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Rethinking Municipal Corporate Rights

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RETHINKING MUNICIPAL CORPORATE RIGHTS

HANNAH J. WISEMAN

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RETHINKING MUNICIPAL CORPORATE RIGHTS

HANNAH J. WISEMAN*

Abstract: In two seemingly antithetical trends, U.S. law increasingly recognizes corporate rights while denying similar rights in the municipal context. Although other corporate forms have celebrated major victories in the First Amendment context, courts have suggested that municipalities lack any constitutional rights, and states increasingly preempt local governments' abilities to address pressing societal concerns. Yet U.S. municipalities are, and have long been, corporations. The erosion of municipal power is problematic because cities' importance is growing.

Many accounts have bemoaned the lack of municipal rights in the context of weak local home rule authority, but this Article takes a different approach. It argues that there are many municipal rights in existing law, particularly if one extends the functionalist theory of the corporation to encompass municipal corporations. The legal justifications for corporate rights, such as contributing to the marketplace of ideas, vindicating individual preferences, and amplifying individual voices of their members, are often more applicable to the municipal corporation than other forms of corporations, yet many of these rights have not been extended to the municipal context.

This Article accordingly calls for enhanced attention to municipal corporate rights in the context of federalism and constitutional rights. The Article does not argue that municipal corporate rights should consistently trump legitimate state reasons for local preemption or that municipalities should be afforded all federal constitutional rights. Instead it argues that in preemption questions and constitutional rights cases, two functional considerations should play a central role in courts' analyses. First, courts should ask whether protecting the municipality against state preemption, or granting it protection under a federal constitutional right, would achieve the core purposes of intrastate federalism or the constitutional right. Second, courts should ask how these favorable outcomes for a municipality would help or harm the municipality's role, both as a government and a corporate provider of a city brand and services.

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INTRODUCTION

The right of natural persons to form associations is firmly embedded within U.S. governance, and associations have become immensely powerful and important entities.[1] They enable meaningful self-governance of groups with similar needs or goals, allow for coordinated investments in capital and services,[2] and can amplify individual beliefs within national and international debates.[3] For example, when banks refused to loan money to assault weapons manufacturers following a gruesome high school shooting in Florida, several members of Congress took note.[4] And after corporations pulled billions of dollars of investments out of North Carolina due to the state's transgender restrictions, other Republican governors refused to follow suit.[5]

There is a growing movement in U.S. law to more formally recognize the role of associations in modern life by giving them a stronger, more broadly defined legal status, and to give them rights of their own. The number and type of associations has grown—states now approve or even compel the formation of thousands of homeowners' associations that closely govern residential communities.[6] Different types of corporations and partnerships now abound,

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[1] *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1682 (2015) (noting that "from its earliest case considering the treatment of corporations under the Constitution, the [U.S. Supreme] Court saw the corporation as representing the identifiable group of people who had chosen to associate through the corporate form").

[2] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392–93 (2000) (describing the function of an organization in pooling assets).

[3] *See, e.g.*, Creek v. Vill. of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) ("To the extent, moreover, that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.").

[4] *See* Alan Rappeport, *Banks Tried to Curb Gun Sales. Now Republicans Are Trying to Stop Them.*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/politics/banks-gun-sales-republicans.html [https://perma.cc/JMH9-9K8R] (noting banks' restrictions on financing of gun sales and Republican lawmakers' threats to halt this practice of "social activism").

[5] *See, e.g.*, Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016), https://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/index.html [https://perma.cc/VGE9-KHEP] (reporting that South Dakota's Republican governor vetoed a similar transgender restrictions bill in the immediate wake of the North Carolina backlash); Camila Domonoske, *AP Calculates North Carolina's 'Bathroom Bill' Will Cost More Than $3.7 Billion*, (Mar. 27, 2017), https://www.npr.org/sections/thetwo-way/2017/03/27/521676772/ap-calculates-north-carolinas-bathroom-bill-will-cost-more-than-3-7-billion [https://perma.cc/YPD4-K6S2] (describing the estimated economic losses resulting from retaliation from businesses and sports organizations).

[6] *See* Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1120–22 (2007) (describing requirements for the formation of homeowners' associations). Many states also allow for the formation of "public benefit" and "social purpose" corporations, which may (or are required to) have a social component of their business, including, for example, considering impacts on employees, the community, and the

and a growing set of court opinions such as *Citizens United v. Federal Election Commission*[7] and *Burwell v. Hobby Lobby Stores*[8] grants constitutional and statutory rights to certain types of associations while emphasizing through dicta that these rights should extend more broadly. The associations at the heart of this Article are corporations, and the Article therefore refers specifically to "corporate rights."[9]

The movement toward corporate rights is by no means a universal good.[10] Indeed, this Article discusses the many flaws that pervade corporate rights doctrine. But current doctrine and the scholarly debate surrounding corporate rights largely exclude one of the most important forms of corporation—the incorporated local government, or "municipality."[11] Municipalities embody

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environment when they make business decisions. *See, e.g.*, Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 80, 84 (2017) (noting that in 2013, Delaware joined thirteen other states in allowing the creation of public benefit corporations, and that thirty-five states and the District of Columbia now have public benefit corporations statutes).

[7] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (reversing a district court's determination that federal restrictions on corporate-funded electioneering communications were constitutional).

[8] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–90, 736 (2014) (concluding that federal laws requiring closely-held corporations to provide health insurance coverage for contraceptives that violated company owners' "sincerely held religious beliefs" violated the Religious Freedom Restoration Act).

[9] *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS, at xvi (2018) (discussing the roots of corporate rights). There are both incorporated and unincorporated communities, but "incorporation" is an express choice by citizens to form an official local government that will exercise certain powers over citizens and provide certain public services. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73–74 (1990) (noting that "[i]n most states, general enabling legislation places municipal incorporation in the hands of local residents or landowners" and that municipal corporations wield police powers, provide public services, and "impose general taxes").

[10] *See, e.g.*, Blair & Pollman, *supra* note 1, at 1731–35 (observing that the Supreme Court, in expanding certain rights to corporations, has consistently relied on derivative liability—the idea that the corporation protects the rights of the natural persons who are its members—while failing to recognize that many of the various types of corporations do not actually represent a natural person, member, or group of members).

[11] *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 44 (1983) ("The beguiling symmetry inherent in the notion of treating municipal corporations and states (not to speak of the federal government) as the constitutional equivalents of private corporations has been rejected, albeit ambiguously, by the Supreme Court." (citing Williams v. Mayor, 289 U.S. 36 (1933))); Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 368 (2019) (noting that "according to a dominant doctrine, cities have to obtain permission from their states to engage in expressive (and other) activities" and are increasingly prohibited from doing so); Richard C. Schragger, Essay, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 67 (2018), https://www.virginialawreview.org/sites/virginialawreview.org/files/Schragger_Online.pdf [https://perma.cc/6ZAX-UHEN] (noting that although cities, individuals, and corporate bodies are all subject to state power, "[u]nlike individuals and corporations, the city does not generally enjoy countervailing property or constitutional rights"). As used here, the term "municipality" refers to a municipal corporation. Municipal corporations have two key attributes: they are incorporated, mean-

most, if not all, of the values championed by the corporate rights movement. With respect to furthering the purposes of rights, such as First Amendment rights, municipalities enhance the power of their individual members' voices,[12] provide meaningful representation of members' views—beyond the formal representation that municipalities provide as governments,[13] and contribute a valuable perspective to the marketplace of ideas.[14] In many ways, municipalities *better* match these types of values than do the corporations that have benefited from this movement, such as for-profit corporations.

Increasingly, municipalities do not just act as governments representing the views of their voting members. Like for-profit and nonprofit corporations, municipalities also project policy positions onto a larger stage by adopting a particular brand to influence the national debate and, sometimes, to attract certain types of residents or businesses.[15] Municipalities have promoted individual rights

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ing the state has approved a charter or other document that gives them a separate, independent existence as an association, and they are "public" in that they "exist for public political purposes," including administering "local civil government." CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 2 (1980). A simpler definition that combines and elaborates on these characteristics defines the municipal corporation as "a city, town or village governed by elected officers, having the power to tax, and possessing characteristics of local self-government in that it is without obligations to report its activities directly to the state government." *Id.* at 3. This Article sometimes uses the term "city" as shorthand for a municipal corporation; city, as used here, is meant to encompass municipal corporations of all sizes, including towns, villages, and boroughs (where boroughs are incorporated local governments, as opposed to mere subdivisions of a city). *Id.* at 5.

[12] *Vill. of Westhaven*, 80 F.3d at 193.

[13] This Article argues that all forms of corporations, including municipalities, increasingly represent at least a subset of their members' and consumers' views by taking national and international political stances—by, for example, boycotting states by pulling conferences and other planned events out of those states, signing high-profile letters objecting to certain policies, widely circulating these stances through social media, and collectively committing to social goals, such as reducing carbon emissions. *See, e.g.*, Andrew Ross Sorkin, *'Simply Unacceptable': Executives Demand Senate Action on Gun Violence*, N.Y. TIMES DEALBOOK (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/business/dealbook/gun-background-checks-business.html [https://perma.cc/V7QA-GBE8] (describing a letter from almost 150 CEOs demanding action on gun reform); *Who's in*, WE ARE STILL IN, https://www.wearestillin.com/signatories [https://perma.cc/928N-3PE3] (showing 2,856 businesses, cities, states, Native American tribes, and other entities that have agreed to meet the Paris Climate Agreement targets); *see also infra* notes 242–243 and accompanying text.

[14] *See* Blank, *supra* note 11, at 368 (arguing for a distinct speech right for cities because cities, collectively, represent a far more diverse range of cultural, ethnic, religious, economic, and other interests than do other levels of government; are at the front lines of a variety of pressing issues for which debate is important, including for example, social and economic issues; and are "small, nimble, and responsive" and thus able to "stir democratic civic engagement," among other reasons); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1117–19 (2007) (pointing to cities as a key contributor to innovative ideas). For a detailed description of cities' many directly expressive activities, see, e.g., Blank, *supra* note 11, at 367–68 (providing examples of local lobbying of state and federal representatives, support of or opposition to state referenda, placement of banners on city halls, and removing monuments, among other activities).

[15] For-profit corporations also project policy stances onto a national stage. Like cities attracting residents and businesses, they appear to do this in part to attract certain types of employees. *See, e.g.*,

movements by enacting powerful anti-discrimination laws[16] and allowing gay marriage, before state laws or the Supreme Court of the United States recognized these rights.[17] Some of the largest U.S. cities have minimum wage laws far more generous than the national minimum,[18] and more than 160 local governments, ranging from tiny towns to New York City, have elected sanctuary city status, in which they refuse to assist the government in arresting, detaining, and deporting immigrants.[19] And 229 municipalities, along with other types of corporations, and some states and tribes, have committed to implement the targets of the international climate agreement from which President Trump withdrew.[20] Indeed, when more than half of the states sued to challenge the validity of the federal Clean Power Plan limiting carbon emissions, several large cities within those states took the opposite position, intervening to defend the Plan.[21]

Although the most high-profile municipal efforts have tended to fall on the progressive side of the spectrum, some municipalities, speaking for residents with different political preferences, have pledged to assist the federal

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CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 247 (2014) (noting that by the 1960s, many businesses readily complied with the Civil Rights Act, "particularly in the larger cities," because "attracting non-Southern investment and workers had become a key part of civic economic strategies"); Open Letter from Undersigned Business Leaders to Patrick McCrory, Governor of North Carolina (undated), http://assets2.hrc.org/files/assets/resources/NC_CEO_Letter_(3).pdf [https://perma.cc/HN23-EA78] (criticizing the state's "bathroom bill," arguing that the bill "will make it far more challenging for businesses across the state to recruit and retain the nation's best and brightest workers and attract the most talented students from across the country").

[16] *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996) (describing the various anti-discrimination laws passed by Colorado municipalities to protect sexual orientation, which led to an amendment of the Colorado Constitution).

[17] *See* DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 1–4 (2006) (describing how the Republican clerk of Sandoval County, New Mexico, decided to issue marriage licenses to same-sex couples in February 2004, but was shut down a day later due to resistance from the Republican Party and county commissioners); *id.* at 19 (describing how in San Francisco, under orders from the mayor, officials began issuing marriage licenses to same-sex couples—an action later halted by the California Supreme Court); *id.* (noting similar actions by mayors, clerks, and other officials in New Paltz, New York, Portland, Oregon, and Asbury Park, New Jersey).

[18] RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 3 (2016) [hereinafter SCHRAGGER, CITY POWER]. *But see* Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1174–75 (2018) [hereinafter Schragger, *Attack on American Cities*] (noting that many states have preempted local minimum wage laws).

[19] Bryan Griffith & Jessica M. Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD. (Apr. 16, 2019), https://cis.org/Map-Sanctuary-Cities-Counties-and-States [https://perma.cc/A392-XWZW].

[20] *See* WE ARE STILL IN, *supra* note 13 (illustrating almost 3,000 businesses, cities, states, Native American tribes, and other entities that have committed to meet the Paris Climate Agreement goals).

[21] *See List of Supporters of the Clean Power Plan in Court*, ENVTL. DEF. FUND, https://www.edf.org/sites/default/files/content/list_of_supporters_of_the_clean_power_plan_in_court.pdf [https://perma.cc/T433-3FV6] (showing Houston and several Florida cities defending the Clean Power Plan).

government in immigrant deportation efforts[22] and have proposed "sanctuary cities" for gun rights.[23] Further, as both corporate actors and governments, municipalities offer an increasingly diverse array of services, infrastructure, and policies. Municipalities compete with other corporations to provide essential human services, such as education, sewer, drinking water, and electricity, often providing these services to residents who would have few other options for obtaining them.[24] Municipalities collectively spend only 16% less on public services than do all of the states, combined.[25] Further, large municipalities serve as hosts to the most significant economic growth in the United States, outcompeting many countries—and the majority of states—with respect to economic output.[26]

Municipalities have many of the statutory and constitutional rights needed to successfully continue their political and economic roles, as explored in this Article. But they have also been largely marginalized from the movement for enhanced corporate rights, and their authority to act is shrinking in important

[22] *See* Jennifer McEntee, *San Diego County Backs Trump Challenge to California 'Sanctuary' Law*, REUTERS (Apr. 17, 2018), https://www.reuters.com/article/us-usa-immigration-california/san-diego-county-backs-trump-challenge-to-california-sanctuary-law-idUSKBN1HO2XE [https://perma.cc/62VV-U7SN] (reporting on the San Diego Board of Advisor's vote to direct the county attorney to submit a friend of the court brief supporting President Trump's deportation policies).

[23] *See* Erik Lacitis, *Tiny City of Republic Delays Vote on Police Chief's Gun Sanctuary Proposal*, SEATTLE TIMES (Nov. 20, 2018), https://www.seattletimes.com/seattle-news/politics/tiny-town-of-republic-delays-vote-on-police-chiefs-gun-sanctuary-proposal/ [https://perma.cc/496J-4V46] (noting a town's proposal to refuse to enforce a state gun control law); *see also* Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) (noting that the majority of examples of state preemption of local law have involved conservative state governments preempting local progressive behavior).

[24] *See, e.g.*, Andrea Kopaskie, *Public vs. Private: A National Overview of Water Systems*, UNC SCH. GOV'T ENVTL. FIN. CTR. (Oct. 19, 2016), http://efc.web.unc.edu/2016/10/19/public-vs-private-a-national-overview-of-water-systems/ [https://perma.cc/T68R-XAKW] (finding that public water systems serve a majority of the residents in fifty out of fifty-two states and territories).

[25] *See* JEFFREY L. BARNETT ET AL., U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: FINANCE—STATE AND LOCAL GOVERNMENT SUMMARY REPORT 8 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/econ/summary-report.pdf [https://perma.cc/V2RH-ZWM7] (observing that in 2012, state governments spent a total of $1.98 billion on all public services, and local governments spent $1.66 billion). Several decades ago, local governments spent even more than state and federal governments. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS (ACIR), STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 6 (Apr. 1982), http://hdl.handle.net/2027/msu.31293016095329 [https://perma.cc/JT69-K8WJ] ("In FY 1977, 43% of all direct expenditures for domestic governmental purposes was made by local governments. The states accounted for 27% and the federal government for 30% of the total . . . .").

[26] *See* SCHRAGGER, CITY POWER, *supra* note 18, at 28–29 (noting municipalities' outsized contributions to the U.S. economy); Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 605 (2014) (noting that local governments "collect nearly a quarter of the nation's revenues").

respects.[27] States now regularly preempt city actions on issues ranging from climate change to gun control, plastic bag bans, regulation of hydraulic fracturing for oil and gas, and immigration.[28] In some cases, states substantially penalize cities and their officials for attempting to regulate in preempted areas. For example, Florida allows the governor to remove from office and fine local officials who enact gun control laws, and the state prohibits cities from funding these officials' defense, among other measures.[29]

Municipal corporate rights should not serve as an absolute or even consistent shield against preemption; there are many doctrinal, theoretical, and practical reasons for intrastate preemption.[30] But municipalities' important status as corporations that provide essential public services—particularly to people who otherwise would struggle to obtain those services—and project their citizens' views on an increasingly national and international platform needs explicit recognition. This dual status should factor prominently in the balancing tests that courts often deploy when deciding intrastate preemption questions.[31]

Beyond state preemption, in the context of federal constitutional rights, the Supreme Court has gone so far as to declare that a "private corporation enjoys constitutional protections, but a political subdivision, 'created by the state . . . has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'"[32] In an older case, *Trustees of Dartmouth College v. Woodward*, the Court similarly stated in dicta that although revocation of private corporations' charters could run afoul of the Contract Clause, for municipal corporations, the "legislature of the State may act according to its own judgment, unrestrained by any limitation of its power im-

[27] *See* WINKLER, *supra* note 9, at 389–94 (discussing a 2014 case in which corporate constitutional rights were pitted directly against municipal rights, and the corporation won); *supra* note 11 and accompanying text.

[28] *See, e.g.*, Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 407 (2017) (describing the expansive scope of preemption laws and providing examples of the subject areas preempted).

[29] *See id.* at 405 (explaining how this more aggressive approach to preemption is described as "maximum preemption" by political scientists). Legal scholars such as Richard Briffault define this approach as "new" and "punitive" preemption. States wholly block local governments from regulating in a particular area rather than simply providing a floor—above which local governments could regulate more stringently—or a ceiling—below which local governments could write less stringent rules. Further, these states do not take up governance of the preempted area at the state level, and in some cases, they provide direct punishment for officials and governments who attempt to disobey by promulgating or enforcing local laws in the preempted area. *See* Briffault, *supra* note 23, at 1999–2008 (defining and describing these new preemption categories).

[30] *See* discussion *infra* Part IV.B.

[31] *See* discussion *infra* Part IV.B.

[32] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009) (internal citation omitted) (quoting Williams v. Mayor of Baltimore, 289 U.S. 36 (1933)).

posed by the constitution of the United States."[33] Indeed, courts have been so staunch in their separation of the municipal corporation from business corporations that when a municipality purchases an enterprise previously operated by a business corporation and continues operating that enterprise, the protections that were previously afforded to that enterprise vis-à-vis the state immediately disappear.[34]

As with preemption, municipal corporate status should not mean that local governments should have all rights enjoyed by traditional corporations, or that local governments should be deemed to universally possess particular First Amendment or other constitutional rights. This, too, should be contextual—just as the application of constitutional rights to traditional for-profit corporations has been.

In summary, it is time to recognize the municipal corporation as a legal association—one worthy of the types of rights afforded to the diverse corporations that have recently received enhanced scholarly, statutory, and judicial attention. This recognition should apply in the context of intrastate preemption and constitutional rights, not as a definitive affirmance of municipal power, but as a meaningful factor that influences a court's analysis. Corporations have important differences. This is particularly true of the municipal corporation, which is both a public governing entity and a more traditional service- and goods-providing corporation.[35] Yet these differences do not justify the treatment of municipal corporations as entities devoid of any rights.

To argue that some corporate rights should extend to municipal activity, this Article combines a functional, or instrumentalist, approach to corporate rights[36] with an institutional approach.[37] Functionally, the Article argues that

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[33] U.S. CONST. art. I, § 10, cl. 1 (Contract Clause); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628, 630 (1819).

[34] *See* Trenton v. New Jersey, 262 U.S. 182, 184–85 (1923) (finding that "[t]he relations existing between the state and the water company were not the same as those between the state and the city[; t]he company was organized and carried on its business for pecuniary profit[, and i]ts rights and property were privately owned and therefore safeguarded by . . . constitutional provisions" such as the Contract Clause). Municipalities, however, received no such protections according to the Court. *Id.*

[35] *See, e.g.*, RHYNE, *supra* note 11, at 2–3 (describing the "public" municipal corporations as distinct from private corporations in that they "exist for public political purposes," and are "established primarily to regulate the local or internal affairs of the area incorporated, and secondarily to share in the civil government of the state in the particular locality" (quoting *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 699)); Schragger, *supra* note 11, at 67 (noting the dominance of the public-private distinction in corporate law, which treats "public" municipal corporations differently because these corporations are governments (essentially, subdivisions of states), and thus not viewed as having rights to be asserted against states).

[36] *See* Blair & Pollman, *supra* note 1, at 1735–38 (arguing for a dual derivate and instrumentalist approach to corporate rights, in which a corporation would have derivative rights of its members only if it could identify the member or group of members with that right, and the purpose of those members in forming the corporation related to that right, and an instrumentalist approach in which a corporation

municipal corporate rights are valuable if granting rights to the municipality would further the purpose of the right. Institutionally, these rights have even more merit if attaching them to municipal corporate action would further the legitimate *corporate* purposes of the municipality. These include creating and maintaining a particular brand to attract residents and businesses and providing important services and goods to resident "members" of the municipal corporation.[38] In the preemption context, courts should similarly ask whether preempting the local government would achieve the purposes of preemption, such as avoiding a "race to the bottom" in regulation, avoiding conflicting laws that impede business activity in the state, or ensuring regulation of externalities at the geographic scale on which those externalities fall.[39] Courts should also ask

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received a right if it would further the purpose of the right); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1671 (arguing that courts should "accord constitutional protections to corporations when it promotes the objectives of those protections").

