an interest in protecting a neighbor's desire to not see a few more cars serving a new building next door or to not be inconvenienced by a bike lane replacing the car lane facing their home.³⁷⁴ Such cases of discomfort should be distinguished from cases in which the relevant zoning law specifically targets noxious uses of land. In such instances, the law's interest in protecting the welfare or even health of those occupying adjacent properties might be rather easy to show.³⁷⁵

We realize that even these cases of neighbor aesthetic or convenience injuries can be contested. Some might argue that they do fall within the zone of interests of even the most generic zoning law. Zoning laws, it is true, are invested in stability.³⁷⁶ And at this point in the development of the American urban and suburban environment, a culture of resistance to change prevails, readily legitimizing neighbors' claims.³⁷⁷ Yet we still believe it is important to note how judges have exacerbated the problem. A leader of the campaign to block the conversion of a vacant Seattle army base into homeless housing, whose email address used the pseudonym "neighborhoodwarrior," explained: "You need a lawyer and a litigation plan. You need to go guerrilla. To me it's like a war."³⁷⁸ Unsympathetic protagonists as they might be, it is hard to blame neighbors like her who are merely employing the litigation tools courts created for them—often out of whole cloth. Courts can, and should, reconnect the neighbor standing rules they have created to the underlying statutes. The legislature is of course free to expand the reach and goals of those statutes—to, for example, address certain aesthetic values or certain inconveniences that burden residents. As made clear, residents,

373. N.Y. Town Law § 263 (McKinney 2022) (enabling towns to adopt zoning regulations "in accordance with a comprehensive plan and designed to lessen congestion in the streets").

374. *Joseph v. Twp. of Grand Blanc*, 147 N.W.2d 458, 460 (1967) (agreeing with other jurisdictions that "a mere increase in traffic with its incidental inconvenience [does] not constitute a substantial damage and, therefore, the plaintiff [is] not considered to be an aggrieved party").

375. *E.g., In re Jerome Cnty. Bd. of Comm'rs*, 153 Idaho 298, 309 (2012) (granting standing under a zoning law dealing with permitting animal operations).

376. Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 770 (2020); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91, 100 (2011); see also David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1320 (2021) (criticizing the normative weight put on owners' expectations of stability by those justifying zoning).

377. See, e.g., Kazis, *supra* note 275, at 2360 (2021) (showing how neighbors end up empowered in the local transportation planning process).

378. Heidi Groover, *Could Wealthy Neighbors Kill Seattle's Plan to Build Affordable Housing in Magnolia (Again)?*, STRANGER (Dec. 14, 2017), <https://www.thestranger.com/news/2017/12/14/25630833/could-wealthy-neighbors-kill-seattles-plan-to-build-affordable-housing-in-magnolia-again> [https://perma.cc/N7WL-RJXY].

especially affluent ones, frequently have the legislature's ear. Legislatures might well enact laws serving those residents' interest, rather than that of the general public. Our contention here is simply that the courts should not add to the problem—expanding the reach of existing laws to serve neighbors' concerns when legislatures have failed to do so themselves.

C. Preemption Standing

Our final category of special rules for suing cities is preemption standing.³⁷⁹ We acknowledge at the outset that this category of cases differs from the other categories in two important ways. First, as Part I established, these cases rely on statutes that specifically, and very intentionally, authorize suits against municipalities.³⁸⁰ Second, as Part II explained, preemption statutes tend to favor not necessarily those groups with economic power (as taxpayer and certainly neighbor standing do), but instead those with political power at the state level.³⁸¹

Any suggested reform to preemption standing—even the mere suggestion that reform is called for—must seriously contend with these distinct features. We have noted throughout the political—in particular, the democratic—costs of suits against cities.³⁸² And we have worried about judge-made law, itself less democratic, entrenching those costs.³⁸³ Preemption standing might present the problems we identified in Part II, but it has going for it the imprimatur of state legislation. And for better or worse, in American law, local governments are subservient to state governments, which may have a legitimate interest in ensuring that their desires be effectively enforced on those local governments.

