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ON PUBLIC PLAINTIFFS AND PRIVATE HARMS: THE STANDING OF MUNICIPALITIES IN CLIMATE CHANGE, FIREARMS, AND FINANCIAL CRISIS LITIGATION

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For more than a decade, cities have taken a lead role in the use of affirmative tort litigation in attempts to combat some of the most pressing issues of the day: global climate change, the proliferation of firearms, and the sale and marketing of subprime mortgage products. To date, with some exceptions, these actions have only had limited success in terms of securing outright court victories. Defendants in these cases have raised successful defenses to some of these actions, including the following: that their conduct was not the proximate cause of the harms the cities alleged; that the issues raised by the cities were pre-empted by state or federal law; or that the cities, as plaintiffs, lacked the requisite standing to sue.[1] If cities are to continue to use litigation as a tool to tackle these and other social problems, they will have to overcome these defenses.

This article attempts to assess the current state of the law with respect to one of these defenses: i.e., the standing of municipalities to bring litigation to remedy the harms caused by private parties within city limits. For this analysis, I review the decisions of courts handling three types of municipal lawsuits that have arisen in recent years: suits by municipalities against the firearms industry; suits by municipalities against financial institutions in the wake of the financial crisis; and suits

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1. *See, e.g.*, City of Cleveland v. Ameriquest Mortgage Sec., Inc., 621 F. Supp.2d 513 (N.D. Ohio 2009) (finding, *inter alia*, city's claims of public nuisance against investment banks pre-empted by state law and barred because city lacked standing for failure to establish that defendants' conduct was the proximate cause of harms alleged).

by government and private plaintiffs against the emitters of greenhouse gas emissions alleged to be responsible for some of the harmful effects of climate change. As part of this review, I analyze both the U.S. Supreme Court's recent decision in *Massachusetts v. EPA*,[2] as well as its decision from the early 1970s, *Gladstone Realtors v. Village of Bellwood*,[3] in which a city sued under the Fair Housing Act.

This review leads to several conclusions. First, when courts analyze the standing of municipalities suing under nuisance theories, they often fail to recognize that traditional approaches to public nuisance law under the common law often permitted municipalities to bring suits on their own, to prevent harm to their constituents, regardless of whether the city suffered some harm to its own interests. A narrow reading of standing doctrine promotes what some call a "private-law model" of standing, one that espouses a view of standing recognizing only the types of "cases" and "controversies" that were available under "traditional" causes of action, and typically requires some sort of direct harm to a litigant in order for that litigant to have standing to sue. This model fails to mesh with the common law, however, which often recognized municipal plaintiffs as the proper parties to challenge in courts of equity the action of private actors carrying out a public nuisance. Indeed, courts entertaining such actions did not question the "standing" of municipal plaintiffs; such courts simply assessed these claims on the merits to determine whether the municipal plaintiff had, in fact, proven that the defendant was causing a public nuisance.[4] As the following discussion of municipal actions sounding in public nuisance makes clear, modern courts are applying standing doctrine using a private-law model, one in which plaintiffs must assert special damages in order to satisfy standing requirements. This ignores the fact that for centuries courts have recognized that municipalities could assert public nuisance claims without any special claim of damages.

Thus, current standing law, which looks at municipalities as having no special "public law" rights, is flawed, particularly when dealing with public nuisance actions filed by municipalities. It fails to take into account that, under the common law, municipalities, like states, were able to bring suits in their own name for nuisances committed within their borders. In light of this history, a re-evaluation of standing law as it

2. 549 U.S. 497 (2007).

3. 441 U.S. 91 (1979).

4. *See, e.g.*, City of Grand Rapids v. Weiden, 56 N.W. 233 (Mich. 1893) (entertaining suit by municipality to enjoin operation of slaughterhouse without questioning city's authority to sue); City of New York v. Montague, 145 A.D. 172, 175 (N.Y. App. Div. 1911) (finding authority of city to sue to enjoin public nuisance well settled); City of Huron v. Bank of Volga, 66 N.W. 815 (S.D. 1896) (reaching merits of city's nuisance claim without questioning municipality's ability to bring suit).

relates to the standing of municipalities when bringing nuisance actions is therefore in order.

What also emerges from this review is that, when courts are determined to utilize the private-law model of standing, municipal plaintiffs are in the strongest position to claim standing when they assert rights as property owners, and when they allege a reduction in their tax base due to the defendant's direct actions. This is true even when other forces might also negatively affect the value of the property that the municipality itself owns, or the value of the property comprising its local tax base. Thus, municipal plaintiffs are most likely in their strongest position when they characterize the injuries they suffer as "private" harms, as opposed to the harms suffered by them as "public"—that is, governmental—litigants.