[37] *See, e.g.*, David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1667 (2006) (explaining that the institutional rights theory looks to "the purpose and character of an institution to determine if it makes sense to extend to that institution a given right"); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 146–48 (2003) (describing how the institutionalist theory justifies corporate rights through the institutions' ability to perform "social functions").

[38] In emphasizing the "corporate" purposes of a municipality, this Article does not attempt to revive the old test in which courts ascertained municipal liability and rights based on whether the municipality was acting in its private or public capacity. *See, e.g.*, Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2019 (2000) (book review) (describing this public-private distinction); *see also infra* notes 213–214 (describing some of the cases that used this test). Rather, the Article emphasizes that beyond focusing on municipal home rule powers, courts should also acknowledge the many corporate purposes and functions of municipalities, many of which blend with their governmental purposes and functions. Indeed, there is a legitimate argument that *all* corporations have blended public and private functions. Even beyond the theoretical argument that corporations owe duties to the public, corporations are increasingly involved in the public policy sphere, arguing for particular laws, such as gun control and transgender rights, that do not relate directly to their businesses. *See, e.g.*, David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/3FCR-AEVA] (describing a letter from nearly 200 prominent CEOs arguing that corporations owe duties to the public on prominent national policy issues). In some cases, these corporations adopt controversial positions that might not represent the views of the majority of their shareholders or customers, just as municipalities speaking out in national policy debates do not necessarily channel the majority view of their residents and businesses. *See, e.g.*, Manish Dudharejia, *4 Branding Lessons from Nike's Colin Kaepernick Ad*, ENTREPRENEUR (Oct. 22, 2018), https://www.entrepreneur.com/article/321130 [https://perma.cc/U68L-GK2J] (noting that when Nike supported Colin Kaepernick, this was largely on the advice of a marketing director, and it was a risky move because the company had a contract with the NFL, which opposed Kaepernick's kneeling during the national anthem).

[39] These are the types of legitimate reasons for state preemption of local control that Richard Briffault and Richard Schragger have noted, as well as preventing local majorities from silencing important minority interests. *See* Briffault, *supra* note 23, at 2025 (noting "extralocal consequences of local actions; the burdens that can result from multiple and divergent local rules; and the scale at which economic, social, environmental, and other problems are handled"); Schragger, *supra* note 11,

whether preemption would limit the important municipal corporate objectives noted above, in addition to home rule powers.[40]

Take the example of a recent Texas preemptive statute that prohibited local governments from refusing to cooperate with federal immigration officials (such as by refusing to inquire about individuals' immigration status).[41] The statute also required local governments to help detain potentially illegal immigrants, and prohibited local officials from endorsing limits on immigration enforcement.[42] This was, in other words, a bill preempting local sanctuary city status—and one that is similar to bills enacted in many other states.[43] From the functionalist approach suggested here, a court reviewing this law should first ask whether recognizing municipal constitutional rights in this context would further the purposes of this right. For instance, if the First Amendment is designed to give speakers the right to speak, to give listeners the right to hear a variety of perspectives, and to enhance political debate, then prohibiting the endorsement of sanctuary city policies likely cuts against all of these purposes.[44] It limits cities' ability to speak, constrains the range of views on immigra-

at 65 ("The usual rationales for centralized regulation in any given case are the presence of externalities, the need for uniformity, and a concern about pathologies in the local political process that result in majoritarian oppression."). For an extensive discussion of the risks and challenges of decentralized control (such as state rather than federal control, or local rather than state control), see, e.g., David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 462–65 (2013) (summarizing the four typical arguments in favor of preemption); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12 (1977) (describing the "race to the bottom," in which decentralized entities compete to loosen regulatory standards to attract business).

[40] Home rule powers, although not determinative in many preemption cases, sometimes still sway courts to interpret potentially vague preemption in favor of the local government. For example, in *Wallach v. Town of Dryden*, the highest New York court found that express legislation that appeared to preempt local regulation of oil and gas did not preempt local *land* regulation of that development, noting that it does not "lightly" preempt home rule authority. 16 N.E.3d 1188, 1192, 1195–98 (N.Y. 2014). In other cases, home rule powers are determinative due to the wording of state constitutions. For example, in Colorado, if a local government acts within its home rule authority and addresses a matter of purely local concern, it may override conflicting state law. *See* City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 579 (Colo. 2016).

[41] *See* TEX. GOV'T CODE ANN. § 752.053 (West 2017).

[42] *See* City of El Cenizo v. Texas, 890 F.3d 164, 173–76 (5th Cir. 2018) (describing TEX. GOV'T CODE ANN. § 752.053, which provides that "a local entity may not 'adopt, enforce, or endorse a policy under which [it] prohibits or materially limits' immigration enforcement").

[43] Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839–40 (2019) (describing Texas's law, six other states with similar laws, and seventeen additional states that "have introduced or passed like-minded bills").

[44] For a focus on the First Amendment as fostering the dissemination of ideas for the benefit of the public, see *Citizens United*, 558 U.S. at 343 (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986)). The U.S. Court of Appeals for the Fifth Circuit, which invalidated only the "endorsement" portion of the statute, focused narrowly on the fact that speech by "elected officials" (in this case local elected officials) is subject to a strict scrutiny test and expressly found that similar re-

tion heard by the public, and similarly restricts debate on immigration issues by silencing one important voice in the debate. Local governments are important participants in the national immigration debate because local officials are often at the front lines of immigration issues. There are far more local than federal police, and local officials are often the first to respond to employment, housing, and social services issues that might ultimately trigger immigration enforcement questions.[45]

Next, a court should ask whether granting the municipality a First Amendment right in this context would further the legitimate purposes of the municipality as a corporation. In this case, prohibiting those who represent the city from voicing their opinions about federal immigration policy would impede all of these purposes. It would force cities to project a specific opinion on an issue that is central to their very brand and identity—the types of residents they will welcome and support—because it prohibits them from opposing federal efforts to identify individuals who might be illegal immigrants. Requiring cities to take a "tough-on-immigration" stance, again, might deter important business activity. It could, too, affect cities' ability to provide important public services if they were forced to devote more resources to assisting with federal immigration efforts. Requiring local support for a federal "tough-on-immigration" approach could also reduce community safety by deterring some individuals—particularly those fearing immigration enforcement—from reporting crimes.[46]

This is not to say that a court should definitively extend First Amendment protection to the municipality, although it should (and did) extend this protection to local officials who were unlawfully prohibited from speaking in favor of sanctuary city status.[47] But these functional considerations, considered together, should potentially lead a court to extend the right. The difficulty would, of course, arise in line drawing, as discussed in more detail in Part IV.[48] After all, nearly any municipal statute, whether it is a ban on plastic bags or a sanctuary city ordinance, could be viewed as "speech" projecting a particular city brand to potential residents and ensuring the provision of important public services to city "members" (residents).

Beyond the question of whether the city should possess a constitutional right that shields it from a particular law, courts also often face a direct

strictions on the employees of those officials would not violate the First Amendment. *El Cenizo*, 890 F.3d at 184–85.

[45] Gulasekaram et al., *supra* note 43, at 875.

[46] *See, e.g.*, *id.* at 839 (noting that a Travis County, Texas, sheriff focused on the importance of crime reporting in supporting sanctuary city status).

[47] *See El Cenizo*, 890 F.3d at 185.

[48] *See* discussion *infra* Part IV.

preemption question. In the preemption context—asking whether Texas should have preempted local governments from taking different stances on federal immigration policy—a court should ask whether preemption comported with the legitimate purposes of intrastate preemption and impeded core local government purposes. Here, again, the state might lose. If we assume, as introduced above, the states legitimately preempt local control to avoid inconsistent regulation that impedes inter-city commerce and address externalities that flow beyond local borders, among other purposes, it is not clear that preemption should trump local government purposes in this context. Requiring consistent local cooperation with federal immigration enforcement efforts might chill important statewide business activity—activity that takes place within individual cities—if businesses feared that even legal employees who spoke a certain way or had a particular type of appearance might be questioned and intimidated by police. The issue of extra-municipal externalities is more complex. The State of Texas likely has an interest in addressing the many effects of immigration policy that extend beyond local borders. But this is more of a national than a state-level concern. And although regulating immigration enforcement at a larger scale would certainly help the federal government by forcing local officials throughout the state to assist with its efforts, the federal government could not have issued this requirement, as it likely would have violated the anticommandeering provision implicit in the Constitution.[49] Indeed, some scholars have suggested that in this context there might be something akin to a local right against state commandeering.[50] This is not to say that the Texas bill should definitively be struck down as invalid preemption. But when courts are interpreting preemptive language that is not entirely clear—as they often do—focusing more closely on both the purposes of intrastate preemption and of local corporations might tip the balance in favor of local control.

Municipal rights, as asserted under the Constitution or as a shield against preemption, are by no means a universal good, and those who argue for enhanced local control—as I do here—must swallow the bitter with the sweet. Yet given the positive role that traditional corporations can play, both for

[49] Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 RUTGERS U. L. REV. 1553, 1571–72 (2017) (describing how the anti-commandeering doctrine, implicit in the Tenth Amendment, prohibits the federal government from forcing states, or state officials, to enact its policies).

[50] Gulasekaram et al., *supra* note 43, at 860. The fact that states may not voluntarily accede to federal commandeering might be an even more persuasive argument for local protection against state efforts, like Texas's immigration legislation, that effectively require local officials to carry out federal immigration directives. *See* New York v. United States, 505 U.S. 144, 167, 182 (1992) (noting in an anti-commandeering case that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials").

members of the corporation and society at large, the drawbacks do not justify a denial of all corporate rights, as has typically occurred for municipalities.

Part I of this Article introduces the rights of business corporations, the rights of municipal corporations, the critical corporate role of municipalities, and the rights that municipalities possess and lack in association with this role.[51] Parts II and III address these issues in more depth, framing the municipality as an essential corporate actor worthy of many of the rights recently afforded to business corporations.[52] Specifically, Part II defines the association and argues that the municipal corporation seamlessly fits within this definition, and not just as a formalistic matter.[53] Building from this definitional argument, Part III analyzes the role and purpose of corporations as defined by theory and legal doctrine and argues that municipalities better encompass many of the positive traits typically attributed to corporations than do many other forms of corporation that currently enjoy an enhanced legal status.[54] In exploring corporate purpose, Part III also documents how U.S. law has tended to thwart certain municipal corporate rights in particular, in large part due to its treatment of municipalities as a governmental arm of the state devoid of any rights. Finally, Part IV explores how courts should contextually extend certain corporate rights to the municipal corporation, both in preemption and constitutional rights cases.[55] Given the failure of many local empowerment proposals to gain much traction in the policy sphere, extending aspects of existing corporate rights to the municipal corporation may be the most meaningful way to provide the tools that local governments need to fulfill their modern corporate role. It may also be a rational step in light of a growing body of rights and obligations that now attach to a diverse array of corporations.

I. RIGHTS THAT CITIES NEED AND LACK

The issue of whether municipal corporations should be afforded the same rights as other corporations, such as for-profit entities, is nearly as old as the U.S. municipal corporation itself. Indeed, courts addressing local subdivisions' powers in the colonies struggled to determine which local governments were corporations and which rights they had. For example, in New York, New York City was the only incorporated local subdivision (a "borough") in the early 1800s; unincorporated towns, counties, and cities did most of the governing.[56]

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[51] *See* discussion *infra* Part I.

[52] *See* discussion *infra* Parts II & III.

[53] *See* discussion *infra* Part II.

[54] *See* discussion *infra* Part III.

[55] *See* discussion *infra* Part IV.

[56] Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 396–98 (1985).

Under English law, unincorporated local units lacked important powers, such as the power to own property and to sue and be sued, without direct legislative action.[57] Yet New York towns, counties, and cities needed these rights to fulfill their responsibilities as powerful governments, and courts struggled to find ways to give them these rights without departing from English law.[58] In Massachusetts, courts addressed this issue differently. Massachusetts laws gave unincorporated governments specific powers, and eventually, the courts simply developed a new description to cover governments that lacked a corporate charter yet possessed powers, calling them "quasi" or "municipal" corporations.[59] Many modern local governments are now chartered, but the term stuck; chartered, incorporated local governments are commonly described as municipal corporations.[60]

Scholarly accounts, too, have long debated the nature, extent, and advisability of municipal rights, but often not through a corporate lens. Within the political science and legal literatures, there have long been calls to change the current legal structure to give local governments more power.[61] Many scholars and policymakers have focused on expanding or reinterpreting cities' home rule authority, which arises from state constitutions and statutes, and gives local governments some self-governing powers that are not as easily removed by the state.[62] But the limits of home rule authority have been widely noted[63] and

[57] *Id.* at 401–02.

[58] *Id.* at 395–409.

[59] *Id.* at 405–06; *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 38 (1999) (noting that colonial towns and cities were treated as "quasi-corporation[s]," because, like other corporations, they wielded rights as a group yet were also "bodies politic").

[60] *See, e.g.*, RHYNE, *supra* note 11, at 3 (noting that "the term 'municipal corporation' or 'municipality' is usually applied to incorporated cities, towns and villages having subordinate and local powers of legislation").

[61] *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 211–25 (2008) (arguing that states should expand local control in areas such as revenues, land use, and education, and should do so with the intent of enhancing local governments' ability to band together with other local governments to create new, empowered regional institutions); DOROTHY HOLLAND ET AL., LOCAL DEMOCRACY UNDER SIEGE: ACTIVISM, PUBLIC INTERESTS, AND PRIVATE POLITICS 195–98 (2007) (arguing for "empowered participatory governance," which would involve states recognizing and not preempting local decision making).

[62] *See, e.g.*, FRUG & BARRON, *supra* note 61, at 211–25 (arguing for a broader understanding of local power); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2257 (2003) (examining the importance of strong home rule in the context of combatting urban sprawl).

[63] *See, e.g.*, SCHRAGGER, CITY POWER, *supra* note 18, at 63 (arguing that "the shift from Dillon's Rule to home rule . . . did not change the fundamental relationship of subordination between cities and their states"); Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1077–81 (2017) (arguing for stronger constitutional home rule, which immunizes local governments from state preemption of certain actions); Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181 (2017) (arguing that for home rule to be meaningful and powerful again, a concerted and organized effort by cities to assert home rule authority would be necessary). *But see* Robert C. Ellickson, *Cities and Homeowners Asso-*

much of the work that cities do now, both functionally and politically, has impacts far beyond city limits, thus falling outside of home rule authority.[64] Other accounts have argued for a wholesale rethinking of the limits on local authority, including, for example, empowering cities to participate in regional governance networks[65] and recognizing cities as "democratically responsive, politically autonomous" entities.[66] Further, a small but important line of legal scholarship, which this Article builds from, has argued for specific legal rights for municipalities, most commonly focusing on constitutional—particularly First Amendment—rights.[67]

This Part focuses on cities' rights in a corporate context.[68] It explores the rights that traditional corporations, such as for-profit and nonprofit corporations, possess, and those that municipal corporations possess and lack.[69] It then

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ciations, 130 U. PA. L. REV. 1519, 1570–71 (1982) (arguing that cities have relatively broad powers under home rule and courts' recent interpretation of city powers under state constitutions and federal law).

[64] For example, cities' attempts to regulate the environmental impacts of industry, such as oil and gas drilling and associated hydraulic fracturing or "fracking," have been deemed to fall outside of their home rule powers. *See Colo. Oil & Gas Ass'n*, 369 P.3d at 579–81 (noting that fracking extends to formations that underlie several jurisdictions and affects national industries).

[65] *See* FRUG, *supra* note 59, at 85–86 ("One possibility [for empowering cities] would be to shift the power to define the legal authority of a metropolitan region's cities from the state government to a regional legislature.").

[66] SCHRAGGER, CITY POWER, *supra* note 18, at 77.

[67] *See* YUDOF, *supra* note 11 (examining the promise and dangers of protecting governmental speech under the First Amendment); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Fagundes, *supra* note 37, at 1637; Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. REV. 1 (2012) (calling for the Supreme Court to overturn the Hunter Rule, which prohibits local governments from claiming constitutional protections against their own state). Richard Briffault explores a variety of actual and potential arguments for municipal legal rights, based in both the Constitution and state law, in the context of combatting "punitive preemption," which "impose[s] harsh penalties on local officials or governments simply for having [state-preempted] measures on their books," "nuclear preemption," in which local governments may not regulate at all absent "affirmative state authorization," and "new preemption," which displaces "local action without replacing it with substantive state requirements." *See* Briffault, *supra* note 23, at 1997 (exploring actual and potential constitutional and state law challenges to new preemption, such as Florida's allowance for removal and fining of local officials who promulgate gun control laws). Josh Bendor discusses limited constitutional restraints on states attempting to wield power over municipalities—embedded within individual rights and the Supremacy Clause—as well as independent constitutional rights that municipalities might wield, including First Amendment rights, property rights protected by the Takings Clause, and Due Process and Equal Protection rights vis-à-vis other cities. Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 419–30 (2013). In exploring potential constitutional and statutory arguments to combat the "new preemption" of cities, including First Amendment rights, Richard Briffault notes in passing *Citizens United*. Briffault, *supra* note 23, at 17.

[68] *See* discussion *infra* Part I.

[69] *See* discussion *infra* Parts I.A & B.

explores theories that have been used to justify the rights of traditional corporations.[70]

A. The Current Status of Rights Held by Business Corporations and Municipal Corporations

Courts have determined that for-profit and nonprofit corporations possess a wide range of rights. Under the Fourth Amendment they are protected against "warrantless regulatory searches."[71] Under the Fifth and Fourteenth Amendments they have liberty interests protected by the due process clause (in the form of their reputation, for example),[72] and traditional corporations also avoid double jeopardy under the Fifth Amendment.[73] Corporations also have a right to trial by jury, although some scholars view this as an unsettled matter.[74] And, as much of the literature has recently described, corporations have certain speech rights, and the right "not to speak or be associated with speech of others."[75] They may sue both individuals and the government; in the governmental realm, corporations count as "persons" under many statutory provisions that give citizens a claim against agencies for failing to perform a nondiscretionary duty.[76] Business corporations are also free of many constitutional restrictions by virtue of their "private status."[77] On the flip side, corporations may be sued, and they lack the sovereign immunity enjoyed by city officials in some contexts.[78]

Cities, too, enjoy some of these rights—indeed, some rights they do not even need due to protections they already enjoy in light of their "public sta-

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[70] *See* discussion *infra* Part I.C.

[71] Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 608 (1990).

[72] *Id.* at 618 (citing Old Dominion Dairy Prods. v. Sec'y of Def., 631 F.2d 953 (D.C. Cir. 1980)); *see also* S. Macomb Disposal Auth. v. Washington, 790 F.2d 500, 503 (6th Cir. 1986) (finding that "[a] private corporation is clearly a 'person' within the meaning of the Equal Protection and Due Process Clauses").

[73] Pollman, *supra* note 36, at 1656.

[74] *See* Mayer, *supra* note 71, at 665 (listing as a corporate right the "Right to Jury Trial in Criminal Case[s]" (citing Armour Packing Co. v. United States, 209 U.S. 56 (1908) and United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971))); Pollman, *supra* note 36, at 1656 (describing the right as "arguable" (citing Ross v. Bernhard, 396 U.S. 531, 532–34 (1970))).

[75] Pollman, *supra* note 36, at 1657.

[76] Nonprofit corporations routinely sue agencies for failures to perform nondiscretionary duties, but other corporations, too, may and do sue. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 164–67 (1997) (allowing irrigation districts to sue as a "person" under the Endangered Species Act); Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1354 (9th Cir. 1978) (allowing a corporation to raise the claim but finding the lack of a mandatory agency duty).

[77] Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1449 (1982).

[78] *Id.*

tus." For example, cities, unlike private corporations, are not generally subject to criminal prosecutions and thus do not need shields against double jeopardy or a right to trial by jury.[79] With respect to constitutional rights that municipalities enjoy, in limited circumstances, cities are "persons" under the Fifth and Fourteenth Amendments for the purposes of procedural due process—such as asserting claims against neighboring states rather than their parent states.[80] Cities may also sue federal agencies for a failure to perform a nondiscretionary duty.[81] Municipal utilities can and do enter into contracts necessary to purchase goods like natural gas or electricity to provide to their resident customers, and, naturally, they can and do sue to enforce these contracts.[82] Indeed, courts have confirmed that municipalities can be "injured in fact" when, for example, they are forced to pay money under a contract.[83] And cities may sue the federal government or state governments for an unconstitutional taking of private property when, say, a government takes municipal land for a flood control project.[84]

Further, those subject to the power of municipalities have reciprocal rights. Customers of municipal utilities can sue municipalities to enforce rights against these businesses, just as they can sue a private corporation.[85] And cities

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[79] *See* Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1201–13 (1994) (describing how municipalities were historically subject to state criminal prosecutions but noting there have been no prosecutions of municipalities since 1975). There are persuasive arguments for making cities—and not just their officers—criminally liable, just as private corporations are. *See, e.g.*, *id.* at 1198–99 (arguing that cities should be criminally liable for official policies that cause their officers to be criminally liable).

[80] Michael A. Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 109 (2002).

[81] *See, e.g.*, City of Olmstead Falls v. U.S. EPA, 233 F. Supp. 2d 890, 904 (N.D. Ohio 2002) (finding that the agency's action was discretionary, but not challenging the city's ability to raise a claim that the agency failed to perform a nondiscretionary duty).