Preemption standing's legislative grounding also means that doctrinal avenues for reforming it are scant. As a statutory creation, preemption standing is subject to limited judicial regulation. In light of the normative issues Part II detected, we could suggest that state legislatures themselves reconsider, or at the very least recalibrate, this exceptional mechanism they have created. Yet that would be mostly futile given these statutes' political animus.³⁸⁴ So, any reform

379. See *supra* Section I.C.

380. See *id.*

381. See *supra* Section II.B.

382. See, e.g., *supra* Section II.C.

383. See, e.g., *supra* Section III.B (discussing the zone-of-interests test).

384. Having said that, at the time of writing, a bill is making its way through the Indiana legislature that would remove the private standing clause from the state's anti-sanctuary cities bill and entrust enforcement to the Attorney General. S. 178, 123d Gen. Assembly, Reg. Sess. (Ind. 2023).

would have to come from the limited toolbox available to judges contending with a legislative act.

As with any statute, state courts can limit statutory preemption standing in two ways: via constitutional review or statutory interpretation. A constitutional attack on preemption standing could be sweeping. The Kentucky Supreme Court, for example, held that the legislature's grant of preemption standing could not displace judge-made standing rules requiring an actual injury.³⁸⁵ As a consequence, it denied standing to a gun-rights group suing a city for policies allegedly preempted by a state statute bestowing preemption standing.³⁸⁶ While we might applaud the result, this decision (mirroring current federal standing doctrine) runs into concerns with judicial hegemony raised above – and this approach would fail doctrinally in states that (unlike current federal standing doctrine) find constitutional standing whenever the legislature creates a cause of action.³⁸⁷

State constitutions provide other bases to attack particular preemption standing laws, without questioning the legislature's general power to bestow standing. Poorly drafted preemption standing clauses (and the laws of which they form a part) might run afoul of some distinct requirements for valid legislation under a given state constitution.³⁸⁸ Some of the more spiteful preemption standing statutes could also perhaps be challenged under state constitutional prohibitions on special legislation – that is, legislation targeting specific municipalities.³⁸⁹ This sense of targeting might be particularly marked when the legislature sets its sights on a smaller city with limited resources incapable of funding litigation. Any such challenge, however, will face hurdles. Most courts read constitutional bans on special legislation very narrowly.³⁹⁰

385. *City of Pikeville v. Ky. Concealed Carry Coal., Inc.*, 671 S.W.3d 258, 266-67 (Ky. 2023) (interpreting the Kentucky Constitution's requirement for a concrete injury).

386. *Id.* While the Georgia court held that a similar statute could not create constitutional standing, in a case dealing with Confederate monuments, it held that plaintiffs could rely on taxpayer standing instead. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 880 S.E.2d 168, 171 (Ga. 2022).

387. *See, e.g., Hous. Auth. v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 941 (Pa. 1999) (“[I]f a statute properly enacted by the Pennsylvania legislature furnishes the authority for a party to proceed in Pennsylvania's courts, the fact that the party lacks standing under traditional notions of our jurisprudence will not be deemed a bar to an exercise of this Court's jurisdiction.”).

388. *See, e.g., Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 738-39 (Ariz. 2022) (striking down a statute banning mask requirements under single-subject and title requirements).

389. *See generally* GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 166 (6th ed. 2014).

390. Schragger, *supra* note 159, at 1221. Ohio is an exception. *See City of Canton v. State*, 766 N.E.2d 963, 967-68 (Ohio 2002).

Perhaps more promising are constitutional protections for the local political process. Under preemption standing, a plaintiff’s “injury” may be the mere adoption, or non-repeal, of some ordinance. The plaintiff’s complaint, therefore, is not against enforcement of a local law, but against the legislative process itself. Such challenges raise clear democratic concerns as their potential effect (and goal) is to chill elected officials. Hence, constitutional shields for the legislative process might come into play. Government-function immunity, for example, renders “discretionary” governmental functions immune from liability.³⁹¹ The adoption of an ordinance could, arguably, be viewed as such.³⁹² Constitutions also might provide legislative immunity shielding legislators from being sued for all actions taken in their lawmaking capacity.³⁹³ Federal and state protections for speech could be used to insulate individual city officials from suits grounded in their expression of support for preempted laws.³⁹⁴