[82] *See, e.g.*, Transmission Agency of N. Cal. v. Fed. Energy Reg. Comm'n, 495 F.3d 663, 663 (D.C. Cir. 2007) (confirming that a municipal utility had standing to challenge a federal order requiring the utility to return to a transmission line operator some of the money it had received for generators' use of its city-owned electricity transmission lines); Fla. Mun. Power Agency v. Fla. Power & Light Co., 81 F. Supp. 2d 1313, 1313 (M.D. Fla. 1999) (showing that a municipal utility can successfully sue as a third-party beneficiary to a contract).

[83] *See Transmission Agency*, 495 F.3d at 670 (showing that the utility was forced to return payments under a contract ultimately enforced by the Federal Energy Regulatory Commission).

[84] United States v. 50 Acres of Land, 469 U.S. 24 (1984).

[85] *See, e.g.*, Pilchen v. City of Auburn, 728 F. Supp. 2d 192 (N.D.N.Y 2010) (ruling that the city's requirement that a tenant pay for water services when his or her landlord fails to pay for them violated due process and equal protection); Bridges v. Veolia Water Indianapolis, 978 N.E.2d 447, 456–57 (Ind. Ct. App. 2012) (recognizing a suit against a municipality and the contractor company that allegedly unlawfully disconnected a customer's water, but requiring the customer to first exhaust administrative remedies).

and their officials, as public entities, are also subject to constitutional claims under 42 U.S.C. § 1983, provided qualified immunity does not apply.[86]

To some degree, cities and city officials also have the rights that they need to represent the political and cultural views of their constituents, to project their own and their residents' opinions on the national and international stages, and to create the type of atmosphere that they have promised for their residents, such as a safe, "green," family-friendly, dog-loving, or adventure-filled place. Cities may, if not preempted, exclude certain types of activity or businesses through land use regulation[87] and promulgate sweeping political measures such as progressive minimum wage laws.[88] To protect their citizens from federally and state-approved activities deemed harmful to their jurisdiction, cities may petition administrative agencies when they disagree with an action of that agency, such as approving a nuclear power plant.[89] And in some cases they may contribute funds to support or oppose state referenda, including referenda that might affect city interests,[90] although in other cases they are restricted from doing so.[91] In a case largely antithetical to *Citizens United*, the Supreme Judicial Court of Massachusetts held that, pursuant to a state statute, municipal political fundraising or expenditures to influence state elections were impermissible.[92] The court noted that "traditionally municipalities have not appropriated funds to influence election results."[93] But in a slight nod to First Amendment rights for municipalities, the Fifth Circuit Court of Appeals has narrowly held that cities' elected officials—simply because they are elected officials (not local ones)—may not be forced to take certain political posi-

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[86] *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978) (establishing that city officials may be sued under Section 1983); *Pilchen*, 728 F. Supp. 2d at 201, 204 (showing a successful suit against a city under Section 1983).

[87] *See, e.g.*, *Wallach*, 16 N.E.3d at 1203 (finding that despite express preemption of local control over hydraulic fracturing for natural gas, local governments retained land use powers to ban fracking within their jurisdictions).

[88] SCHRAGGER, CITY POWER, *supra* note 18, at 3.

[89] *See* Cty. of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual. The right to petition administrative agencies is a basic First Amendment right" (internal citations omitted)).

[90] *See* Anderson v. City of Boston, 380 N.E.2d 628, 639 (Mass. 1978) ("[T]he Commonwealth has no right to restrict [municipal actions supporting a state referendum proposal] where there is no opposition from any affected citizen . . . ."); Harold Hongju Koh, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 541 (1980) ("*Buckley*'s reasoning implies that a city's political speech includes its expenditures to express views on political issues.").

[91] *Anderson*, 380 N.E.2d at 639–40.

[92] *See Citizens United*, 558 U.S. at 372 (protecting corporate speech rights in funding independent communications supporting or opposing political candidates).

[93] *Anderson*, 380 N.E.2d at 634.

tions, such as supporting the federal government when it asks for voluntary local assistance with immigration enforcement.[94]

Cities and city officials may also take significant steps to create a particular type of political or cultural atmosphere and project their views through proprietary actions. For example, they may purchase electric vehicles for their fleet of city buses and maintenance trucks[95] or commit to purchasing and generating one hundred percent of their power from renewable energy sources.[96] Finally, cities may vindicate certain preferences and political stances through litigation, as they have done on issues ranging from climate change to flawed bank lending practices, and as noted above in this Section.[97] But these rights are not adequate to fill cities' growing role, as discussed in the following Section.[98]

B. Growing Obstacles to City Rights

Cities' ability to act as both functional and political actors is increasingly limited. One scholar observed that "[a] city is the only collective body in America that cannot do something simply because it decides to do it."[99] Unlike churches, unions, traditional for-profit corporations, and similar associations, cities lack the "power to do what they want unless prohibited by state law."[100] Although the rights described in Section A of this Part give cities important tools to act like other corporate forms by attracting resident "investors" and meeting the demands of these investors, municipalities still lack certain rights enjoyed by other corporations including, so far, a First Amendment right directly recognized by the Supreme Court. And state preemption has prevented local governments from acting in a growing number of areas in which other corporations enjoy relative freedom to act.[101] Indeed, in a stark example of cities' growing powerless-

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[94] *El Cenizo*, 890 F.3d at 183–84.

[95] *See, e.g.*, Jason Plautz, *Dallas Deploys Electric Bus Fleet*, SMART CITIES DIVE (July 13, 2018), https://www.smartcitiesdive.com/news/dallas-deploys-electric-bus-fleet/527707 [https://perma.cc/9GRV-PUJZ].

[96] *See* HEATHER PAYNE ET AL., TRANSITIONING TO A LOWER-CARBON ENERGY FUTURE: CHALLENGES AND OPPORTUNITIES FOR MUNICIPAL UTILITIES AND ELECTRIC COOPERATIVES, UNC CTR. FOR CLIMATE, ENERGY, ENV'T & ECON. 7 (2018), https://law.unc.edu/wp-content/uploads/2019/09/fsuuncmuni.pdf [https://perma.cc/K63K-SZEP] (describing Austin, Texas, which is working toward obtaining all energy from renewable energy sources by 2050).

[97] *See* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018); *see also* discussion *supra* Part I.A.

[98] *See* discussion *infra* Part I.B.

[99] FRUG, *supra* note 59, at 5.

[100] *Id.*

[101] *See* Schragger, *Attack on American Cities*, *supra* note 18, at 1164–67 (describing how states increasingly use preemption to block municipal authority in areas ranging from the provision of broadband to prohibiting local preferences for contractors who hire a minimum number of local residents).

ness, Richard Schragger has documented Charlottesville, Virginia's inability to remove a confederate-era statue or prevent white supremacist protesters from wielding intimidating weaponry on city streets, such as maces and torches.[102] A corporate headquarters faces few such obstacles, even in the wake of state "guns everywhere" and open-carry legislation.[103]

There are often good reasons for placing constraints on cities but not other types of corporations. Because cities wield a form of coercive power that most other corporations do not—over residents who do not "choose" to live within the jurisdiction but rather are stuck there—constitutional rights and other limitations should protect these residents.[104] And federalism concerns associated with allowing a patchwork of conflicting regulations that could impede efficient economic development, or could inadequately regulate this development under a "race to the bottom," are serious ones.[105]

The drawbacks of local governmental authority, as well as legitimate but solvable federalism concerns, should not lead to the extreme position increasingly taken by states that aggressively preempt local control. Indeed, municipal rights could have limits that would protect against incursions into residents' individual rights. And states could and sometimes have placed reasonable boundaries on local governments' regulations, thus allowing some local control while preventing a patchwork of conflicting laws.[106] For concerns about a "race to the bottom," in which local governments issue inadequately stringent laws to attract industry, states can and sometimes do simply place a "floor" on regulation, allowing only local regulations that are more protective than the state floor.[107] But despite these options, local rights are increasingly eliminated altogether, or dismissed as nonexistent.

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[102] Schragger, *supra* note 11, at 59–60.

[103] *See, e.g.*, Christine M. Quinn, Note, *Reforming State Laws on How Businesses Can Ban Guns: "No Guns" Signs, Property Rights, and the First Amendment*, 50 U. MICH. J.L. REFORM 955, 957–62 (2017) (cataloguing numerous state laws requiring guns to be allowed in bars, nightclubs, and other business establishments but describing the case law that still generally protects businesses' right to exclude weapons from their private property, albeit with some limitations (for example, requiring businesses to allow guns in parking lots)).

[104] Additionally, as noted in Part IV, many residents do not join municipalities for expressive reasons. *But see generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008) (observing that increasingly, people living in the United States tend to move to areas with like-minded people).

[105] *See* Stewart, *supra* note 39, at 1211–12 (exploring the trend of municipal deregulation to attract potential businesses).

[106] *See, e.g.*, WIS. ADMIN. CODE PSC § 128 (2012) (showing preemption of local wind energy regulations, which still leaves room for local regulation and specifies its allowed contours, thus avoiding a patchwork of conflicting regulation while still giving local governments some control over safety and aesthetic concerns).

[107] *See generally, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (describing regulatory floors); Dave Owen,

With respect to economic limits on city rights, states define the taxes that cities may or may not levy, and they regularly cap or otherwise constrain these taxes and the debt that cities may incur.[108] Some states retain the right to inspect and even reject local budgets.[109] And in the face of crippling debt, a majority of states restrict municipalities from restructuring their own debts.[110]

Policywise, states impact local governments' decision-making authority on nearly every front. At the extreme, states sometimes abolish certain local governments or force them to merge. For example, Indiana's legislature forced Indianapolis and Marion County to merge without offering any input from citizens through a mechanism such as a referendum.[111] Somewhat close to this extreme, states like Florida, Oklahoma, and Texas have considered but not passed bills that would involve "nuclear preemption"—wholly prohibiting local governments from regulating in a policy area, such as business or private property.[112] Oklahoma's proposed bill was the broadest; it would have prohibited local governments from regulating in any state-regulated policy area without the express authorization of the state.[113]

Beyond attempts to preempt numerous policy areas, the use of punitive preemption is expanding. This occurs when states fine, remove from office, or otherwise punish local officials and cities who vote to enact laws preempted by the state.[114] In Arizona, for example, if the state determines that a local government is operating in any preempted area, the state withholds any "state shared monies" from that municipality.[115] Like Florida, Arizona also punishes local governments for promulgating laws on gun control, a specifically preempted area, although its $50,000 fine is steeper than Florida's $5,000 penalty.[116] Other

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Cooperative Subfederalism, 9 U.C. IRVINE L. REV. 177 (2018) (observing that cooperative federalism exists in the state-local context).

[108] *See* ACIR, *supra* note 25, at 152 (noting that states "decide what revenue sources local governments can use" and also exercise heightened control over municipal debt); FRUG & BARRON, *supra* note 61, at 86 (noting that "even the cities empowered to impose income or occupation taxes remain subject to extensive state regulation" because states cap local taxes that may be charged); Erin Scharff, *Preemption and Fiscal Authority*, 45 FORDHAM URB. L.J. 1270, 1273, 1277 (2018) (noting state limits on "local governments' abilities both to tax and to borrow" and that "state law restricts municipal authority over fiscal affairs more than it does in other policy areas").

[109] ACIR, *supra* note 25, at 152.

[110] *See* Samir D. Parikh & Zhaochen He, *Failing Cities and the Red Queen Phenomenon*, 58 B.C. L. REV. 599, 601–02 (2017) (highlighting how municipalities lack adequate power to restructure their finances, thus sometimes causing their economic demise).

[111] ACIR, *supra* note 25, at 152.

[112] Briffault, *supra* note 23, at 2007–08.

[113] *Id.* at 2007.

[114] *Id.* at 2002–06.

[115] *Id.* at 2005 (citing ARIZ. REV. STAT. ANN. § 41-194.01 (2018)).

[116] *Id.* at 2004–05 (citing ARIZ. REV. STAT. ANN. § 13-3108(I) (2018)).

states have considered similar punitive preemptive efforts in the immigration space.[117]

Beyond these "nuclear" and "punitive" preemptive measures, states are simply preempting local government action in more substantive areas, and simultaneously preempting these areas more broadly. States have preempted local regulation of hydraulic fracturing, anti-discrimination laws, minimum wage and workers' rights provisions, plastic bag bans, and ride-sharing safety, among many other local laws.[118]

Alongside the increasing breadth of state preemption, courts have also denied municipal rights altogether. The Supreme Court has gone so far as to state that a municipality, as opposed to a private corporation, has "no privileges or immunities under the federal constitution" as asserted against states.[119] And the Court in *Hunter v. City of Pittsburgh* declared that a state "at its pleasure, may modify or withdraw *all*" municipal powers and thus is "unrestrained by any provision of the Constitution of the United States."[120] The Court accordingly asserted that municipalities lack any constitutional rights. As one scholar notes, this language, "if taken seriously, would appear to foreclose any serious contention that the Federal Constitution protects a measure of local governmental freedom from state control."[121] Other cases reach similar conclusions. In the First Amendment context, the majority of courts that have addressed whether municipalities have First Amendment rights have answered the question in the negative.[122] The Supreme Court has determined that "[t]he First Amendment protects

[117] *See* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1498–99 (2018) (describing proposed bills in eight states that would penalize local governments for adopting sanctuary city legislation).

[118] *See* Briffault, *supra* note 23, at 2000 (noting states' preemption of local efforts to address food deserts and other nutrition challenges as well as local regulation of "pesticides, tobacco products, e-cigarettes, factory farms, and fire sprinkler installation in new homes," among other preemptive measures); Scharff, *supra* note 117, at 1484 (noting similar preempted areas and providing additional examples, such as preemption of local regulation of factory farming and requirements for paid sick days); Schragger, *Attack on American Cities*, *supra* note 18, at 1173 (exploring the various areas preempted by states).

[119] *Ysursa*, 555 U.S. at 363. Business corporations also lack privileges and immunities protection, but the *Ysursa* language referred to all constitutional privileges—not just the Privileges and Immunities Clause.

[120] 207 U.S. 161, 178–79 (1907) (emphasis added). This could, of course, simply be a statement of federalism principles. But it goes further. The Court here does not simply imply that states may preempt local control or even dissolve local governments; it also expressly asserts municipalities' lack of constitutional rights. *See id.* ("The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.").

[121] Barron, *supra* note 67, at 562.

[122] Fagundes, *supra* note 37, at 1641–43.

the press from governmental interference; it confers no analogous protection on the Government,"[123] and other courts have tended to follow suit.[124]

C. Theories Justifying Non-Municipal Corporate Rights

Theories that explain the reasons for the existence of private (non-municipal) corporations—and the rights they deserve—are as abundant and varied as the modern forms and types of corporations. Many are primarily economic in their orientation, focusing on the nature and meaning of the "firm" in terms of its efficiency and efficacy for organizing and managing resources over time. Following economists' development of the theory of the firm in the 1920s and 1930s, the legal literature picked up the concept, although it did not flourish in the literature until the late 1970s and beyond.[125] Under this approach, the firm exists for functional economic reasons—that is to organize the "suppliers of factors of production" and associated contracts within a central entity, thus lowering the transaction costs of production.[126] A large body of this literature follows a "nexus of contracts" theory, focusing specifically on the delegation of contracting authority to a third party (the corporation), thereby freeing each member from having to individually contract for services, goods, and the like.[127]

In another functionalist approach to the firm, which centrally draws on issues of liability, Henry Hansmann and Reinier Kraakman argue that the key

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[123] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (emphasis omitted).

[124] Fagundes, *supra* note 37, at 1643 (noting that the *Colombia Broadcasting* reasoning has been followed in subsequent cases, though not examined in close detail). *But see El Cenizo*, 890 F.3d at 184 (providing for very narrow protection of elected officials' speech rights, including local elected officials).

[125] *See* Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927, 930 (1983) (observing that the "development of a theory of the firm can be traced back to Knight and Coase" but grew "most rapidly" in the 1970s and early 1980s). Coase in 1937 argued that economists had failed to fully define the "firm" as used in the economics literature or explain why, within firms—unlike general markets—production is directed by a coordinator through vertical integration, rather than primarily on price signals in a series of market exchanges. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 386–89 (1937). Coase further argued that firms are primarily organized due to various costs of using the traditional market price mechanism to obtain the factors of production (such as, in the cotton industry, power (energy), shop rooms, looms, and yarn), as opposed to a coordinator. *Id.* at 388, 390. He noted the efficiencies of avoiding separate contracts for each and every exchange and of avoiding shorter contracts for reasons of transaction costs or risk, for example, and how certain governmental interventions—such as sales taxes or quotas and price controls—apply to individual transactions within markets but not within firms, thus also potentially applying to business transactions toward organizations of firms. *Id.* at 391–93.

[126] Scott, *supra* note 125, at 930.

[127] *See* Hansmann & Kraakman, *supra* note 2, at 391 (describing the "nexus of contracts" theory that allows a group of people to effectively coordinate actions).

reason for forming a corporation is "asset partitioning"—the formation of a "designated pool of assets that are available to satisfy claims by the firm's creditors" and are "distinct from assets owned by the firm's owners or managers."[128] Focusing on assets from a different angle, several theories emphasize firms' ability to pool and secure assets and make them more durable from one generation of business leadership to the next. Individual entities may leave the firm and give up their claim to some of its assets, but they may not walk away with those assets. The exit of individuals and their associated property interests, in other words, does not dismantle the firm's assets.[129]

Other approaches are more metaphysical, focusing on the very nature or "ontology" of groups and their meaning, separate and apart from their practical, economic, or moral functions. Under the "real entity" approach, some view the corporation as an entity unto itself—a separate being capable of having its own opinions, beliefs, and values.[130] British pluralists—early corporate theorists—held this view, building upon still earlier theory that viewed the corporation as an independent living creature.[131] Others argue that the corporation merely channels or represents the views of its members, voicing certain members' individual views or providing a collective voice that represents a consensus of at least a sub-group of members. The Court in *Hobby Lobby* largely embraced this member-based or "aggregation" approach, emphasizing that "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all" and that when "rights,

[128] *Id.* at 393.

[129] *See, e.g.*, Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 390 (2003) (arguing that "the ability to commit capital, once amassed, for extended periods of time" was a key reason for the formation of corporations) (emphasis omitted); Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1306–08 (2017) (arguing that even traditional partnerships, although they could be dissolved, "sought to *preserve* existing configurations of business assets upon dissolution" and did not allow exiting partners to "assert property interests in specific business assets upon dissolution," and arguing that Blair's "locking in capital" theory could in fact apply to traditional partnerships, not just corporations). Hansmann and Kraakman also note a separate literature that focuses on the need to prevent the disassembly of "transactional relationships that ha[ve] been costly to assemble" or an "organization's accumulated experience with working procedures and forms of organization," not just monetary assets. Hansmann & Kraakman, *supra* note 2, at 391 n.5 (citing Raghuram Rajan & Luigi Zingales, *The Firm as a Dedicated Hierarchy: A Theory of the Origin and Growth of Firms* (Nat'l Bureau of Econ. Research, Working Paper No. 7546, 1998)).

[130] *See* Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 170 (2016) ("The real entity theory posits that corporations exist independently of their constituents or the statutes authorizing them, and are thus a distinct entity entitled to all (or at least most) of the rights of natural persons.").

[131] *See* Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 345, 349–50 (Micah Schwartzman et al. eds., 2016) (citing to pluralist sources and their reliance on the earlier work of Otto Gierke).

whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[132]

There is also a large debate surrounding the public versus private nature of the traditional corporation—whether a corporation is merely a product of individual choice and contracting, or is alternatively more embedded within the public sphere and thus responsible for effects beyond the contracting individuals who are members of the corporation.[133] In a somewhat different vein, another line of literature focuses on the corporation as a distinctly "private" form of governance that allows individuals to wield important decentralized power by governing themselves—allowing problems to "be attacked by and left to the final decision of those living closest to them."[134] In this vein, corporations are compared to governmental sub-units in that they better respond to individual preferences and have more "socially constructive energies" than do overloaded, centralized entities.[135]

Gerald Frug argues that if corporate rights are to be justified by this argument for the decentralization of power, "cities could perform these tasks as well as corporations now do."[136] This line of debate views the corporation through the private lens—as being organized to better respond to its members, and not for society as a whole. But as Frug observes, municipalities could very well serve this function—for example, by creating "city banks and city insurance companies" that better responded to citizens' preferences in these areas.[137] This Article, which argues for a focus on local governments' "corporate-type" functions in a rights-based or preemption analysis, borrows from Frug's approach.[138] It proposes that courts more closely examine local governments' ability to provide essential public services, create diverse physical and political spaces for citizen "footvoters," and support innovation and economic growth, for example.

Beyond considering corporate and municipal purposes, this Article also argues that courts should focus on whether granting rights to a municipality or protecting the municipality against preemption would further the purposes of

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[132] 573 U.S. 682, 707–08 (2014); Kesten, *supra* note 130, at 170 (observing that the aggregation theory "concludes that corporations must . . . have whatever powers and privileges necessary to vindicate the rights of those underlying constituents").

[133] *See* Pollman, *supra* note 36, at 1631–39 (examining shifting conceptions of the corporation as existing for public or private purposes).

[134] Kingman Brewster, Jr., *The Corporation and Economic Federalism*, *in* THE CORPORATION IN MODERN SOCIETY 72, 75–76 (Edward S. Mason ed., 1959).

[135] *Id.* at 75.

[136] Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1143 (1980).

[137] *Id.* at 1150.

[138] *See supra* note 38 (noting that this Article does not attempt to revive the rejected formal "public-private" division that used to define local government liability, but rather emphasizes the intertwinement of public and more corporate "private" purposes within cities and for-profit corporations).

the right or preemption. In this sense, it follows a more functionalist approach to corporate rights, of the type advocated by scholars such as Elizabeth Pollman. Pollman argues that corporations should have rights if granting those rights would achieve the objectives associated with the rights.[139]

II. THE CORPORATION DEFINED

Municipal corporations are merely one entity within the sprawling definitional category of the corporation, yet, as shown in Part I, the courts tend to exclude them from corporate rights, allowing states to increasingly preempt their powers.[140] Because corporations are artificially created entities—owing their entire existence to state law—the project of defining a corporation inherently involves questions of value and purpose. This Part accordingly defines corporations by focusing on the many purposes for which corporations are created and legally recognized. While undertaking this definitional analysis, it places municipalities firmly within the definition of corporate actors.

Merely stating that a municipality is, formally speaking, a "corporation," is a formalistic argument with little purchase. The goal of re-focusing on the corporate identity of the municipality is a deeper one. This Part explores how municipalities carry out the purposes that courts and scholars envision other types of corporations achieving—specifically, what a municipal corporation does for its members and for society. This, in turn, suggests why the municipality deserves the rights afforded to other corporations under the rationale of societal benefit.[141]

Associations, for the purposes of this Article, are groups of natural persons who join together to form a separate, individual, legally recognized entity.[142] Most of the entities within this category are labeled as "corporations."[143] They have numerous, and often varied, purposes and functions, and they take a

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[139] Pollman, *supra* note 36, at 1675.

[140] *See* discussion *supra* Part I.

[141] *See* discussion *infra* Part II.

[142] For definitions of "firms"—another way of describing an association—see, e.g., Hansmann & Kraakman, *supra* note 2, at 392–93 (describing legal entities as having "(1) a well-defined ability to contract through designated managers, and (2) a designated pool of assets that are available to satisfy claims by the firm's creditors," and distinguishing firms from natural persons in that a firm's "bonding assets are, at least in part, distinct from assets owned by the firm's owners or managers," meaning that creditors would claim the firm's assets before claiming those of the "personal creditors of the firm's owners or managers"). Some have even persuasively argued that corporations need not have natural persons as members. *See* Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93, 96 (2015).

[143] *See, e.g.*, Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 786 ("When a corporation is formed, the law immediately recognizes the existence of a new legal entity that is separate from the organizers and investors, an entity that can carry out certain business activities as a 'person.'").

growing variety of forms.[144] There are homeowners' associations, typically organized as nonprofit corporations, that enforce detailed private covenants, own certain infrastructure, and provide services within subdivisions.[145] There are many types of business corporations and partnerships that differ in terms of liability and tax treatment, obligations to shareholders, and the activities in which they may engage. For example, a traditional business corporation primarily acts in the interests of its shareholders.[146] A "public benefit corporation," in contrast, allowed by many states, "balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."[147] Additionally, there are for-profit taxpaying charities[148] and nonprofit tax-exempt charities. But despite these many differences, several shared features allow for the lumping of these many entities into one definitional category.[149] And this lumping, in turn, allows for an exploration of how

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[144] For a description of the types of associations that exist in the United States, see Hansmann & Kraakman, *supra* note 2, at 390 (noting "standard-form legal entities" in the United States as including "the business corporation, the cooperative corporation, the nonprofit corporation, the municipal corporation, the limited liability company, the general partnership, the limited partnership, the private trust, the charitable trust, and marriage," among others); *see also* Blair & Pollman, *supra* note 1, at 1678–79 (noting the expansion of the types of corporate form by the early twentieth century, including "large, branded, publicly traded corporations" as well as "nonprofits, cooperatives, political units, clubs, and advocacy associations," among others).

[145] CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2016 COMMUNITY ASSOCIATION DATA 1 (2016), https://www.caionline.org/AboutCommunityAssociations/Statistical%20Information/2016StatsReviewFBWeb.pdf [https://perma.cc/WYT4-CVEG] (estimating that in 2017 there were more than 345,000 homeowners associations in the United States).

[146] There is a large debate in the literature as to whether corporations should primarily benefit the corporation itself and shareholders or society more generally, but corporate law, as it stands, primarily follows the former view. For a discussion of the debate, see, e.g., Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that "all powers granted to a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders"); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing that the business corporation is an "economic institution which has a social service as well as a profit-making function"); Robert C. Hughes, *Exploitation, Deontological Constraints, and Shareholder Theory*, 17 GEO. J.L. & PUB. POL'Y 1007, 1008 (2019).

[147] *See, e.g.*, DEL. CODE ANN. tit. 8, § 362 (2019) (explicitly allowing the creation of "public benefit corporations").

[148] *See* Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2019–20 (2007) (describing what the authors believed to be the first for-profit charity, formed by Google); Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1260 (2011) (describing a growing number of for-profit charities and an increasingly blurry boundary between for-profit and nonprofit entities).

[149] Several elements of my definitional category track the essential elements identified by corporate law scholars, although I add elements that are not always included in these accounts. For example, Margaret Blair includes four essential aspects of the corporate status, including "[p]roviding continuity and a clear line of succession in the holding of property and the carrying out of contracts" (related to the "self-perpetuating" function described here); "[p]roviding an 'identifiable persona' to

and why the shared traits of corporations are important—in other words, how they can benefit their members and society at large.

A. Self-Perpetuating

As defined here, all corporations are self-perpetuating; when the members and management leave or change, the corporation does not. This is one of the central defining characteristics of a corporation, and has been since their inception. Early treatises on corporate law note that "[o]ne essential characteristic of a corporation is an indefinite duration, by a continued accession of new members to supply the place of those who are removed by death, or other means."[150] Similarly, John Dillon—a federal judge, famous land use treatise writer, and the creator of "Dillon's Rule" of limited local government powers—wrote that the most important characteristics of corporations "are continuous legal identity or unity, and perpetual or indefinite succession under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members [of the corporation]."[151]

In the case of the municipal corporation, the City of San Francisco, for example, retains its status as a singular, legally recognized entity even as inhabitants move in and out and are born or die, and as the people occupying the positions of city councilmembers and mayor change.[152] The city's policies and the package of services it provides to residents also change over time, but the city itself—absent a major reordering, such as a decision by the State of California to revoke the city's charter—remains. The city retains its status as the distinct entity of "San Francisco" for issuing bonds, enacting and enforcing ordinances, taxing residents, and so on. The same is true of for-profit and nonprofit corporations and the like; members join or leave, management turns over, and missions change, but the corporation as a distinct, legally recognized entity remains.

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serve as a central actor in carrying out the business activity," including the ability to "sue and be sued in its own name;" "[p]roviding a mechanism for separating pools of assets according to which assets are dedicated to the business, and which assets are the personal assets of the human persons who are participating in the enterprise;" and "[p]roviding a framework for self-governance by the participants in the enterprise." Blair does not include approval by government as a definitional feature, but that is likely because her definition is a functional one, focusing on the functions that make corporations effective, legal "persons." Blair, *supra* note 143, at 787–88.

[150] 1 Stewart Kyd, A Treatise on the Law of Corporations 2 (1793).

[151] 1 John F. Dillon, Commentaries on the Law of Municipal Corporations 57 (5th ed. 1911).

[152] *See, e.g.*, Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 530–31 (2011) (describing the early Roman association of the "*universitas*" and exploring its similarity to cities) ("The *universitas* was not limited to the lives or agreement of a particular set of individuals. Its identity and ability to sue and be sued remained despite changes in, or even a complete turnover of, its original membership. . . . A new city is not formed as citizens are born and die. The same city or corporate body continues.").

The importance of this self-perpetuating status relates to the legal personhood theory of corporations introduced in Part I and discussed in further detail here. Because the corporation remains the same entity despite changes in the composition of its management and directors, the corporation can act as effectively as an independent legal entity, "[p]roviding continuity and a clear line of succession in the holding of property and the carrying out of contracts."[153]

More broadly, the ongoing existence of a separate legal entity that individual members may choose to join or leave over time creates a continuous, relatively clear signal about the nature and character of the corporation and whether it will further the goals of the potential member. Members considering whether to join a corporation may investigate the history of its actions to determine whether the corporation is likely to provide a good return on the individual's investment or achieve a social goal. This is true for municipal corporations, too, which residents "join" by moving.[154] As with all organizations, the choice to join a municipality is a packaged choice—the resident may dislike the municipality's land use laws, worrying that the laws will not protect the value of her home (a major investment), but might favor the municipality's social and environmental policies.[155] The existence of the municipality as a perpetual, independent entity, however, allows for the potential resident to identify the various elements of the "packaged" corporation she might join.

B. Comprised of Members, Yet Possessing Independent Legal Personhood

Closely related to their self-perpetuating function is the ontological notion that corporations are "legal persons," albeit artificial ones. Legal personhood has many definitions, but all generally coalesce around the fact that the corporation, as a fictional person, has not only members but also an independent, separate, singular identity from those members.[156] The many definitions of legal personhood also consistently include notions of legal abilities, liabilities,

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[153] Blair, *supra* note 143, at 787.

[154] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (describing how resident footvoters shop among communities based on the goods and services the communities offer).

[155] *Cf.* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 896 (noting that, for private homeowners association-governed communities, the large sets of restrictions are packaged together and suggesting alternatives, such as an "a la carte menu of use restrictions").

[156] *But see* Bayern, *supra* note 142, at 96 (arguing that "modern LLC statutes in the United States appear to permit the development of 'memberless' legal entities—that is, legal persons whose actions are determined solely by agreement or algorithm, not in any ongoing fashion by human members or owners"). The courts, however, have generally rejected the view of the corporation as a separate entity from its members, instead arguing that the corporation *is* its members, to the consternation of many scholars. *See* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 454–55 (arguing that the courts consistently, and incorrectly, view corporations as extensions of their members and as possessing the rights of their members); *see also supra* note 132.

or rights that attach to the corporation. In other words, the corporation may *do* certain things within the legal sphere—as if it were a human being signing a contract or walking into a courtroom—and may be liable for certain things and possess certain legal rights. As Margaret Blair puts it, "[w]hen a corporation is formed, the law immediately recognizes the existence of a new legal entity that is separate from the organizers and investors, an entity that can carry out certain business activities as a 'person.'"[157]

There are competing views as to the extent of this personhood and the legal abilities, liabilities, and rights it confers. For example, Elizabeth Pollman argues that early conceptions of corporate personhood were limited to the ability of the corporation to address the "property and contract interests of shareholders," but that the Court has problematically overextended that rationale—by, for example, attaching criminal liability and commercial and political speech rights to the corporation, in an "ad hoc" manner.[158] Professor Pollman would limit the rights defining corporate personhood to cover only rights that protect the underlying members of the corporation—a starting point that she believes would lead to more productive analysis of the particular rights the corporation should hold.[159] Shawn Bayern focuses more on the functional aspects of legal personhood, defining it as "the capacity of a person, system, or legal entity to be recognized by law sufficiently to perform basic legal functions," including "the ability to participate in the fundamental relationships regulated by private law."[160]

In the context of the corporation being liable for its actions, Pamela Bucy argues that there is a "corporate ethos" that is separate both from the individual members and managers of the corporation and from the corporation's technical functions, such as "manufacturing, retailing, [or] finance."[161] This ethos involves a particular corporate culture and personality—as evidenced, for example, by corporate goals, the extent to which the corporation monitors "compliance with legal requirements" or trains employees about legal requirements, and the hierarchy of the corporation.[162]

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[157] Blair, *supra* note 143, at 786.

[158] Pollman, *supra* note 36, at 1630.

[159] *Id.* Other scholars and jurists have expressed the view that the separate legal personality of corporations should prevent them from holding certain rights. *See, e.g.*, Macey & Strine, *supra* note 156, at 545–55 (arguing that corporations should be treated as separate legal entities, not as associations of citizens bearing the rights of those citizens, and that as separate legal entities, corporations do not "have constitutional rights equal to human beings").

[160] Bayern, *supra* note 142, at 94–95.

[161] Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991).

[162] *Id.* at 1129–39.

Municipal corporations fit squarely within both the narrower and more expansive definitions of legal personhood. Like other corporations, they have members (residents), yet they also maintain a separate legal status from those members.[163] As "legal persons," municipal corporations may, and consistently do, own and manage large swaths of property, such as city or town offices, courthouses, public parks, recreation centers, schools, and commercial buildings.[164] As with other corporations, this ownership allows them to further the goals of their members. For example, a growing number of municipalities are choosing to "municipalize" their power supply; rather than having residents purchase electricity from an investor-owned utility, these municipalities build and own their own electricity generation or purchase electricity and sell it to residents.[165] This movement is largely the result of residents demanding a greener, lower-carbon energy supply.

Beyond owning and managing property, municipalities also regularly contract with other entities to have infrastructure built or provide services, and they regularly sue and are sued.[166] Indeed, the Court has explicitly defined municipalities as "persons" who may be sued in some capacity.[167] This allows individuals to hold municipalities liable when an official policy causes a constitutional violation, although a number of hurdles—largely the difficulty of showing official policy or custom—have made this showing relatively rare.[168]

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[163] Corporations' independence from their natural person members is often cited as a reason not to extend certain rights to the corporation, such as the Fifth Amendment right against self-incrimination. *See, e.g.*, Mayer, *supra* note 71, at 655 (arguing that "[n]owhere in the law . . . is the dissonance between a corporation and a person as great as in the Bill of Rights context"); *cf.* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 143–44 (1995) (arguing that because corporations are an entity formed by a nexus of contracts, and not a person, they should not have a right against self-incrimination); Macey & Strine, *supra* note 156, at 493 (agreeing with the court cases that deny the corporation—which is a separate legal entity from its members—the Fifth Amendment rights against self-incrimination while granting individual officers and stockholders a personal right against self-incrimination).

[164] *See* Ellickson, *supra* note 63, at 1570–71 (noting cities' ownership of commercial properties and businesses).

[165] *See, e.g.*, Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 290 (2017) (noting that, at that time, 2,028 municipally owned energy systems served over fourteen percent of residential customers of electricity in the United States).

[166] For a discussion of municipalities' broad involvement in lawsuits, see generally Swan, *supra* note 97.

[167] *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 694 (1978) (determining that local governments are "persons" for the purposes of Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and may be sued for "execution of a government's policy or custom" but not "for an injury inflicted solely by its employees or agents").

[168] *See, e.g.*, Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 498 (2018) ("Meeting the Supreme Court's tests [for custom and official municipal policy] requires plaintiffs to pursue discovery not only into the facts and events of the particular case, but more broadly into municipal documents and records relating to policy, custom, discipline, training, and other, similar incidents.").

More broadly, as discussed in Part I, a limited number of courts have recognized certain municipal rights, as if these municipalities were indeed "persons."[169] For example, some courts have held that under the First Amendment, municipalities have the right to petition an administrative agency[170] and may not be required to "endorse" or refrain from endorsing certain state policies.[171]

In the context of petitioning a federal agency, the U.S. District Court for the Eastern District of New York observed in *Suffolk v. Long Island Lighting Co.* that the municipality had the right to assert its view that a proposed nuclear facility posed a danger to the government's residents. It did not, however, assert that in this sense, the municipality was acting like a traditional government representing its citizens. Rather, it emphasized that the corporation, "like any corporation, is protected under the First Amendment in the same manner as an individual."[172] In a separate ruling striking down a Texas provision that prohibited local officials from endorsing sanctuary city status, however, the U.S. Court of Appeals for the Fifth Circuit focused solely on the city's governmental role—finding that strict scrutiny applies to restrictions placed on the speech of any *elected* official, such as an official advocating a certain position in a town hall meeting.[173]

Much like corporate "ethos"—a status of corporate personhood identified by some scholars—municipalities, like for-profit corporations, have distinct cultures. City managers, mayors, and city councilmembers can be either beneficially hands-on or too inactive when it comes to monitoring the actions of city employees or training employees with respect to legal requirements. For example, the City of Miami Beach—responding to apparently lax management of potential corruption—recently issued new rules requiring employees to report bribery and official misconduct, with the City Manager emphasizing that these rules would be closely enforced and that "[r]eporting of these offenses is mandatory."[174]

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[169] *See* discussion *supra* Part I.A.

[170] Cty. of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("Suffolk had . . . a constitutional right under the First Amendment to speak and act in opposition to [the] Shoreham [Nuclear Power Facility].").

[171] City of El Cenizo v. Texas, 890 F.3d 164, 184–85 (5th Cir. 2018).

[172] *Cty. of Suffolk*, 710 F. Supp. at 1390.

[173] *El Cenizo*, 890 F.3d at 184 ("The state cannot regulate the substance of elected officials' speech under the First Amendment without passing the strict scrutiny test.").

[174] Tim Elfrink, *Miami Beach Requires Workers to Report Bribery as Top Official Faces Corruption Probe*, MIAMI NEW TIMES (Aug. 30, 2017), http://www.miaminewtimes.com/news/miami-beach-issues-new-bribery-rules-as-top-official-faces-corruption-case-9630957 [https://perma.cc/HJ89-X4FN].

C. Holding Independent Assets

One aspect of legal personhood noted above is the ability to hold property, but this aspect is often singled out as a separate, essential definitional characteristic of a corporation. This is because "legal personhood" focuses more closely on the ability of the corporation to *act* in various legal capacities, such as owning property and entering contracts, whereas asset ownership focuses on a more particular function of property ownership: the fact that corporations hold resources independently of their members. The members contribute many of these assets, yet the assets of the corporation are separate and separately reachable by creditors.[175]

Hansmann and Kraakman emphasize the efficiencies that arise from collecting individual assets into a common, separate pool. If a group of people wish to gather together to obtain a loan or other form of credit to purchase machinery for a manufacturing plant or services that will benefit the group, they can much more easily obtain credit based on one common pool of assets—creditors need only have "familiarity with the firm's own assets and business affairs."[176] If, in contrast, creditors had to individually determine each member's contribution of assets to the corporation and the creditworthiness of each member, credit costs would be quite high.[177]

Similarly, a municipality can more easily obtain credit for the construction of needed infrastructure, such as sewage and drinking water lines, with a separate, common pool of assets. Although these assets are collected in the form of taxes, rather than voluntary investment by corporate members, their function is the same as that of a more traditional corporation. A creditor can more easily ascertain the risk of loaning to a city as compared to evaluating the creditworthiness of each resident of the city who might invest in a shared infrastructure project. Furthermore, the existence of a separate pool of assets creates economies of scale and minimizes coordination costs. It is more difficult for residents to pool together their own assets and collectively bargain for infrastructure or services than it is for the municipality to take on this task on behalf of its members.

D. Self-Governing

Closely related to legal personhood and a corporation's ownership of assets is the fact that the corporation also governs itself; even for-profit corpora-

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[175] *See* Hansmann & Kraakman, *supra* note 2, at 402 (describing the firm function of pooling assets for efficiency reasons).

[176] *Id.*

[177] *See id.* (noting large transaction costs).

tions are mini governments in many respects.[178] In the case of traditional corporations, individuals choose to join and consent to the corporation's rules and coercive powers by purchasing stock.[179] The corporate members can then influence the decisions of the corporation through proxy votes and similar mechanisms, although, as discussed in Part III, stockholder influence is quite limited in many respects.[180]

The municipal corporation is, of course, more traditionally recognized as a "governing" entity, which runs its own affairs through an elected legislative body, such as a city commission, council, or board of selectmen, and often an "executive" such as a mayor. Members of municipal corporations choose to join and be subject to the government's coercive power by moving there or electing not to leave. Individuals' choice here is of course much more constrained than in the context of a for-profit corporation. Often, residents find themselves stuck within the jurisdiction of a local government due to limited mobility and could not be accurately described as having affirmatively selected that government as their representative.

E. Approved by Government

Legally recognized associations, as opposed to informal groupings of people, are self-governing but must receive some sort of approval from a higher governmental authority—typically a state. In short, they must be chartered. There are competing theories that argue against this "concession" view of corporations, asserting that the "corporation exists prior to and separate from the state" and need only obtain the consent of its members, not the state.[181] But even if one views corporations primarily as the product of their shareholders, the technical reality holds that in order for any form of "legal" association to take certain actions, it must first demonstrate that it meets state-defined criteria.

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[178] *See* Blair, *supra* note 143, at 787 ("Although corporations are not often regarded primarily as units of governance, in fact, self-governance was one of the earliest purposes of incorporation.").

[179] The argument that corporations, like more traditional governments, have coercive powers over individuals is primarily an older one voiced by "legal pluralists." Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1881 (2003). For a classic legal pluralist view, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (rejecting the public-private distinction). *See generally, e.g.*, ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[180] *See infra* note 311 and accompanying text.

[181] *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211 (describing "natural entity theory," in which "[t]he conception of the corporation as an artificial creation entirely dependent on the state for its powers gradually gave way to the view that corporations are the natural products of individual initiative and possess powers conferred by their constituent shareholders"); Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 112–13 (2009) (describing the real entity theory).

This is often a pro-forma process; although states previously approved both municipal and business corporate charters on a case-by-case basis, approval is now typically automatic if certain minimal boxes are checked. Business and charitable corporations are formed when a group of incorporators decide on a name (within restrictions provided by the state),[182] write and sign articles of organization, and file the articles with a state, along with a fee.[183] In the case of many municipal corporations, residents of a particular area—typically by majority vote—form a chartered municipality as permitted by state statute or the state constitution.[184]

One could view municipal corporations, which have both a public and private corporate status, as possessing more bottom-up authority than certain other types of corporations. Even John Dillon recognized the relatively strong, independent roots of cities despite advocating for a narrower recognition of their power.[185] Indeed, in 1871, two state judges argued for a doctrine of local government power that would recognize an organic, independent governance status for municipalities—one that would not paint municipalities as dependent on states for their authority. In *Le Roy v. Hurlbut*, the Supreme Court of Michigan addressed a statute that empowered the state legislature to establish the procedures by which local governments should elect members of local boards, such as water commissions and sewer commissions.[186] The legislature used this provision to directly appoint individual members of Detroit's sewer and water commissions, and the Michigan Supreme Court deemed this to be an invalid assertion of state power.[187] Justice Campbell noted that "[i]ncorporated cities and boroughs have always, both in England and in America, been self-

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[182] *See, e.g.*, MASS. GEN. LAWS ch. 156D, § 4.01 (2019) (providing that corporate names "shall contain the word 'corporation,' 'incorporated,' 'company,' or 'limited' or the abbreviation 'corp.,' 'inc.,' or 'ltd.,' or words or abbreviations of like import in another language," among other requirements).