Aside from the recourse to constitutional review, courts could also narrow preemption standing through statutory interpretation. For one example, the Nevada Supreme Court read a state statute barring cities and counties from regulating firearms (and granting preemption standing alongside liquidated damages against them) as not applying to regulations library districts adopt.³⁹⁵ More generally, and especially as litigation looks more and more punitive, there is an argument that courts should apply something like a rule of lenity to construe preemption’s scope narrowly.³⁹⁶ Announcing a rule of narrow construction limits preemption’s chilling effect. If a court said that only local actions clearly preempted will result in personal liability and one-way fee shifting, then perhaps local officials would be less concerned about taking actions that they are reasonably confident are permitted. Even before the current wave of new preemption, scholars interviewing local officials found that they were hesitant to take actions

391. *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990) (“[W]hen official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action.”).

392. *But see* *Fried v. State*, 355 So. 3d 899, 910 (Fla. 2023) (refusing to adopt this view).

393. Courts have read that immunity into the speech-and-debate clauses in both U.S. and state constitutions. *See* *Tenney v. Brandhove*, 341 U.S. 367, 372–75 (1951); *In re Perry*, 60 S.W.3d 857, 859 (Tex. 2001).

394. *See, e.g.,* *City of El Cenizo v. Texas*, 890 F.3d 164, 182 (5th Cir. 2018) (striking down a clause in an anti-sanctuary preemption law prohibiting local officials from “*endors[ing]* a policy,” (quoting TEX. GOV’T CODE ANN. § 752.053(a)(1) (West 2018) (emphasis added))).

395. *Flores v. Las Vegas-Clark Cnty. Libr. Dist.*, 432 P.3d 173, 173 (Nev. 2018) (concluding that the statute did not apply to library districts).

396. *See, e.g.,* *Bittner v. United States*, 598 U.S. 85, 101 (2023) (“Under the rule of lenity, this Court has long held, statutes imposing penalties are to be ‘construed strictly’ against the government and in favor of individuals.” (quoting *Comm’r v. Acker*, 361 U.S. 87, 91 (1959))).

likely within their power for fear that a court would still choose to interpret a preemption law broadly.³⁹⁷ A rule of narrow construction could help avoid this eventuality. Limiting the chilling effects with respect to actions that are not actually preempted by a statute, though seemingly an act of judicial supremacy, would be consistent with the actual text of the statute.

Additionally, courts can narrowly construe the class of plaintiffs that preemption statutes empower. Preemption standing clearly aims to supplement the regular procedure whereby a defendant charged under a preempted ordinance uses the state law as a defense. These new statutes imagine preemption as a sword, not just a shield. Still, it does not follow that basically anyone should be able to brandish that sword. The standard language preemption standing statutes apply to describe those who can sue is “[any] person . . . adversely affected by an[y] . . . ordinance.”³⁹⁸ The term “adversely affected” leaves much room for interpretation. Courts can interpret it as requiring that a plaintiff experience more than mere political displeasure or symbolic injury.

Courts can prioritize the enforcement of preemption laws by those actually injured by the preempted policy (or enforcement by the state itself) in other ways as well. They can make facial challenges more difficult. Where they have choices about sequencing or pacing litigation, they might prefer cases brought by individuals subject to the allegedly preempted law over facial challenges. We discussed courts’ special power to require security in derivative suits,³⁹⁹ but many courts also have general discretion to require security, which they could apply to these cases.⁴⁰⁰

In deciding when to resort to these various tools, courts should be informed by the normative considerations discussed earlier. Where preemption standing intervenes to level the economic or political playing field, or responds to a deficit in local governance, courts might apply a softer touch. For example, like the private attorney general model on which it is based, preemption standing might be necessary where the normal channels of ensuring that relevant actors (here, cities) abide by duly enacted laws (here, preemption laws) are practically or legally

397. See DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 9-12 (2004) (surveying Boston-area local officials).

398. *E.g.*, OHIO REV. CODE ANN. § 9.68(B) (West 2022); MISS. CODE ANN. § 45-9-53(5)(a) (West 2023); N.C. GEN. STAT. ANN. § 14-409.40(h) (West 2015); FLA. STAT. § 790.33(3)(f)(1) (West 2020).