[183] *See, e.g.*, *id.* § 2.03 (providing that "[c]orporate existence begins when the articles of organization become effective" and that "[t]he filing of the articles of organization with the state secretary shall be conclusive evidence that the incorporators satisfied all conditions precedent to incorporation and that the corporation has been incorporated under this chapter").

[184] *See, e.g.*, MASS. GEN. LAWS ch. 43, § 2 (2019) ("Any city, except Boston, which shall adopt, in the manner hereinafter prescribed, one of the plans of government provided in this chapter shall thereafter be governed by the provisions thereof . . . ."); EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 300–02 (1st ed. 1911) (noting that municipal charters were previously granted individually through special legislation but that states now have general incorporation laws through which municipalities may choose to establish a charter).

[185] DILLON, *supra* note 151, at 2, 16–22, 26–27 (noting that cities were independent sovereigns in Greece, that they amassed great power in England, although those powers were temporarily reined in by King Charles I and II, and that early local governments in the United States had many powers and were deemed to be important self-governing entities despite obtaining their powers from the states).

[186] 24 Mich. 44, 45 (1871).

[187] *Id.*

governing communities within such scope of jurisdiction as their charters vest in the corporate body"[188] and "[o]ur constitution cannot be understood or carried out at all, except on the theory of local self-government."[189]

Even more powerfully, Justice Cooley argued that local governments might have as much, or even more, power than the states, suggesting that we might just as easily assume that "states have received delegations of power from independent towns," rather than the dominant theory of local governments beholden to states.[190] He noted that local governments were often formed before or alongside states, and that "[o]ur traditions, practice and expectations have all been in one direction" of independent local self-governance.[191] Eugene McQuillin, writer of the *Law of Municipal Corporations*, later echoed this point, arguing that municipal control is "not a mere privilege, conferred by the central authority" but rather arises from fundamental principles of local control.[192]

Dillon's conflicting, more limited theory of local government power won the day in most respects; however, the accounts of Justice Campbell, Justice Cooley, and McQuillin highlight facts that are often lost in the modern-day assumption that local governments are mere arms of the state.[193] And some modern opinions arguably recognize relatively broad local powers, albeit not vis-à-vis states. The strongest Supreme Court doctrine recognizing generally strong rights of local governments (but not constitutional rights) is in the land use context. In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court defended a local government's decision to classify one property owner's property

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[188] *Id.* at 88.

[189] *Id.* at 90.

[190] *Id.* at 100.

[191] *Id.* at 102–03.

[192] MCQUILLIN, *supra* note 184, at 156. Indeed, in provinces such as New Hampshire—previously part of the Massachusetts Bay Colony—several settlements declared themselves to be self-governed territories prior to the formation of the colony or province. *See, e.g.*, Thomas Linzey & Daniel E. Brannen Jr., *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL'Y 1, 10 (2017) (noting compacts in places that were to become Portsmouth, Dover, and Exeter, New Hampshire dating back to the 1620s and 30s).

[193] *See* Frug, *supra* note 136, at 1114 (noting the "Cooley-Eaton-McQuillin thesis," to which "[h]istory has not been kind"). As Frug notes, Eaton, too, argued that cities' "'right to local self-government' existed prior to state incorporations." *Id.* at 1113 (quoting Amasa Eaton, *The Right to Local Self-Government* (pts. 1–3), 13 HARV. L. REV. 441, 570, 638 (1900); (pts. 4–5), 14 HARV. L. REV. 20, 116 (1901)). *But see* Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 408 (2002) [hereinafter Schragger, *Reclaiming the Canvassing Board*] (describing the "shadow doctrine" of local government law—a "quasi-constitutional doctrine of local sovereignty" that "finds expression in a number of cases involving the primary powers of local governments to regulate land use, control local finances, and administer local public schools").

into three different zoning districts—two of which prohibited industrial development—despite the property being near other industrial areas.[194] According to generous readings of the case, the Court in *Euclid* and other cases recognized the "primary powers of local governments to regulate land use."[195] Richard Schragger views the Court in other cases as also having recognized local authority to "control local finances, and administer local public schools."[196] Indeed, in the realm of finances, the Court has specifically noted that when the federal government has shown an intention to give funds directly to local governments, the state may not then appropriate those funds.[197]

In one other indication that municipalities cannot be differentiated from other corporations simply because they depend on states for their governmental powers, a municipality's subordinate status alone is sometimes not enough to protect a state's decision to curtail the rights of a municipality. For example, in *Gomillion v. Lightfoot*, the Court addressed Alabama's attempt to redraw the boundaries of the City of Tuskegee to disenfranchise black voters.[198] The Court noted that the state had failed to provide any reason for its action other than racial discrimination.[199] The Court explicitly rejected as a legitimate justification the state's municipal subordination argument—the argument that Alabama had simply redefined Tuskegee's boundaries because it had the power to do so.[200] The Court acknowledged *Hunter v. City of Pittsburgh*, *Trustees of Dartmouth College v. Woodward*, and similar cases, under which municipalities, as mere arms of the state, have no protection under the Contract or Due Process clauses.[201] But the Court asserted that the state's supposed ability to unilaterally revoke municipal creation and municipal powers without running afoul of

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[194] *See* 272 U.S. 365, 379 (1926) (describing how the east and west portions of the property were bounded by residential areas, but the property was also abutted by a railroad and industrial development).

[195] Schragger, *Reclaiming the Canvassing Board*, *supra* note 193, at 408.

[196] *Id.*; *see also* Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 99 (1989) (noting that *Euclid* restored the local control stripped by Dillon's Rule, and that local governments' land use powers stripped away by the states' "Quiet Revolution" in land use were similarly "redominated by local governments").

[197] Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 263, 265 (1985) ("Congress was not merely concerned that local governments receive adequate amounts of money, and that they receive these amounts directly. Equally important was the objective of ensuring local governments the freedom and flexibility to spend the federal money as they saw fit.") (rejecting a state's attempt to direct how a county could use federal funds distributed under the Payment in Lieu of Taxes Act).

[198] *See* 364 U.S. 339 (1960).

[199] *Id.* at 342.

[200] *Id.* at 344–45.

[201] *Id.* at 342–44; Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

the Contract or Due Process clauses (doctrines which the Court also questioned at the time of the decision) did not insulate the state from its specific Fifteenth Amendment obligations.[202] Thus, Alabama's "generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units" failed to persuade the Court in *Gomillion* that Alabama could redraw the City of Tuskegee's boundaries at will.[203]

In short, all corporations, whether public, private, or a combination of the two, rely to some extent on a higher government to grant them power, but this does not strip them of a unique, somewhat independent status. As Dillon himself noted, "*Like other corporations*, municipal corporations must . . . be created by statute. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them or by other statutes applicable to them."[204]

F. Private or Public

Many courts view municipal corporations as different—and refuse to grant them certain rights afforded to other corporations—by emphasizing that municipal corporations are not just subordinate to the state but are also *public* entities.[205] This distinction follows a long line of earlier state and federal cases that, particularly in the nineteenth century, focused closely on the differences between public and private corporations and emphasized local governments' reliance on states for their power.[206]

The reasoning is that a higher governmental entity must recognize the municipal charter, as with any corporation, but the municipality itself is also a

[202] *Gomillion*, 364 U.S. at 342–43.

[203] *Id.* at 342.

[204] DILLON, *supra* note 151, at 61 (emphasis added). Dillon further emphasized this point, stating that "all corporations, public and private, exist and can exist only by virtue of express legislative enactment . . . ." *Id.* at 88. Dillon did, however, agree with the legal principle alive at that time, which was that private corporations possessed charters that constituted contracts, whereas municipal charters were not contracts. But he noted that, "vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under" a municipal charter. *Id.* at 142.

[205] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009) (referring to the municipality as a "public employer").

[206] *See* DILLON, *supra* note 151, at 142 (distinguishing between public and private corporations and noting that for private corporations, "when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation"); Frug, *supra* note 136, at 1061 ("[T]he nineteenth century distinction between public and private corporations . . . created the radically different modern status for cities and for private corporations.").

public arm or subcomponent of that higher governmental entity, and this makes the municipal corporation different. In *Ysursa v. Pocatello Education Association*, the Supreme Court—deeming municipal corporations to have no constitutional rights—zeroed in closely on this status, reasoning:

> A private corporation is subject to the government's legal authority to regulate its conduct. A political subdivision, on the other hand, is a subordinate unit of government created by the State to carry out delegated governmental functions. A private corporation enjoys constitutional protections, but a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."[207]

This reasoning follows, in part, the early principle set forth in dicta by the Supreme Court in *Dartmouth College*, which similarly made a stark distinction between public and private corporations due to the former's reliance on a grant of *political* as opposed to private power.[208] The Court determined that although revocation of private corporations' charters could run afoul of the Contract Clause, for municipal corporations the "legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States."[209]

Some scholars have rejected this public-private distinction. For instance, Roderick Hills argues that traditional corporations are just as constrained in their powers as municipalities, observing:

> [S]tate legislatures have traditionally exercised broad regulatory powers over private business corporations, controlling and sometimes even abolishing their economic activities. The business corporation today only has the power to initiate policies that have not been outlawed by the state. This power is precisely what municipal corporations have.[210]

Indeed, numerous corporations have a complex public-private status—one that has existed since the earliest corporations were formed.[211] As Christo-

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[207] 555 U.S. at 363 (quoting Williams v. Mayor of Baltimore, 289 U.S. 36 (1933)).

[208] 17 U.S. (4 Wheat.) at 629–30.

[209] *Id.* at 630.

[210] Hills, *supra* note 38, at 2019.

[211] Blair, *supra* note 143, at 787–88 & n.15 (quoting Andrew Lamont Creighton, The Emergence of Incorporation as a Legal Form for Organizations 34 (1990) (unpublished Ph.D. dissertation, Stanford University) ("Some early corporations were created as 'quasi-governmental bodies, existing largely independent of the state, with broad political, taxation, and coercive powers.'")). Modern electric utilities and municipal housing corporations, which have governmental and private members, are

pher Stone observes, there are corporations that compete in the marketplace but largely depend on "government licenses and other privileges"; federally-chartered corporations whose members are not government employees; private corporations whose officers and directors are selected by public agencies after a securities-based settlement; private corporations that provide "traditional public services" like judging; and "public" municipal corporations that contract with private entities to provide traditional public services like police and fire protection.[212]

Relatedly, municipalities themselves have a complex mixture of public and private functions embedded within their structure, as evidenced by the exceedingly complex law of municipal tort liability. In nineteenth-century U.S. law, municipalities were immune from liability when acting in their "public" sovereign capacity. But like any other private corporation, they were liable under tort law when acting in a proprietary manner—providing services similar to other private corporations or otherwise carrying out "private" functions, such as functions that were specified in their corporate charter approved by the state.[213] State statutes governing municipal liability and court decisions, to some extent, still apply this proprietary/government test for municipal conduct and associated municipal liability.[214]

The argument that municipal corporations lack the protections of other corporations because they are governmental entities also fails to recognize the dual nature of municipalities, which, as the proprietary/government test acknowledges, are both governments and more traditional corporate service providers.[215] In many respects, municipalities do exactly what traditional cor-

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considered quasi-public entities. *See, e.g.*, Bedminster Hills Hous. Corp. v. Timberbrooke at Bedminster Condo. Ass'n, 2008 WL 631299, at *1 (N.J. Super. Ct. App. Div. Mar. 11, 2008) (noting a quasi-public housing corporation).

[212] Stone, *supra* note 77, at 1445–47.

[213] *See, e.g.*, Jones v. New Haven, 34 Conn. 1, 14 (1867) (finding that when a municipal corporation receives a charter from the state and agrees to certain conditions as part of that charter, the municipality is no longer acting in merely a public function but is more like a private corporation and is liable to individuals for injuries that result from a violation of those conditions, such as trimming trees in a public square); Bailey v. New York, 3 Hill 531, 541 (N.Y. Sup. Ct. 1842) (finding that municipal corporations, when acting "in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners" and are subject to tort liability, and concluding that New York City was liable for faulty construction of a dam).

[214] *See, e.g.*, Hillerby v. Colchester, 167 Vt. 270, 272 (1997) (noting that "[t]his Court has applied the governmental/proprietary distinction for decades" and providing examples, such as a case finding that a municipal housing project was a proprietary activity subject to potential tort liability, whereas construction of a public playground was not). *But see id.* (acknowledging that only a minority of states still applies this distinction).

[215] *Cf.* Frug, *supra* note 136, at 1066 (arguing that "the historical connection between public and private corporations has been forgotten in favor of an automatic incantation of the distinction between them").

porations do, with the important caveat that they additionally tax residents and wield governmental power over those residents—activities that are clearly beyond the ambit of the traditional corporation. As Robert Ellickson notes, the Arizona Constitution expressly allows municipal corporations to "engage in industrial pursuits,"[216] and in many states they act as businesses, owning and operating retail stores and housing stadiums, for example.[217] This dual function is explored more fully in Part III below.[218]

Considered together, the many characteristics of corporate status quite easily define both a traditional corporation and the municipal corporation. And the distinctions most commonly emphasized in differentiating municipal corporations from others—their subordinate, public status—are not in fact as clear cut as typically portrayed. Indeed, with the rise of a broader range of corporation types, such as public benefit corporations that must stay true to a stated public purpose and quasi-public entities like housing corporations, the public-private line is increasingly obfuscated.

III. THE PURPOSE AND ROLE OF CORPORATIONS

Municipalities are "corporations" well beyond the formalistic definitional groupings explored in Part I. Indeed, municipalities fit quite well within various theories and doctrine defining the purpose and role of the corporation, in some cases more comfortably than other types of corporations that enjoy more corporate rights. Court cases giving certain rights to corporations have tended to follow one or more of these theories, often picking and choosing aspects of several theories in describing the importance of corporations and their need for rights.

This Part explores the current essential roles of cities—building from a growing body of scholarship that emphasizes the importance of cities and the dearth of power possessed by cities.[219] It then explores several of the dominant judicial theories for corporate rights, and how these justifications for giving rights to traditional corporations apply with equal or more force to cities and the modern demands that cities face.[220]

A. Cities' Essential Modern Functions

Modern cities are essential political and economic actors. At their most basic level, cities' importance as governing bodies rivals that of states and the

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[216] Ellickson, *supra* note 63, at 1571 (quoting ARIZ. CONST. art. 2, § 34).
[217] *Id.* at 1570–71.
[218] *See* discussion *infra* Part III.
[219] *See* discussion *infra* Part III.A.
[220] *See* discussion *infra* Part III.B.

federal government on a variety of levels. As of the last census count, there were 38,910 counties, municipalities, and townships in the United States.[221] But cities are not merely governments. Economically, cities provide direct services to residents, run more traditional businesses, and host an enormous proportion of U.S. economic growth. On the political front, cities not only respond to residents' demands for local change but also take important positions on the national and international stage—representing some residents' views, acting as policy advocates in their own right, and by forming and maintaining a particular city brand or ethos.

1. Cities as Economic Actors

Perhaps more so than is typically recognized, cities independently engage in business, displacing private actors that would have otherwise provided the same good or service. Many local governments provide the services and goods to which the most basic of human rights attach—education, drinking water, waste removal and sewage service, and, in some cases, electricity and other basic energy needs. In many states, investor-owned utilities provide these services in certain geographic areas, but some municipalities choose to provide them within their jurisdiction.[222] Municipalities do this for a variety of reasons, such as providing greener or more socially responsible power at the request of their citizens[223] or ensuring consumer protection.[224] In their role as providers of essential services, local governments collectively spend nearly as much as the states in terms of expenditures such as welfare, health, housing and community development, education, libraries, police and fire protection, parks, and

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[221] *See* CARMA HOGUE, U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012, at 1 (Sept. 26, 2013), https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf [https://perma.cc/58R8-NRQB]. Not all of these, however, were incorporated. *See id.* (breaking down the number further to "3,031 counties, 19,519 municipalities, and 16,360 townships").

[222] *See, e.g.*, *Differences Between Publicly and Investor-Owned Utilities*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/pou_reporting/background/difference_pou_iou.html [https://perma.cc/FPT5-VNPQ] (describing publicly owned utilities and investor-owned utilities in California).

[223] *See* Welton, *supra* note 165, at 338–41 (describing local municipalization of power supplies and the reasons for this trend).

[224] *See* PAUL ZUMMO, AM. PUB. POWER ASS'N, RETAIL ELECTRIC RATES IN DEREGULATED AND REGULATED STATES: 2017 UPDATE (May 2018), https://www.publicpower.org/system/files/documents/Retail-Electric-Rates-in-Deregulated-States-2017-Update%20%28003%29.pdf [https://perma.cc/3LFW-QBLU] (observing that in the majority of states, investor-owned utilities are regulated by state public utility, public service, or corporation commissions, and the rates that they may charge consumers are capped because they are treated as natural monopolies). Some municipalities do not view this system of state regulation as adequately protecting consumers or their interests. *See, e.g.*, Welton, *supra* note 165, at 338–41 (describing the reasons for municipalization).

highways;[225] in 2012, state governments spent a total of $1.98 billion on all public services, and local governments spent $1.66 billion.[226]

With more people now choosing cities as their home, and with increasingly tight federal and state budgets, cities are expected to pick up the slack in terms of service and infrastructure provision, providing a growing suite of essential services to residents despite struggling to balance their own budgets. For example, under federal environmental law cities must build wastewater treatment plants for sewage and industrial waste to meet federal standards, yet federal funding for these plants has declined.[227] Many cities also provide drinking water—which must comply with a different set of federal standards—without adequate funding from states or the federal government.[228] As the 2014 Flint, Michigan crisis demonstrates, when bankrupt cities attempt to fulfill their duty to provide basic human needs like water, disaster can result.[229] In the case of Flint, thousands of children were permanently damaged by lead in their drinking water.[230] States, in turn, require cities and other local governments to provide and operate everything from new voting machines to courts and jails, often without providing these governments with adequate funding for these immense tasks.[231] Beyond these direct public services, cities participate

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[225] U.S. Census Bureau, *supra* note 25, at 8.

[226] *Id.* Several decades ago, local governments spent even more than state and federal governments. *See* ACIR, *supra* note 25, at 6 ("In FY 1977, 43% of all direct expenditures for domestic governmental purposes was made by local governments. The states accounted for 27% and the federal government for 30% of the total . . . .").

[227] Pietro S. Nivola, Brookings Inst., Fiscal Millstones on the Cities: Revisiting the Problem of Federal Mandates 1–2 (Aug. 2003), https://www.brookings.edu/wp-content/uploads/2016/06/pb122.pdf [https://perma.cc/QB75-ZUYM] (finding a decline in federal funding).

[228] *See supra* note 24 and accompanying text.

[229] Flint Water Advisory Task Force, Office of Governor Rick Snyder, Final Report 16–18 (Mar. 2016), http://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf [https://perma.cc/3P59-JAV8] (explaining that the Flint crisis occurred when state emergency managers running the city switched the water supply, and the new water source corroded lead pipes).

[230] *See* Chinaro Kennedy et al., Ctrs. for Disease Control & Prevention, *Blood Lead Levels Among Children Aged <6 Years—Flint, Michigan, 2013–2016*, 65 Morbidity & Mortality Weekly Rep. No. 25, at 653 (July 1, 2016), http://www.cdc.gov/mmwr/volumes/65/wr/mm6525e1.htm [https://perma.cc/X4KF-A7WG] (noting high lead count in children's blood in Flint).

[231] *See, e.g.*, Tex. Ass'n of Ctys., The Cost of County Government: Six Significant Cost-Drivers Not Addressed by Lower Revenue Caps, https://county.org/Legislative/issues/Documents/Six%20Significant%20Cost-Drivers%20Not%20Addressed%20by%20Lower%20Revenue%20Caps.pdf [https://perma.cc/4J6D-JHGG] (citing courts, jails, indigent defense, and adult and juvenile probation as significant unfunded mandates for counties); Rachel Charlip, *Unfunded Mandates Dominate Much of City's Budget Expenses*, LocalDVM (Apr. 27, 2016), https://www.localdvm.com/news/unfunded-mandates-dominate-much-of-citys-budget-expenses/ [https://perma.cc/7U57-YBEJ] (reporting that $1.7 million in the City of Winchester, Virginia's 2016 annual budget were expenditures related to state requirements such as new voting machines, jails, and "a new office for the commonwealth's attorney").

in a variety of other economic activity, both engaging in business and encouraging economic growth.

Although several commentators focus on cities' inability to act like traditional corporations, Robert Ellickson disagrees, noting that in many states, local governments "develop housing complexes, retail stores, office buildings, sports stadiums, and redevelopment projects"; they also "rent tools; own and operate distant vacation resorts; sell retail products such as gasoline, liquor, light bulbs, and sportswear; and lend money to home-buyers and business enterprises."[232]

In addition to being important economic players, cities are critical in their role as hosts to the bulk of economic growth that occurs within the United States. Not only do two of the largest U.S. cities rank within the top twenty economies in the world,[233] but many cities outrank their states on several economic metrics. As Richard Schragger notes, "Phoenix generates 70% of Arizona's total economic output and 71% of the state's employment."[234] Traditionally, the literature describes cities as entities competing to attract growth, but several leading local government scholars take a different view. For example, Schragger argues that although cities host the bulk of U.S. economic growth, cities are not "merely vessels to be filled with desirable people or investments."[235] Many cities that have living wage laws—laws that go against the assumption that cities consistently compete for business by offering low taxes and other business friendly policies—are also some of the most economically prosperous. In short, Schragger argues that "the relationship between economic prosperity and policy is not straightforward," and thus, cities should—and in a surprising number of cases, do—feel free to implement policies that respond to the needs of interests beyond business; yet these cities might still experience strong economic growth.[236]

Many cities still follow the traditional approach of offering tax breaks and other perks to corporations.[237] But another strategy is more nuanced and relates to Schragger's observation that the driving forces behind economic prosperity in cities are not clear cut. In some cases, cities are taking progressive political stances to respond to the demands of their electorate and bolster the national political aspirations of local officials, but they are doing so equipped with the

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[232] Ellickson, *supra* note 63, at 1570–71.

[233] *See* SCHRAGGER, CITY POWER, *supra* note 18, at 28–29 (noting New York City and Los Angeles as the tenth and eighteenth largest city economies in the world, respectively).

[234] *Id.*

[235] *Id.* at 3.

[236] *Id.*

[237] *See, e.g.*, Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 493 (2009) (describing cities' use of tax subsidies to attract businesses).

knowledge that forming and maintaining a particular city brand—including a political one—might attract certain types of residents and corporate wealth. Many corporate headquarters are moving to cities to attract young, tech-savvy employees.[238] Although many cities enact progressive policies in response to non-business constituents, it is possible that some have recognized the connection between certain progressive policies and the likelihood that a highly sought after workforce might move to the city in part due to a preference for these policies. Whether cities' policies are aimed directly at attracting business or are more nuanced, cities need rights proportionate to their roles as critical hosts of business and resident "foot shoppers."[239] When extensive preemption of laws like living wage ordinances and environmental regulations prevents cities from creating the type of physical and cultural atmosphere that they believe will attract residents and workers, they need rights to at least partially counteract this trend.[240]

2. Cities' Role as Political Representatives and Policy Advocates

Cities are increasingly recognized not only as units competing to offer services to residents but also as important political players—both in terms of representing their residents and also acting as policy advocates on the national front. In this sense, too, they are like traditional for-profit corporations that respond to internal shareholder initiatives but also, increasingly, externally advocate for national or international policy without any prodding from shareholders.

In many respects, local governments are quintessentially representative "public governments"—even more so than their federal or state counterparts.[241] Internally speaking, cities exist only because their residents have elected that

[238] *See* Nelson D. Schwartz, *Why Corporate America Is Leaving the Suburbs for the City*, N.Y. TIMES (Aug. 1, 2016), https://www.nytimes.com/2016/08/02/business/economy/why-corporate-america-is-leaving-the-suburbs-for-the-city.html [https://perma.cc/D7TK-8EJS] (quoting the Chemours chief executive as stating "we wanted to be where we could attract millennials," a "group that likes to be in an urban setting, with access to public transportation" and the Motorola Solutions chief executive as noting that "[w]hen we post jobs downtown, we get four or five times the response").

[239] *See* Tiebout, *supra* note 154, at 418 ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.").

[240] *See* Schragger, *Attack on American Cities*, *supra* note 18, at 1173–75 (describing extensive preemption).

[241] Pathologies in local government procedures sometimes constrain meaningful participation by residents in local decision-making processes, however, even if these residents are technically better represented. *See, e.g.*, HOLLAND ET AL., *supra* note 61, at 48 (noting that one woman who worked to oppose a landfill in her neighborhood lamented the city council's procedures, complaining that "they make one decision, and you come back in two weeks and they have been in a closed session, took a secret vote that you or nobody else knows about, and they turned around what they had spoken two weeks ago").

leadership, and one of their primary roles is to respond to citizens' goals and concerns. Indeed, they are far more "representative," in terms of the number of officials per represented person, than federal and state governments. In 1992—the last time the U.S. Census reported this information—incorporated municipal governments had 135,531 elected officials; counties had an additional 58,818 officials.[242] In total, elected local officials (including counties, municipalities, and "special districts" that provide water and other limited services) comprised 96.2 percent of all elected officials in the United States.[243] Although this does not mean that local governments are, in fact, more responsive to individuals' views than more numerically limited and distant state governments, statistics provide some optimism for the proposition that a higher ratio of representatives to residents leads to better responsiveness. Residents contract their local representatives more than their state or federal ones, and they participate directly in local government through membership on boards.[244] A recent political science study of representation in 1,600 U.S. cities and towns concluded that "city governments are responsive to the views of their citizens across a wide range of policy areas," and "the substantive impact of citizens' preferences on policy outcomes is quite large."[245]

Local governments—not only as part of their representation of constituents but also a broader, outwardly focused mission—are also critical external players. In some cases, locally implemented policies simply have important collective impacts at the state, and even national level. For example, city bans on smoking were a substantial factor precipitating the rapid transition to largely smoke-free spaces now enjoyed around the United States,[246] despite states initially preempting these efforts.[247]

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[242] U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF GOVERNMENTS, VOL. 1: GOVERNMENT ORGANIZATION, NUMBER 2: POPULARLY ELECTED OFFICIALS, at VII (June 1995), https://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf [https://perma.cc/3GAW-278R].

[243] *See id.* at VI, VIII (describing "special districts" as "special-purpose government units (other than school district governments) that exist as separate entities with substantial administrative and fiscal independence from general-purpose local governments").

[244] *See* Hills, *supra* note 38, at 2027 (observing that "research has repeatedly suggested that citizens personally contact local elected officials more frequently than their federal or state counterparts to express opinions on issues of public concern" and that "about three percent of adult Americans have served on some sort of local board").

[245] *See* Tausanovitch & Warshaw, *supra* note 26, at 605–06 (defining responsiveness as government reacting to "changes in citizens' views by moving policy in the direction of those views").

[246] *See, e.g.*, Abby Rapoport, *Blue Cities, Red States*, AM. PROSPECT MAG., Summer 2016, at 28, 29 (noting how "localities began passing smoking bans and smoke-free requirements" in the 1980s and how R.J. Reynolds noted the importance of seeking state laws to preempt these local efforts).

[247] Paul D. Mowery et al., *The Impact of State Preemption of Local Smoking Restrictions on Public Health Protections and Changes in Social Norms*, 2012 J. ENVTL. & PUB. HEALTH 1, 1–2 (researching the impact of state preemption on local smoking regulation).

Beyond influencing broader policy through their own policy actions, cities act expressly as policy advocates. They regularly lobby and sue states (when they are allowed to)[248] and the federal government, and they have increasingly joined forces to impact national and international policy through lobbying and litigation. In recent examples, at the state level, Florida cities have sued to oppose state preemption of local gun control.[249] Nationally, sixty local governments, along with eighteen states and the District of Columbia, intervened in support of the Obama administration's Clean Power Plan, which was designed to curb U.S. greenhouse gas emissions.[250] In 2005, cities and states successfully sued the Environmental Protection Agency for its failure to adequately justify its refusal to regulate greenhouse gases as a "pollutant" under the Clean Air Act.[251] In other national debates, such as immigration, more than 160 cities and counties have elected sanctuary city status, meaning that they will not assist the federal government in detaining and deporting immigrants.[252]

As noted above, on the international front, hundreds of cities have joined states, businesses, and nonprofit groups to declare an ongoing commitment to the Paris Agreement, an international climate agreement.[253] These are not empty promises. Some of the signatory cities are among the fifteen most populous in the United States, are substantial contributors to greenhouse gas emissions that cause climate change, and are now on a path to eliminate or substantially reduce greenhouse gas emissions. For example, Austin, Texas, which operates its own electric utility, has a city-wide goal of emitting net zero greenhouse gases by 2050.[254] It is meeting this goal largely through energy efficiency and renewable energy initiatives, and based on current and planned projects, the city is "on track to produce fifty-five percent of its energy from renewable

[248] *See supra* note 97 and accompanying text.

[249] *See generally* Complaint for Declaratory Relief, Weston v. Scott, Filing # 70091355 (Fla. Cir. Ct. Apr. 2, 2018), https://images.law.com/contrib/content/uploads/documents/392/16987/Complaint-Concerning-Constitutional-Challenge-To-Statute-Or-Ordinance.pdf [https://perma.cc/B77X-V928].

[250] ENVTL. DEF. FUND, *supra* note 21.

[251] *See* Brief for the Petitioners on Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit, Massachusetts v. EPA, 549 U.S. 497 (2006) (No. 05-1120), 2006 WL 2563378 (showing Oakland, California, Baltimore, Maryland, and New York City as petitioners along with states and nonprofit groups).

[252] Griffith & Vaughan, *supra* note 19. This list is incomplete because it does not include many smaller jurisdictions, such as towns in New England states, that have also elected sanctuary city status. *See, e.g.*, Dave Solomon, *House Defeats Bill Banning Sanctuary Cities*, N.H. UNION LEADER (Feb. 28, 2019), https://www.unionleader.com/news/politics/state/house-defeats-bill-banning-sanctuary-cities/article_df67a935-f4a2-5ac1-98e2-a9e9c30406e0.html [https://perma.cc/MVR3-VYXT] (finding five sanctuaries for illegal immigrants as identified by a national immigration group).

[253] WE ARE STILL IN, *supra* note 13.

[254] *Climate Change*, AUSTIN, TEXAS, http://www.austintexas.gov/climate [https://perma.cc/368B-6MCD].

sources by 2025."[255] In many cases, when cities act as policy advocates, they are only representing a subset of their "members"—the voters who agree with the position. Indeed, in some cases voters openly oppose cities' outward stances. In *Anderson v. City of Boston*, a taxpayer resident sued Boston, Massachusetts when the city approved the use of local funds to support a state referendum. The Supreme Judicial Court concluded that local governments in Massachusetts could not, under state legislation, spend any money influencing political campaigns such as state referenda.[256] But the same representation issue is true of private corporations that take increasingly public stances, as previously discussed in Part II.[257]

Cities thus play a central role in state and federal debates in addition to fostering local policies designed to benefit their residents. Cities need the leeway to provide the services their residents expect and that they are legally obligated to provide—that is to regulate in support of their residents' welfare, attract businesses and the workforce on which these businesses rely, and enact policies that are both symbolic and substantive. Several scholars have focused, in particular, on the need for cities to act as local democracies—places in which citizens can achieve desired policies that are blocked by large interests, gridlock, and other impediments at the state and federal level. As Gerald Frug argues:

> Cities have served—and might again serve—as vehicles to achieve purposes which have been frustrated in modern American life. They could respond to what Hannah Arendt has called the need for "public freedom"—the ability to participate actively in the basic societal decisions that affect one's life.[258]

Richard Schragger similarly argues for a "robust, democratically responsive, politically autonomous city" that can tackle issues well beyond economic growth.[259]

In sum, cities need the power, and protections, to create economic and political environments that allow them to attract and retain residents, respond to resident preferences, and project residents' and cities' broader views into state, national, and international debates that affect their wellbeing.

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[255] PAYNE ET AL., *supra* note 96, at 7.
[256] Anderson v. City of Boston, 380 N.E.2d 628, 639 (Mass. 1978).
[257] *See* discussion *supra* Part II.
[258] Frug, *supra* note 136, at 1068.
[259] SCHRAGGER, CITY POWER, *supra* note 18, at 77.

B. Values Ascribed by Courts to Business Corporations

Business corporations are like cities in many ways. Indeed, scholars have emphasized many of the commonalities. Roderick Hills asserts that private governments such as "churches, trade unions, for-profit corporations," and the like are:

> "[G]overnments" in the obvious sense that they govern some part of the world—land . . . bank accounts, buildings, machinery . . . [b]ut [also] in the sharper sense that, because they control these resources, they have the power to influence or . . . "coerce" individuals by withholding the resources they control.[260]

Political scientist David Ciepley argues that governments—indeed, even the U.S. government—are modeled directly on corporate charters, noting how "[t]he earliest American colonies were literal corporations of the Crown."[261] Similarly, Earl Latham notes that "the First Charter of Massachusetts . . . created 'one body corporate and politique in fact and name,'" and that the early Virginia Charters similarly granted business corporations—those that owned land and private resources—governmental powers as well, including the "management of military forces and the coinage of money."[262]

Hills also notes critical differences that make some corporations "private," as opposed to "municipal," including, for example, the fact that municipal corporations "have involuntary citizens when they are first incorporated . . . and their customers and constituents . . . cannot escape municipal jurisdiction without changing their place of residence."[263] These and other differences are important, as explored here, but this Section also focuses on the meaningful commonalities between the institutional purposes of business and municipal corporations, as well as the functional aspects of constitutional rights that can be furthered when these corporations are given such rights.[264]

1. Identity-Neutral Rights Bearers

In the courts, a prominent purpose linked to corporations is their ability to represent members' views. This lauded purpose takes two forms also found in

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[260] Hills, *supra* note 37, at 149–50.

[261] David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418, 418 (2017).

[262] Earl Latham, *The Body Politic of the Corporation*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 134, at 218, 221 (quoting WILLIAM MCDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 22 (1928)).

[263] Hills, *supra* note 37, at 151.

[264] *See* discussion *infra* Part III.B.

the literature on speech rights. In his article theorizing the importance of group speech rights—and particularly governments' right to speak—Meir Dan-Cohen identified two primary forms of speech: "active" speech, representing individuals' autonomy and their right to speak, and "passive" speech rights associated with listeners' autonomy and their freedom to be exposed to and select from a range of views.[265] The right of listeners to be exposed to speech and ideas has been particularly prominent in the corporate rights cases, which de-emphasize the identity of the speaker and emphasize the importance of speech being projected and available to all.[266]

As David Fagundes has noted, the very text of the First Amendment is "object neutral" in that it protects the "freedom of speech" and does not "specify the entities on which" it "confers rights."[267] The recent Supreme Court cases strengthening corporate rights similarly assert that for certain constitutional rights, the identity of the rights bearer is irrelevant. Rather, the corporation, as rights bearer, merely has the beneficial purpose of contributing to a larger societal cause, such as contributing to the marketplace of ideas. This Subsection explorers the identity-neutral aspect of this argument, and Subsection 2 describes the Court's focus on the broader societal purposes of the corporate rights it has identified.[268] Subsection 3 follows by exploring corporations' ability to represent the individual views of their members and amplify these views on a broader stage—a purpose associated with Meir Dan-Cohen's "active speech" rights.[269]

In 1979, in *First National Bank of Boston v. Bellotti*, the U.S. Supreme Court expressed a principle that laid the foundation for later corporate rights decisions. The Court emphasized that a First Amendment analysis should not concern itself with the question of whether corporations—who happened to be challenging the law—"have First Amendment rights and, if so, whether they are coextensive with those of natural persons."[270] In other words, whether the speaker happened to be an individual or a group of individuals who had banded together in the form of a "corporation" did not matter; the relevant inquiry was whether protected First Amendment speech had been violated.[271] The Court in *Citizens United v. Federal Election Commission* solidified and further emphasized this principle, observing: "The identity of the speaker is not deci-

[265] Meir Dan-Cohen, Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State, 79 CALIF. L. REV. 1229, 1233 (1991).

[266] *See infra* notes 270–283 and accompanying text.

[267] Fagundes, supra note 37, at 1648.

[268] *See* discussion *infra* Parts III.B.1 & 2.

[269] *See* discussion *infra* Part III.B.3.

[270] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978) (internal quotations omitted).

[271] *Id.*

sive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[272]

Just as certain legal protections extend to all entities, the Court has also gone to great pains to emphasize that the *type* of corporation does not matter from the perspective of vindicating certain rights, as shown by the *Citizens United* mention of "corporations and *other associations*."[273] In *Burwell v. Hobby Lobby Stores*, in which the closely-held corporation Hobby Lobby was deemed to be a "person" protected by the Religious Freedom Restoration Act (RFRA), the Court stated: "No known understanding of the term 'person' includes *some* but not all corporations," and "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[274] Further highlighting the many forms and types of entities protected as persons under the Act, the Court in *Hobby Lobby* noted that "[e]ach American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act *for any lawful purpose* or business."[275]

In responding to various arguments of the government and dissent for why certain types of corporations should not be able to assert religious beliefs, the Supreme Court in *Hobby Lobby* did focus on the fact that the corporation seeking shelter under RFRA was a "closely-held corporation."[276] Indeed, the holding only applies to this type of corporation, although much of the Court's language emphasizes in great detail the importance of treating all corporations equally from the perspective of personhood.

The reasoning in *Bellotti*, *Citizens United*, and *Hobby Lobby* does not seem to provide any exceptions to the identity-neutral preference of the Court in the context of the First Amendment and RFRA. Read more broadly, it suggests that municipal corporations should not be excluded from these types of rights merely because they have a different corporate label.

Municipal corporations are formed, in part, for a different purpose than traditional corporations. Like many traditional corporations, municipalities provide various services and goods to residents and charge them accordingly, but unlike traditional corporations, they also wield governmental authority over residents to reduce conflicts among land uses and protect public health,

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[272] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010) (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986)).

[273] *Id.* (emphasis added).

[274] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708 (2014).

[275] *Id.* at 711 (quoting 1 J. COX & T. HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4:1, 224 (3d ed. 2010) (emphasis provided by Court)).

[276] *See id.* at 719 (applying the ruling specifically to "closely-held corporations").

safety, and welfare in other ways. But the Court has expressly noted that the purpose of a particular corporation is irrelevant; a corporation is a corporation.[277] Further, it should not matter that municipal corporations exist only at the whim of the state and that their powers can be stripped away by the state. The Court in *Citizens United* recognized that states are the creators of all forms of corporation.[278] Indeed, traditional corporations, too, exist only because the state allows them to and are subject to ongoing oversight by the state regarding their structure and operation.[279]

Citizens United and *Hobby Lobby* thus further buttress a view that a *Harvard Law Review* Note expressed in 1980—that "[t]he Court's reasoning in . . . *Bellotti* could be used to support a constitutional argument that the first amendment protects municipal speech."[280] Indeed, these two more recent cases, with their insistent inclusion of corporations, and all forms of corporations, within certain protected legal spheres, seem to strongly support this conclusion.[281]

The argument for ignoring the identity of the entity seeking a right is not bulletproof—or perhaps even sound. As the dissent in *Citizens United* correctly noted, the Court has held "in a variety of contexts . . . that speech can be regulated differentially on account of the speaker's identity" if justified by a legitimate governmental interest.[282] And with respect to speech relating to elections, the identity of the speaker can matter substantially due to concerns about distortion and corruption—concerns recently highlighted by growing evidence that Russia used social media and other means to influence the outcome of the last U.S. presidential election.[283] But despite the serious flaws in the identity-neutral argument for protecting corporate speech, while the law stands there are few reasons for refusing to extend it to municipalities. Indeed, municipalities might serve as an important countervailing force to some of the distortion and corruption that could arise from rampant corporate speech.

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[277] *See supra* notes 273–275 and accompanying text.

[278] *See supra* note 275 and accompanying text (noting that corporations depend upon authorization from a state).

[279] *See supra* notes 179–182 and accompanying text.

[280] Koh, *supra* note 90, at 541.

[281] There are, of course, limits. If a municipal corporation rather than a closely-held corporation had initiated the *Hobby Lobby* case, the Court likely would have found that a local government's refusal to provide certain forms of birth control in a health plan for religious reasons violated the Establishment Clause.

[282] *Citizens United*, 558 U.S. at 420–21 (Stevens, J., dissenting).

[283] *See, e.g.*, Abigail Abrams, *Here's What We Know So Far About Russia's 2016 Meddling*, TIME (Apr. 18, 2019), https://time.com/5565991/russia-influence-2016-election/ [https://perma.cc/YM4H-8ZCE] (summarizing facts on Russia's interference in the 2016 U.S. presidential election).

2. Bearers of Rights That Benefit Society

Deeply intertwined with the identity-neutral argument is the Court's focus on certain constitutional rights that are primarily designed to broadly protect and benefit society at large, not just individuals.[284] As the Court has stated, "[t]he Constitution often protects interests broader than those of the party seeking their vindication."[285] And corporations, in the Court's view, are excellent bearers of these sorts of rights.

The First Amendment is a classic example; it is largely viewed as safeguarding the right of all to have access to a broad and diverse marketplace of ideas, and thus as an essential measure for protecting the vibrancy of our democratic state.[286] In *Citizens United*, the Court alluded to this broader importance, noting that with censorship of certain views, "the electorate [has been] deprived of information, knowledge and opinion vital to its function."[287] This relates directly to the Court's view—described in Subsection 1 of this Section—that the identity of the entity asserting a right is inoperative in some contexts.

Under this "societal benefit" or "object neutral" approach to a right, the Court asks whether a particular law impermissibly impedes a constitutional right, and, if it does, the law must fall. For example, in *Bellotti*, which rejected the identity of the speaker as being important to First Amendment analysis, the Court noted that certain constitutional protections like the First Amendment are largely designed to serve "significant societal interests," and that therefore the proper question is whether a particular law abrogates "expression that the First Amendment was meant to protect."[288] In a limited number of cases, courts have recognized municipalities' ability, in particular, to foster this sort of public-benefiting expression. A California court has concluded that governments, including municipalities, should have certain First Amendment protections because "if the unfettered interchange of ideas is a central concern of the First Amendment," protecting government speech from certain defamation claims "is entirely consistent with First Amendment dogma, in that it promotes government's contribution to the marketplace of ideas."[289] And while stopping

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[284] *Bellotti*, 435 U.S. at 776 ("The First Amendment, in particular, serves significant societal interests."). David Fagundes describes this as a "public rights" approach. Fagundes, *supra* note 37, at 1671–72.

[285] *Bellotti*, 435 U.S. at 776.

[286] *See id.* ("Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[287] *Citizens United*, 558 U.S. at 354 (quoting United States v. Cong. of Indus. Orgs., 335 U.S. 106, 144 (1948)).