399. See *supra* notes 325-328.

400. See, *e.g.*, Fed. R. Civ. P. 65(c) (providing rules regarding injunctive relief); MICH. R. CIV. P. 2.109 (allowing bond “if it appears reasonable and proper”).

blocked.⁴⁰¹ One such instance is the grant of general standing to enforce on cities state statutory requirements that all local government meetings be made open to the public.⁴⁰² A state official can hardly be expected to have access to information about each breach by any of the state's many local governments. They might also lack the motivation to pursue laws that tie the hands of other public officials. But we think these circumstances are unlikely to materialize when cities breach many of the new preemption laws. These laws' subject matter tends to be politically salient; municipalities violating them do so openly; and these statutes tend to be adopted in states with one-party control of state offices and highly mobilized interest groups.⁴⁰³ The economics of litigation and of the political process should ensure sufficient levels of enforcement, and thus courts should not feel compelled to refrain from employing the usual tools of constitutional analysis and statutory interpretation to limit private enforcement.

None of our suggestions for curbing preemption standing mean that the underlying preemption laws will not be enforced. The substantive preemption laws create a defense available to anyone against whom the offending ordinance is enforced. And even without broad standing, state actors such as the attorney general can sue to facially invalidate the local laws. Where it exists, the preemption claim against the city will still, in all likelihood, reach the court. But the subtle shift in enforcement we advocate is meaningful not just doctrinally, but normatively. The identity of those enforcing the laws matters – even if only in the long-term. It is important that the public be made aware of a state's intrusion into local affairs. Even citizens who support the political substance of a given preemption law might balk at state government interference. A gun rights supporter might have some qualms when the state sues the city to override a gun control policy adopted through the local political process – as she might realize that if political winds change, state power might turn against her locality and its decisions. Citizens should know that it is the state itself, not some individual or advocacy organization (whom they might otherwise support), seeking to disempower cities. Preemption standing should not enable the state to conceal the ever-present menace of its dominance. Particularly with respect to non-culture war issues (such as deregulatory preemption) where preemption statutes serve business interests, state interventionist tendencies might not be particularly

401. See, e.g., SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 214-15 (2010); Burbank, Farhang & Kritzer, *supra* note 153 at 662-64; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1410 (2000).

402. E.g., TEX. GOV'T CODE ANN. § 551.142 (West 2019).

403. Cf. Zachary D. Clopton, *Substance and Form in Vigilante Federalism*, 108 CORNELL L. REV. ONLINE 159, 166-67 (2023) (suggesting that states enact “vigilante federalism” laws, such as Texas’s SB-8, when there is a highly mobilized interest group).

salient to the average voter. Forcing the state itself to enforce these laws, rather than quietly subcontract the task to seemingly neutral, often little-observed, private actors might draw attention to these laws. Our suggestions will, at least hopefully, raise the profile of not only the preemption standing clauses but also of preemption laws themselves to ensure they are the subject of democratic control.⁴⁰⁴

CONCLUSION

Cities are not a main concern of civil procedure scholars. Standing rules are not a main concern of local government law scholars. But observing the standing rules for suing cities shines a new light on important stories both groups tell. It complicates the assumption that for private parties, suing governments in America is hard. Suing local governments is easy. It complicates the narrative that what is holding city power back in America is the law's partiality to state governments.⁴⁰⁵ The law's solicitude toward private suits against cities also tightly reins in city power. Civil procedure and local government law scholars should pay more attention, therefore, to the practice of suing cities.

At the same time, bringing the normative insights of both groups of scholars to bear on America's special regime for suing cities helps illuminate what is wrong with that regime – and how it can be improved. Suing has a role to play. Cities have a role to play. It is the task of the law to determine in which cases one is more important than the other. Hopefully, this Article aids in that mission.

404. *Cf.* *New York v. United States*, 505 U.S. 144, 169 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”). Sometimes these bills are intended to get attention, in which case our intervention would be more modest – just ensuring that the public understands how these provisions work and how they differ from more traditional private-enforcement statutes.

405. *See* Frug, *supra* note 268, at 1062-67; Barron, *supra* note 267, at 496-97.