[288] *Bellotti*, 435 U.S. at 776.

[289] Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 197 (Ct. App. 1994).

short of recognizing that governments are protected by the First Amendment, the D.C. Circuit has noted in a footnote that a government (in that case, a federal agency) may at times "participate in the marketplace of ideas or contribute its own views to those of other speakers."[290]

Beyond the First Amendment, many statutory and constitutional rights have a similarly broad purpose—albeit perhaps a secondary purpose to protecting individual liberties. Thus, although rights such as Equal Protection are rooted in preventing discrimination against individuals and specific groups, their purpose extends to fostering a more just society in which no one lives with the fear of being singled out for an unconstitutional reason.

Cities, perhaps more so than for-profit corporations, are well positioned to exercise rights that have a broader public purpose. They often promulgate ordinances designed to further protect or expand the individual rights guaranteed by the federal constitution, in part as a symbolic move to signal a preference for a more open and welcoming community. In taking these steps, cities have in some cases been at the forefront of national moves to garner federal constitutional protection for previously unrecognized groups. For example, Aspen, Boulder, and Denver, Colorado prohibited discrimination against individuals based on sexual orientation,[291] and a diverse set of cities or individual city officials in both blue and red states issued marriage licenses to same-sex couples,[292] well before states legalized same-sex marriage and the Supreme Court constitutionalized the right in *Obergefell v. Hodges*.[293]

3. Representatives of Members

Under a theory that is somewhat counter to the identity-neutral and public-focused arguments, the Supreme Court and scholars in certain camps have also identified corporations as important conduits for individual members' views. Indeed, corporations can collect views and preferences of individuals and work to vindicate these views and preferences through internal governance. A corporation's representation of members' views can also extend externally, in that the corporation can convey those views to the external world.

The virtue of representation varies in tone across different corporate theories introduced above, which alternately argue that the corporation merely ex-

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[290] Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC, 593 F.2d 1102 n.17 (D.C. Cir. 1978).

[291] *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996) (describing the local ordinances that led Colorado to amend its Constitution).

[292] *See supra* note 17 and accompanying text.

[293] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (requiring states to recognize same-sex marriage licenses).

ercises derivative rights of its members,[294] or is itself a rights-wielding entity.[295] If the corporation is merely derivative—an approach also described as the "aggregation theory" in corporate law[296]—the question of adequate representation is particularly important.

The majority in *Hobby Lobby*, which extolled the representative aspect of corporations, seemed to take a firm derivative rights approach, asserting:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people . . . . Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.[297]

The majority therefore viewed corporations as essentially identical to their members, suggesting that when a corporation speaks or asserts beliefs, it is simply channeling the beliefs of its members. The Court in *Citizens United* seemed to take less of a derivative approach, viewing corporations as independent entities that can speak. For example, in response to concerns by the dissent that corporations' dissenting shareholders would be silenced by the holding, the majority noted that in First Amendment cases relating to the media, this would unreasonably silence a newspaper from speaking if its shareholder disagreed with a particular political view of the newspaper.[298] But at other points, the Court veered toward derivative rights, emphasizing the gravity of the "right of citizens" to speak when granting First Amendment protections to a corporation.[299] Justice Scalia's concurrence was even more clearly

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[294] *See* Fagundes, *supra* note 37, at 1664 (describing the derivative rights approach to organizational speech rights as one in which "the collective body is an object of concern only insofar as it operates as a means for expressing and vindicating the rights of constituent members").

[295] *See* Kesten, *supra* note 130, at 170 (contrasting the "real entity" and "aggregation" theories, in which the former theory views the corporation as an entity unto itself, and the latter views the corporation as possessing the rights of its members); *supra* notes 130–132 and accompanying text (providing other accounts of these theories).

[296] *See* Kesten, *supra* note 130, at 170 (describing the aggregation theory).

[297] *Hobby Lobby*, 573 U.S. at 706.

[298] *Citizens United*, 558 U.S. at 361.

[299] *Id.* at 339; Kesten, *supra* note 130, at 171 (noting this language and suggesting that it represents the aggregate view).

within this camp; he asserted that the corporate representative "speaks on behalf of the human beings who have formed that association."[300]

The Court in both cases, although taking more of a derivative approach in *Hobby Lobby*, also addressed or simply dismissed the concern that a corporation—assuming that to some extent it speaks for its members—could not adequately represent all members' views or beliefs given their diversity. The majority in *Citizens United* noted that there is little evidence of shareholder representation abuse "that cannot be corrected by shareholders through the procedures of corporate democracy."[301] The majority in *Hobby Lobby* similarly dismissed criticisms that large corporations with millions of distant and diverse shareholders could not hold beliefs or accurately represent those shareholders' beliefs. In a somewhat weakly reasoned rebuttal, the majority assumed that most "corporate giants"[302] simply would not raise RFRA claims due to practical difficulties in doing so, while also noting that the case only addressed closely-held corporations, which have means of resolving disputes among their members.[303]

With respect to concerns about whether a corporation can adequately represent its members' views or beliefs or be recognized as an independent "belief-wielding" entity, the average resident within a municipal corporation—even a resident within the political minority—is likely to feel better represented by her government than by the large corporations in which she holds stocks.[304] Indeed, some municipalities even allow noncitizens and sixteen-year-old residents to vote.[305] Along these lines, some scholars argue that states' curbs on local speech—for example, prohibitions on local governments' deci-

[300] *Citizens United*, 558 U.S. at 392 n.7; Kesten, *supra* note 130, at 172 (emphasizing this language and again using it as an example of the aggregate view taken by the Court in some cases).

[301] *Citizens United*, 558 U.S. at 361–62 (internal quotations omitted).

[302] *Hobby Lobby*, 573 U.S. at 717 (assuming that publicly traded "corporate giants" would face too many practical constraints to sue under RFRA).

[303] *Id.* at 718. The Court also noted that the only issue before it was that of the closely-held corporation, and despite the Court's broad language indicating that *all* types of corporation should count as persons in the RFRA context, its holding is technically confined to closely-held for profit corporations. *Id.* at 719.

[304] *See, e.g.*, Diller, *supra* note 14, at 1130 (noting that citizens of large cities like New York might "feel just as disconnected from their municipal government as other citizens feel disconnected from their state and federal governments" but that "it is often the largest cities—such as New York, San Francisco, and Chicago—that offer the most significant innovations in public policy, even though a communitarian might expect citizens in these large cities to be democratically disengaged").

[305] Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1041 (2017).

sions to remove old confederate monuments—inhibit individuals' speech rights by blocking a message that the community has decided to support.[306]

In both the municipal and traditional corporation, however, members of the corporations are not consistently directly represented; they rely on a higher-level entity to listen to and, potentially, vindicate their views. In the traditional corporate context, managers make the ultimate decisions, and "may act in a way that fails to maximize shareholder welfare."[307] Similarly, in a city, an elected council or commission votes and inevitably estranges minority constituents opposed to that vote. But cities also offer robust opportunities for citizen initiatives and referenda, which involve direct democracy,[308] and residents frequently take advantage of these referenda, using them for issues like bans on hydraulic fracturing[309] to sweeping measures that support environmental protection.[310] Shareholders also have opportunities for proxy activism through federally regulated shareholder proposals, but the use and success rate for proxy activism appears to be more limited than in the municipal context, particularly because so many individuals invest through mutual funds and cannot take direct "action to influence corporate governance."[311]

Even large cities offer far more opportunities for input from their members than do for-profit corporations, and residents in the political minority can likely better influence a campaign to oust the incumbent city council than an

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[306] *See* Ira C. Lupu & Robert W. Tuttle, *The Debate Over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), https://takecareblog.com/blog/the-debate-over-confederate-monuments [https://perma.cc/XCJ3-6LL6]; Schragger, *supra* note 11, at 69 (citing Lupu & Tuttle).

[307] Kesten, *supra* note 130, at 176.

[308] *See* Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 298 (2001) (noting that in the municipal context "[i]nitiatives are legal devices whereby citizens enact legislation" by petition and that "a referendum decides the validity of previously enacted legislation," and describing both as direct democracy).

[309] *See* Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293, 304 (2016) (describing fracturing bans through referenda in Longmont, Colorado and Denton, Texas).

[310] PHYLLIS MYERS, BROOKINGS INST., LIVABILITY AT THE BALLOT BOX: STATE AND LOCAL REFERENDA ON PARKS, CONSERVATION, AND SMARTER GROWTH, ELECTION DAY 1998, at 1 (Jan. 1999), https://www.brookings.edu/wp-content/uploads/2016/06/myers.pdf [https://perma.cc/YA3J-MLSV].

[311] Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 844–45 (2009) (noting that "[a]pproximately 77.7 million individuals in the United States invest in equities through stock mutual funds" and that "data show that mainstream [mutual] fund Advisers overwhelmingly cast votes in favor of management and against shareholder advisory resolutions on matters including corporate governance"); *see also* Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1365 n.36, 1366–67 (2010) (noting that only "17.5 percent of public pension funds engage in proxy activism" as well as more success for changes in corporate governance and less success for social proposals, such as environmental and anti-apartheid measures).

effort to unseat corporate board members.[312] That said, participation rates in local elections are abysmally low,[313] so although municipalities offer opportunities for relatively strong representation, residents do not consistently take advantage of these opportunities.

Another representation-based concern raised by the dissent in *Citizens United* was that ignoring a speaker's identity (including corporate identity) for the purposes of protecting political speech could allow the speaker to channel the views of members who should *not* receive equal footing with respect to speech rights. Specifically, the dissent was concerned that the majority's *Citizens United* approach means that "multinational corporations controlled by foreigners" have the same speech rights as "individual Americans."[314] Municipalities do not suffer from a similar problem, in that they generally only speak for the voting residents within their boundaries. That is not to say, of course, that municipal officials are immune from outside influence. And some states now allow municipalities to permit nonresidents to vote in limited municipal elections "such as bond and tax elections."[315] But the threat of municipalities speaking for or otherwise representing individuals who are not as deserving of U.S. legal rights seems more remote in the municipal context than in the "corporate giant" sphere.

Municipalities, which are arguably more representative of members' views (at least, that is, the majority's views) than other corporate forms, are also particularly good at raising these views beyond municipal limits, whether through lawsuits, international commitments coordinated with other cities, or other platforms external to the city itself. As the U.S. Court of Appeals for the Seventh Circuit has suggested, "[t]o the extent . . . that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents."[316] The challenge here, of course, is determining when a city should act as a megaphone, if one focuses on the city acting derivatively for its members, rather than independently as an entity wishing to promote a certain brand to attract certain new residents and businesses. As David Fagundes notes, under the megaphone theory, if one views a corporation as exercising rights for its

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[312] *See supra* note 244 and accompanying text.

[313] *See, e.g.*, John Mangin, *Ethnic Enclaves and the Zoning Game*, 36 YALE L. & POL'Y REV. 419, 429 (2018) (noting that "voter participation for local elections is notoriously low").

[314] *Citizens United*, 558 U.S. at 424 (Stevens, J., concurring in part and dissenting in part).

[315] NONRESIDENT PROPERTY OWNERS AND VOTING IN LOCAL ELECTIONS: A PARADIGM SHIFT?, THE CANVASS, DENVER, COLO. NAT'L CONFERENCE ST. LEGISLATURES 1 (Oct. 2008), http://www.ncsl.org/Portals/1/documents/legismgt/elect/Canvass_Vol5A.pdf [https://perma.cc/KP3D-37EL].

[316] Creek v. Vill. of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996).

members (the derivative approach), one would have to choose whether the corporation should speak only when a simple majority of members agreed with the viewpoint, a near-unanimous majority agreed, or by some other metric—and identifying the degree of member agreement on each issue would be difficult.[317]

Critics of extending corporate rights to cities are also likely to argue that a key public-private corporation distinction is that members of public corporations are not exactly members by consent; they become members simply by moving in—a decision often dictated primarily by economic and social needs and not by the person's preference for the particular municipality. This is particularly problematic for political minorities whose voice is not well represented at the municipal level. But even individuals who become members of a corporation by consent—as with shareholders in a publicly-held for-profit corporation—can find themselves in the minority, and often with fewer tools to express their objections than they would find within a municipal corporation. Under the "exit and voice" theory of influence, individuals wishing to change the policies of an organization of which they are a member can stay within that organization and attempt to express their concerns, or they can simply leave.[318] On this metric, private and municipal corporations are nearly equal; municipalities arguably provide more opportunities for members to voice objections, whereas shareholders can arguably more easily exit a traditional corporation than a municipality.[319]

With respect to voice, an annual shareholder meeting for a corporation with millions of shareholders is hardly an outlet for an individual with a paltry amount of stock. This is particularly the case compared to monthly or even weekly opportunities for a municipal resident to voice her concerns before a city council or a commission. Further, if "nonconsenting" residents of a municipal corporation have moved to a municipality solely for reasons of finding a job there or needing to be near family, these individuals are also "captive" members of the state and need a voice at the state level, too. If the "megaphone" theory of local speech is correct, and the municipality is able to amplify these individuals' views in opposition to contrary state positions, this is an important outlet for captive residents.[320]

Exit wise, shareholders might fare better than municipal residents. In many cases they can more easily pull their stock out of a corporation than pack up and move from a municipality. But even here, municipalities might some-

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[317] *See* Fagundes, *supra* note 37, at 1664–67 (noting the ambiguity of drawing such a line).

[318] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3–4 (1970).

[319] *See supra* notes 307–311 and accompanying text (detailing residents' potentially more effective voice in the municipal as opposed to corporate context).

[320] *See supra* note 317 and accompanying text.

times provide a stronger opportunity for expression. The millions of relatively unsophisticated stockholders who invest through mutual funds are limited to sending relatively messy signals through their exit actions; in other words, they will have difficulty pulling their investments out of specific companies within the fund whose policies are found objectionable. An average middle-class citizen wishing to pull her investments out of any company associated with fossil fuel production or refining might realistically have to move all of her assets to a socially responsible mutual fund, potentially forgoing substantial yields as a result of this decision.

4. Economically Powerful Speakers

In another argument that focuses on the identity of the rights-holder, the Supreme Court has argued that it is important for even economically powerful corporations to have speech rights. The Court in *Citizens United* noted that "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster"[321] and highlighted the danger of stifling the voices that "*best represent the most significant segments of the economy*."[322] If it is indeed important for the most powerful economic actors to contribute their voice to the marketplace of ideas, municipalities must have a seat at the table.

Many scholars paint the early purpose of municipalities as being almost wholly an economic one.[323] Indeed, the British municipal corporations to which U.S. municipalities owe their origins were decidedly economically focused.[324] During the early colonial years, U.S. towns and cities similarly "devot[ed] the bulk of their legislative effort to promoting economic order and growth" and did not provide much in the way of other public services such as sewage or waste removal or health-promoting laws.[325] Over time, local gov-

[321] *Citizens United*, 558 U.S. at 343 (quoting *Pac. Gas & Elec.*, 475 U.S. at 8).

[322] *Id.* at 354 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 257–58 (2003) (internal quotations omitted) (emphasis added)).

[323] *See, e.g.*, FREDERIC C. HOWE, THE CITY: THE HOPE OF DEMOCRACY 21–22 (1905) (observing that "formerly the town was an ecclesiastical, feudal guild, or commercial affair" and noting "new political forces" that emerged with the growth of the industrial city); JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650–1825, at 4 (1975) (noting the distinctly commercial focus of early British cities); *cf.* FRUG, *supra* note 59, at 27 (noting that "medieval towns established a degree of autonomy within their society that has been the goal of advocates of local power and the target of its critics ever since" and that this autonomy was "not of a political institution like a modern city but of a complex economic, political, and communal association"). *But see* TEAFORD, *supra*, at 12 (noting that municipalities played a role beyond their primary commercial function, although trade was still their primary focus).

[324] TEAFORD, *supra* note 323, at 9–11.

[325] *Id.* at 18.

ernments grew to be major providers of public services such as water, sewer, natural gas, and electricity, among other goods.[326]

Modern cities host the bulk of economic activity in the United States. The New York metropolitan area alone is the world's tenth largest economy, and Los Angeles is not far behind, ranking eighteenth.[327] Under the *Citizens United* reasoning, cities—even more so than other actors—may need their voices heard in the political debate so that they can enact the types of policies essential to attracting, retaining, and fostering economic growth, without being broadly preempted.[328]

Further, the majority in *Citizens United* specifically pointed to the importance of corporations of all sizes and types communicating with the federal and state governments through lobbying and other means, observing:

> Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis.[329]

The Court emphasized that it would be dangerous to allow these types of communications for only certain types of corporations—such as large, for-profit corporations, and to prohibit them for others, such as nonprofits. It expressed specific concerns about preventing corporations "including small and nonprofit corporations, from presenting both facts and opinions to the public," noting the need for these types of corporations to "raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government."[330]

Like nonprofits and small corporations, many municipalities play an important role in providing diverse views that sometimes counter the views of large, for-profit corporations. For example, as noted above, sixty local governments intervened in support of the Clean Power Plan that would have curbed U.S. greenhouse gas emissions, countering large coal companies and

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[326] Mindy Fetterman, *As Water Infrastructure Crumbles, Many Cities Seek Private Help*, PEW: STATELINE (Mar. 30, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/30/as-water-infrastructure-crumbles-many-cities-seek-private-help [https://perma.cc/S9SQ-FKQL] (explaining that more than 2,000 cities provide drinking water under public-private partnerships).

[327] SCHRAGGER, CITY POWER, *supra* note 18, at 29.

[328] The corporations deemed so essential to speech by the U.S. Supreme Court increasingly choose to move to cities, in part due to city policies and services that are attracting the tech-savvy young millennials essential to the corporate workforce. *See supra* note 238 and accompanying text.

[329] *Citizens United*, 558 U.S. at 355.

[330] *Id.*

some other corporations that opposed the plan.[331] Although many municipalities are themselves economic giants, as noted above, their interests extend far beyond profits, as evidenced by the fact that some of the cities with the largest economic "worth" have some of the most generous wage floor policies.[332]

5. Rights Bearers with a Focus Beyond Profits

On the flip side of the importance of economic interests, one emphasis of the majority in *Hobby Lobby* and *Citizens United* was that corporations can state important political opinions and wield beliefs because they are not merely focused on profit margins. This was in part in response to dissenting arguments that profit-motivated actors hold very different types of beliefs and ideas that do not merit protection in the speech-based or religious contexts of these cases. This dissenting focus had several components. First, the idea was that the supposed "speech" or "beliefs" of a corporation might not relate at all to political or religious ideas, but rather money. And second, in the First Amendment context, this problem was intertwined with the fact that wealthy corporations would have a disproportionate impact within the marketplace of ideas and would distort it.

Expressing both of these concerns, the dissenting justices in *Citizens United* noted:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas. It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.[333]

The *Hobby Lobby* dissent similarly noted that "for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]."[334]

The majority in both cases dismissed concerns that recognizing powerful economic corporations as persons with protected beliefs or speech was prob-

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[331] *See supra* note 250 and accompanying text.

[332] SCHRAGGER, CITY POWER, *supra* note 18, at 3 (noting that Los Angeles was among other cities that "adopted wage floors that are significantly higher than the wage floors of their states").

[333] *Citizens United*, 558 U.S. at 465–66 (Stevens, J., concurring in part and dissenting in part) (internal quotations and citations omitted).

[334] *Hobby Lobby*, 573 U.S. at 756 (Ginsburg, J., dissenting) (quotations and citations omitted).

lematic given corporations' purpose of making money, or given their ability to use disproportionately large resources to distort debates. The *Hobby Lobby* majority offered the somewhat weak rebuttal that for-profit corporations often support charitable causes,[335] and that organizations with a primarily charitable mission sometimes organize as for-profits for purposes other than making money, such as retaining the ability to lobby.[336] And the majority in *Citizens United* argued that most for-profit corporations do not have "large amounts of wealth."[337]

Municipal corporations, more clearly than for-profit corporations, exist not only for practical purposes—such as attracting businesses and an adequate tax base to run their affairs—but also for clear publicly driven purposes unrelated to profits. As John Dillon noted, "[m]unicipal corporations are created and exist for the public advantage, and not for the benefit of their officers or of particular individuals or classes."[338] Indeed, the number of large cities that have chosen to enact aggressively redistributivist policies demonstrates the publicly oriented focus of many municipalities.[339] So, too, do cities' efforts to protect the rights of certain societal groups. For example, in *Romer v. Evans*, initiated by municipalities and individual gay and lesbian plaintiffs, the Court affirmed Colorado local governments' efforts to protect these plaintiffs' rights.[340] And in *Washington v. Seattle School District No. 1*, Washington blocked a school district's attempt to end "racial isolation" and cure a racial imbalance in school populations by reassigning students to different schools and busing them, among other measures.[341]

The simple fact that much of the purpose of municipal corporations is to benefit the public should not, however, be extended too far to suggest that *municipal* corporations should possess full First Amendment rights. As others have noted, governments—perhaps even more so than for-profit corporations—also have the dangerous ability to distort speech, although this is more of a threat at the federal level due to the breadth and resources of the federal government.[342]

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[335] *Id.* at 712 (majority opinion).

[336] *Id.* at 712–13.

[337] *Citizens United*, 558 U.S. at 354.

[338] DILLON, *supra* note 151, at 61.

[339] *See, e.g.*, SCHRAGGER, CITY POWER, *supra* note 18, at 3 (noting wage floors).

[340] *Romer*, 517 U.S. at 635.

[341] 458 U.S. 457, 461 (1982).

[342] *See, e.g.*, YUDOF, *supra* note 11, at 10, 45 (noting that "we rely on public agencies to furnish us with information on the cost of a tax cut [and] the rate of inflation" and arguing that "[g]overnments, particularly the federal government, are not fledgling communicators, needing protection from the community's excesses; they may pose more of a threat than do corporations").

With these caveats aside, if we are to follow the Court's recent doctrine and reasoning with respect to recognizing corporate rights, cities might be a far better fit than other corporations—particularly for-profit entities—supported by the Court's opinions. Post-*Hobby Lobby* and *Citizens United*, no courts have directly addressed whether the Supreme Court's broad definition of corporations and associations, and its extension of certain rights to these groups, applies to municipalities. But prior to these cases, at least one court has taken the approach for which this Article advocates. Speaking in the context of the First Amendment, the U.S. District Court for the Eastern District of New York stated directly that "[a] municipal corporation, *like any corporation*, is protected under the First Amendment in the same manner as an individual."[343]

IV. Operationalizing and Justifying Municipal Corporate Rights

Recognizing cities as corporations worthy of the rights assigned to other corporate forms will not likely provide cities with all of the powers that scholars have persuasively argued they need, such as the power to raise adequate funds to provide essential services. For example, any city effort to argue against a state's extensive limitations on its ability to tax citizens or incur debt—an argument that cities' property rights were restricted without due process of law or amounted to a "taking" of property—would likely fall flat. Taxes are one of the few areas in which a clear public/private distinction can be drawn: the ability to tax comes directly from the state and can be removed by the state, and clearly involves a public, coercive power. And prospectively limiting a local government's ability to incur debt is simply a limitation on potential, future property gains. But in some cases, extending corporate rights to cities would meaningfully enhance their ability to provide public services, act as policy advocates, and create and maintain a distinct ethos or brand. This is particularly the case for First Amendment rights. When cities are acting as policy advocates, or quite clearly promoting the views of some of their residents within a larger forum, their actions support many of the purposes of the First Amendment, as explored in Part II.

A. Extending Constitutional Rights to Cities

When a court considers whether it should extend a particular constitutional right to a city, it should ask two questions: (1) whether extension of the right would further the purposes of the right, such as promoting public debate or enhancing cities' right to hear speech in the First Amendment context, and (2)

[343] Cty. of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (emphasis added).

whether the right would support the legitimate purposes of the municipality, including its more traditional corporate purposes. As also noted above, this test tracks and borrows from several existing arguments for corporate rights in the business realm.[344]

The test largely follows Elizabeth Pollman's functionalist approach, which is to "accord constitutional protections to corporations when it promotes the objectives of those protections."[345] One challenge with that test, as Pollman observes, is that the purposes of constitutional protections are subject to multiple interpretations, and it is difficult to pinpoint which are the most important or legitimate.[346] But particularly where a court has listed numerous purposes in the business corporate context—as the Supreme Court did in *Citizens United v. Federal Election Commission*, focusing largely on the right of the public to hear speech—there is little reason to avoid the extension of this reasoning to the municipal corporate context. Indeed, as Part III argued, municipalities might often better achieve the objectives of the right than would other corporate forms.[347]

By focusing on whether extending a right to the corporation achieves the objectives of the constitutional protection, the functionalist approach also asks whether the right, as extended to the corporation, will protect who it was designed to protect—that is, both the municipality itself and its members. This is a similar question to the derivative test advocated by Pollman or Margaret Blair, which expressly asks how recognizing a corporate right would help the corporation's members or a subset of them—and whether the members joined the corporation with the purposes of the right in question in mind.[348] Pollman notes that the challenge of this sort of approach is identifying whom, exactly, is protected by the extension of the right to the corporation, such as shareholders or employees.[349] Additionally, in some cases corporations are so large that granting the corporation a right, such as the freedom of speech, does not meaningfully protect its members. For example, Blair and Pollman observe that even if it were possible to identify the views of Coca-Cola's thousands of worldwide "associates" and hundreds of "bottling partners," among its many other members, "it could not be argued that those individuals chose to associate with each other through Coca-Cola for the purpose of expressing themselves politically, or that protecting freedom of speech rights for Coca-Cola

[344] *See supra* notes 36–46 and accompanying text.
[345] Pollman, *supra* note 36, at 1672.
[346] *Id.*
[347] *See* discussion *supra* Part III.
[348] Blair & Pollman, *supra* note 1, at 1734–35.
[349] Pollman, *supra* note 36, at 1673–74.

would protect the rights of expression of any identifiable group of real people behind the corporation."[350]

Similar difficulties would arise with a functionalist test in the municipal context—particularly to the extent that functionalism asks about a right's purpose in terms of its benefits to individuals. Some cities are so large, and so full of diverse interests, low- and high-income populations, parents and retirees, small and large businesses, industrial entities and environmental groups, that it might be difficult to trace the benefits of a municipal corporate right to any particular group. In some cases, the group that benefits is clearly identifiable, but the extent to which the right cuts against the interests of other municipal members is quite clear—and potentially problematic. Qualified immunity for local officials benefits these officials, but not the municipality's residents who seek remedies for harms caused by those officials. And rights that would enhance the city's ability to provide public services would benefit some residents while potentially harming others. Often, a city provides different charges and levels of service to different subsets of residents, such as residential, commercial, and industrial members of the city, and not all of these sectors are consistently pleased with these services. Rights supporting a city's ability to project views onto a larger stage—by, for example, contributing money to oppose or support a state referendum—would pose similar conflicts. Although in some cases this policy advocacy would beneficially amplify residents' views, in other cases it might primarily help mayors or other officials seeking future positions in state or federal government.

The fact that a corporation has members with varied interests has not stopped courts from granting business corporations constitutional rights, and it should not in the case of municipal corporations either, particularly because these corporations are arguably more representative of their members, as explored in Part II. But another concern is that many residents do not join a municipal corporation to benefit from a corporate right granted to that corporation, such as a First Amendment right. For example, many people and businesses move to a city for reasons of the kind outlined by Charles M. Tiebout, such as obtaining goods and services that they need without having to pay taxes that they deem too high.[351] Whereas certain expressive policies happen to come along with this package of policies, it is often not a primary motivator for moving. Perhaps even more common than seeking out a package of goods and services, many people simply move because they found a job in the city, or their family is there. On the other hand, empirical work suggests that many people now move to specific cities or neighborhoods in large part to be around

[350] Blair & Pollman, *supra* note 1, at 1734.
[351] *See supra* note 154 and accompanying text.

people with similar political perspectives, in which case residents would benefit from rights such as those protecting cities' expressive abilities.[352]

Under a functionalist test that asks how granting a right to a city would further the purposes of the right—for society, the municipality itself, and the municipal members meant to benefit from the right—First Amendment rights should likely extend to municipalities in several contexts. Governmental actions that seem to clearly interfere with the free exchange and consideration of information and ideas, such as policies prohibiting localities from considering scientific models when regulating in anticipation of sea level rise,[353] should likely be barred as a violation of municipal First Amendment rights.[354] These policies substantially interfere with the societally oriented purposes of the First Amendment, such as the right of the public to hear diverse views. They also impede core municipal functions, including providing public services, such as adequate planning and preparation for crises like climate change. And even residents that did not join the municipality for expressive reasons would likely expect that the municipality would have the freedom to consider various scientific concerns when regulating and to address these concerns.

A state should also not be able to prohibit a city from communicating with residents in particular ways. For example, a state likely could not prevent a city that owned and operated its own electricity generation plant from sending a mass mailing explaining why the city supported nuclear or renewable power. In *Consolidated Edison Co. of New York v. Public Service Commission of New York*, the U.S. Supreme Court determined that the State of New York could not prohibit this type of mailing (in bill form) from a regulated electric company—a corporation.[355] The Court emphasized that in past cases it had "rejected the contention that a State may confine corporate speech to specified issues."[356] Any attempts to distinguish this type of corporate right from that of a city should likely fail. Here, again, a refusal to grant the right would interfere with core purposes of the First Amendment. And more so than with the sea level rise example, it would harm municipalities' members—both officials and residents—who expect to be able to have an open exchange of political ideas

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[352] *See* BISHOP, *supra* note 104, at 205 (noting that since the mid-1970s, people began to make "choices about how and where they wanted to live," and that these choices were increasingly influenced by the politics of the places to which they moved).

[353] *See An Act to Study and Modify Certain Coastal Management Policies*, 2011 N.C. Sess. Laws 2012-202 (limiting the definition of the rates of sea-level change to a definition provided by a state commission, and allowing the commission to consider only certain types of scientific models (historic ones) in establishing its definition).

[354] *See, e.g.*, Briffault, *supra* note 23, at 2011 (arguing that a law that "penalize[s] local expressive activity may trigger judicially enforceable free speech concerns").

[355] 447 U.S. 530, 535 (1980).

[356] *Id.* at 533.

with their representatives.[357] Officials expect to be able to communicate opinions and views to their electorate, and those moving to a municipality assume that they will have an opportunity to hear the views of their leaders and communicate their support for or opposition to these views.

In many cases, municipal corporate rights will not be rooted in the First Amendment. After all, nearly every local law—from a ban on plastic bags to a ban on fracking—could be labeled as "expressive" in that it signals a preference—in this case, for environmental protection.[358] Drawing a clear line between municipal activity that is clearly expressive of a municipal interest, as opposed to a substantive desire to regulate to achieve a particular goal, would be difficult. But there are clear cases of municipalities acting to express the views of their leadership and/or member residents, including, for example, contributing money to support or oppose a state referendum, or committing to a national or international effort to reduce carbon emissions.[359]

B. Balancing Local Interests Against Preemption

One specific setting for recognition of municipal rights is the preemption context, in which local rights are pitted against the power of the state to limit or wholly remove local authority. As noted in Part I, one of the greatest impediments to municipal rights is states' tendency to remove those rights in the fiscal and political contexts, substantially limiting local governments' abilities to raise money and take certain political stances. States unquestionably have the power to preempt local control in all of these areas, and if they do so clearly, unequivocally, and expressly, nothing short of a strong constitutional municipal right is likely to overturn the state preemption. But, if municipal corporate rights were taken more seriously, they would serve as a factor pushing back against states' wrestling control away from municipalities—particularly where the extent of state preemption is not fully clear.

When courts ask whether a state has preempted a local government in a particular area, there are three ways in which preemption can occur, as in the federal context. A state may expressly take away local power, or it may impliedly do so by enacting a law that either conflicts with a local law or occupies the regulatory field and leaves no room for local control.[360] In all three of these areas, courts must engage in a great deal of guesswork to ascertain the

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[357] *See supra* note 353 and accompanying text.

[358] *See, e.g.*, YUDOF, *supra* note 11, at 13 (including in the definition of government discourse "government conduct (e.g., passing energy conservation legislation or making child abuse a criminal offense) that symbolically communicates values").

[359] *See supra* notes 13 & 83 and accompanying text.

[360] *See* Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 948–49 & n.93 (2015) (describing these three forms of preemption in the state-local context).

true meaning and intent of the legislature—even under express preemption. Many express preemptive statutes still allow for some local control in a given regulatory area. For example, Texas has preempted most local control over oil and gas development but allows local governments to establish "commercially reasonable" regulations to address certain aspects of development.[361] And some express preemption has been interpreted to only remove "technical" authority from local governments—such as their ability to mandate certain types of oil and gas equipment at sites—as opposed to broader land use authority.[362]

Beyond the interpretational questions that make express preemption less clear than it may sound, courts often employ a degree of balancing even in the expressive context. For example, when New York's highest court held that New York's preemption of local "regulation" of oil and gas law did not preempt local bans on fracking promulgated under local governments' land use authority, the court noted that it does not "lightly" preempt governments in areas where they are exercising traditional home rule authority, thus potentially tipping interpretational gray areas in favor of the local government. When a preemption question impacted an important aspect of a local government's corporate authority—for example, its provision of public services, particularly for individuals who lack many other options, or a government's expression of citizens' views to a broader audience—courts should similarly consider the importance of the municipality's corporate function, as balanced against the state's legitimate preemption interests.

Courts must engage in even more interpretive guesswork when determining whether a local law conflicts with state law, or whether the state has occupied a field, and here, a municipal corporate right might once again tip the balance in the municipality's favor, particularly in ambiguous cases. Conflict preemption is sometimes defined as a situation in which complying simultaneously with local and state law would be impossible, but this is open to a variety of interpretations.[363] For example, some courts view a requirement that a person pay a tax in one amount to a state, and another amount to a local government, as a conflict. Other courts simply acknowledge that the regulated entity could pay both taxes.[364] And under an alternate definition of conflict preemption—a situation in which the local law impedes the purpose of state law—this

[361] 2015 Tex. Gen. Laws 971.

[362] Wallach v. Town of Dryden, 16 N.E.3d 1188, 1203 (N.Y. 2014) (interpreting express preemption of local oil and gas "regulation" to mean the regulation of technical matters, not land use controls).

[363] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 772 (1994) (describing these two types of conflict preemption).

[364] *See, e.g.*, Hildebrand v. New Orleans, 549 So. 2d 1218, 1228 (La. 1989) ("The levy of a municipal inheritance tax does not prevent the State from continuing to take complete advantage of the federal credit for state death taxes.").

of course opens up a variety of potential interpretations. If a state law allows for a particular industrial activity and regulates it, but a local government imposes even stricter regulations on that same activity, does this impede the state's purpose?

In Colorado, for example, to address conflict preemption, courts first determine whether the local regulation involves an area of statewide or mixed state and local concern, in which case "state law preempts and supersedes" the conflicting ordinance.[365] For areas of purely local concern, local law prevails. Courts use a four-factor test to determine whether, on balance, the area involves local or state matters or a combination of both. This test includes the following factors:

> (1) The need for statewide uniformity [of regulation];
> (2) The extraterritorial impact of the [local regulation];
> (3) Whether the matter has traditionally been regulated at the state or local level; and
> (4) Whether the Colorado Constitution commits the matter to state or local regulation.[366]

The question of whether the regulation implicates some of the municipalities' core values as a corporation—for example, its provision of goods and services to the public, or its ability to express municipal views on a national stage—could either be incorporated into the question of whether local governments have traditionally acted in the area of concern (the third factor), or added as an independent factor in the balancing test.

In all three of these gray areas of preemption, recognizing municipal corporate rights and the degree of importance of these rights would simply introduce another consideration into the balancing analysis that courts already employ. One factor that courts already balance is home rule authority—the ability of local governments to control truly local matters, such as choices about public services provided or the location of city hall—and traditional areas of regulatory authority such as land use decision making. Although the right of local self-governance under home rule is limited, some courts have recently used home rule to more generally recognize the importance of municipal rights as balanced against competing considerations.[367] For example, New York's highest court allowed municipalities to ban fracking for oil and gas despite state preemptive language that appeared to expressly preempt these bans.[368] The

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[365] Ryals v. City of Englewood, 364 P.3d 900, 905 (Colo. 2016).

[366] *Id.*

[367] *See, e.g.*, *Wallach*, 16 N.E.3d at 1195 ("[W]e do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake.").

[368] *Id.* at 1203.

court relied primarily on past cases that had clarified that if the legislature wished to preempt local governments' *land use* powers in a particular area, it had to clearly and expressly do so.[369] And because the legislature had not preempted these powers in the fracking contexts, local governments could use them to ban fracking. But the court also generally noted the importance of home rule. It acknowledged that although the legislature can remove local home rule powers, the court will not "lightly" preempt a local government that is acting within its home rule authority.[370]

Thus, in a case preempting a local law, courts should examine the state interest in preemption, such as encouraging economic activity unimpeded by conflicting regulation, avoiding "races to the bottom," and ensuring that the scale of governance matches the scale of the externalities. Courts should also focus on the municipal rights at stake and their importance to the municipality's legitimate corporate functions—adding this as a factor, in addition to home rule, that is balanced against the state's interests, particularly when a state preemption statute is ambiguous with respect to the scope of preemption.

The state will still often prevail under a test that balances a state's legitimate interests in preemption against the local government's home rule and corporate interests. For example, in policy areas like hydraulic fracturing, in which externalities cross local lines, conflicting local regulations could potentially impede oil and gas development. Operators moving from town to town would have to identify and comply with different requirements, and municipalities might compete to attract industry with loose regulation or "race to the top" tactics, issuing ever more stringent regulations to attract residents who oppose oil and gas drilling in their backyard.

But this is also an area involving strong local home rule authority that implicates core municipal corporate interests. The regulation of industrial land uses falls squarely within local governments' home rule powers—although in states that define home rule relatively narrowly, the regulation of any industry that operates beyond the confines of the municipality is considered a matter of statewide concern, or mixed state and local concern. Further, the regulation of oil and gas development centrally affects a local government's ability to provide effective public services. Cities and towns in places like North Dakota, where oil development has boomed, amassed millions of dollars in debt to provide the infrastructure necessary to support the people who rushed into town as part of the boom.[371] Take the example of Watford City, North Dakota,

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[369] *Id.* at 1198.

[370] *Id.* at 1195.

[371] Richard G. Newell & Daniel Raimi, *Shale Public Finance: Local Government Revenues and Costs Associated with Oil and Gas Development* 43–45 (Nat'l Bureau of Econ. Research, Working Paper No. 21542, 2015), https://www.nber.org/papers/w21542.pdf [https://perma.cc/9X5D-TZS8].

which had no debt prior to the boom. After oil and gas companies rushed into the city to drill and hydraulically fracture wells, the city had "roughly $12.5 million in outstanding loans" to fund the expansion of water and sewer infrastructure and other city services.[372]

One difficulty in balancing municipalities' corporate and home rule rights on the one hand, and state rights on the other, is that states possess many of the same corporate values as municipalities. States, like municipalities and business corporations, provide goods and services, represent their members, and project their members' views onto a larger stage. California, in aggressively pushing for more stringent environmental regulations—such as limits on carbon emissions from automobiles—might better and more forcefully represent its many staunchly environmental residents than any one California municipality.[373] But the "decentralized" justification for corporate rights noted in Part II—which argues that either traditional business corporations or municipal corporations better represent and respond to their members' concerns simply by avoiding larger, centralized bureaucracies, would argue that the smaller unit—the municipality—has the upper hand.[374] Indeed, as noted above, municipalities are technically far more representative of their members on a per capita basis than are states, although voter participation in municipal elections is notoriously low.[375] And local governments, both as speakers on behalf of their

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[372] *Id.* at 43.

[373] *See* 42 U.S.C. § 7543(e)(2) (2018) (allowing California, with a waiver, to apply stricter standards than the federal requirements). California regulated pollution from automobiles even before the Clean Air Act did, and the state in the Act therefore received a preemption waiver allowing it—with the Environmental Protection Agency's (EPA) permission—to regulate emissions from automobiles more stringently than the federal government. California applied for and received a waiver to regulate greenhouse gas emissions from automobiles under the Obama administration, but the Trump administration EPA withdrew the waiver and loosened federal regulations on greenhouse gas emissions from automobiles. California struck back, entering a deal in which four major automakers agreed to still pursue reductions in greenhouse gas emissions from automobiles despite the Trump administration's laxer regulation. The administration, in turn, began investigating these four automakers for antitrust violations and threatened to withdraw federal funding for California highways. Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html [https://perma.cc/62VX-JW4R].

[374] And as noted above, many municipalities are arguably more powerful economic voices than the states that host them, and the Supreme Court has noted the importance of giving these types of actors a voice within policy debates. There are many reasons to worry about too much of a focus on this value given the ability of economically powerful actors to drown out other voices. But to the extent that one takes the *Citizens United* reasoning seriously, municipalities might merit more speech protection than their state counterparts if these two entities were pitted against each other in a preemption battle. *See supra* note 234 and accompanying text (noting that Phoenix generates 71% of Arizona's total economic output). On the other hand, when a corporation locates within a municipality, it also, of course, locates within the state, and there is a question of the extent to which municipal versus state policy influences corporate practices and wealth generation.

[375] *But see supra* note 241.

citizens and speakers in their own right, provide a far more diverse array of views than states and serve as an important counterforce to increasingly aligned and uniform state and federal views.[376]

This Article does not endeavor to provide a bulletproof judicial test for extending corporate rights to municipalities or shielding municipalities from preemption. Considering, however, the corporate values of municipalities sheds light on an essential, but often ignored, function of local governments—particularly with the often-singular focus on home rule powers—and suggests that municipalities should be able to reasonably argue that rights extended to business corporations are equally relevant in the municipal context.

CONCLUSION

Corporations of all types have an increasingly important role, both for society and their members. In the midst of federal gridlock and a seemingly endless pattern of bipartisan bickering and shifts in party control, corporations make a relatively constant contribution to civic life. Corporations influence the law by refusing to build new headquarters or host major events in states that have enacted highly controversial laws. They influence the behavior of other individuals and businesses by, for example, refusing to loan to entities that take stands antithetical to the corporations' purpose. And corporations and states, combined, might ultimately achieve the U.S. international climate commitments from which the federal government recently withdrew.

But municipalities are an often-forgotten corporate player. As hosts to the bulk of U.S. economic activity, as loud voices within state and national policy circles and courts, and as providers of essential human services, municipalities—and their function, in particular—cannot be understated. Many aspects of the law already allow municipalities to function as they need to. They may own and operate businesses, sue and be sued, and, through proprietary actions, substantially influence national markets by, for example, purchasing "green" fleets of buses and city maintenance trucks. But preemption, in particular, and courts' insistence on separating municipal corporate rights from other rights, impedes many essential municipal functions. This Article argues that the mere recognition of municipal corporations as true corporations, not separate from the many other forms of corporations that exist, could help municipalities gain these needed rights. Recognizing the functional importance of the municipality as a corporation—its need to represent the views of its individual members, amplify their voices, respond to member concerns by promulgating certain

[376] *See* Blank, *supra* note 11, at 370–71 (arguing "state policy-making increasingly reflects national politics and lobbyist groups rather than local interests" and that local governments are essential in terms of combatting federal dominance of the political agenda).

laws, and provide services demanded from its residents—could attach important constitutional rights to municipalities and weigh against state preemption of certain municipal actions.