This article is organized as follows. Part I is divided into four sections. First, I provide a brief overview of the doctrine of standing and identify some of its key fault lines, some of which are implicated by the discussion of the standing of municipalities. I next devote separate subsections to standing decisions in each of the three areas introduced above: climate change litigation, firearms lawsuits, and financial crisis litigation. Part II is an attempt to synthesize these more modern decisions in light of the Court's recent decision in *Massachusetts*, and the only Supreme Court precedent on the subject of municipal standing from over forty years ago, *Gladstone Realtors*.

I. MUNICIPAL LAWSUITS AND STANDING

A. *Standing*

Encapsulating standing in a few select words is difficult, but various courts have outlined its basic contours, articulating both the constitutional requirements of standing and its judicially constructed "prudential" limitations. In *Lujan v. Defenders of Wildlife*,[5] the Supreme Court described those constitutional requirements as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely

5. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

> "speculative," that the injury will be "redressed by a favorable decision."[6]

In addition to these basic standing requirements, courts have grafted prudential limitations onto the core constitutional boundaries, which have been described as follows:

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[7]

It is an understatement to say that the standing doctrine is not without its critics. Standing has been attacked as having no basis in the Constitution, as a fig leaf for the political and personal proclivities of judges, and as an incoherent doctrine.[8] Despite this scholarly assault, standing doctrine has shown no sign of weakening. Its supporters, some of whom can be found in the highest levels of the federal judiciary, have given no

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6. *Lujan*, 504 U.S. at 560–61 (alterations in original) (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) and Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

7. Valley Forge Christian Coll. v. Am. United for Separation of Church & State, 454 U.S. 464, 474–75 (1982) (citations and footnotes omitted) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

8. For additional representative scholarship, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) ("[S]tanding is . . . formulated at a high level of generality and applied across the entire domain of law. In individual cases, the generality of the doctrine often forces us to leave unarticulated important considerations . . . . This consequence is obvious in the apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine."); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999) ("[T]he doctrines that purport to govern standing disputes are sufficiently malleable to allow the Justices to use them as tools to further their ideological agendas."); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) ("[T]he very notion of 'injury in fact' is . . . a large-scale conceptual mistake. . . . [I]t injects common law conceptions of harm into the Constitution. Moreover, it acts as if injury can be assessed through a purely factual inquiry, rather than one that is inevitably a product of courts' value-laden judgments . . . . This deep problem has been obscured by the surprising evolution of standing principles.").

indication of retreat, and federal courts seem comfortable deploying the doctrine as a bar to litigation with regularity.[9]

At the same time, the U.S. Supreme Court's approach in *Massachusetts* seems to indicate some flexibility in the doctrine, and a willingness to provide some guidance in its application. While the *Massachusetts* decision is nominally about the rights of states, which, the majority opinion declared, are entitled to "special solicitude" in the standing analysis,[10] there are also aspects of the decision that have implications for standing doctrine generally. For instance, the doctrine arguably shows some leeway with respect to the standing of municipalities in particular, which courts have viewed unfavorably in some of the recent decisions reviewed below. Indeed, as the discussion in Part II addresses, many of the decisions in firearms and financial crisis litigation likely need to be revisited in light of the implications that flow from *Massachusetts*.

Moreover, it is also arguable that municipalities are entitled to some "special solicitude" in standing analysis, similar to that which states enjoy, and debatable whether the "private-law model" of standing—best exemplified in the Court's holding in *Lujan*—should even apply in cases that municipalities commence. I shall return to these questions in Part II. The remainder of this Part will be devoted to an overview of standing decisions in firearms, financial crisis, and climate change litigation with implications for municipalities' suits in these and other areas.

B. *The Standing of Municipalities in Firearms, Financial Crisis and Climate Change Litigation*

The first wave of the modern era of municipal litigation involved suits by cities and localities looking to recoup the costs they incurred when dealing with the fallout from the use of illegal guns on local streets. These costs included outlays for increased police and hospital services. To date, few of these cases have succeeded on the merits. The following

9. *See, e.g.*, Kauai Kununa Dairy Inc. v. United States, 2009 U.S. Dist. LEXIS 114123 (D. Hawaii) (denying standing to companies alleging what were described as "generalized grievances" in challenge to constitutionality of provision of the Jones Act); ASPCA v. Feld Entm't, Inc. 677 F. Supp. 2d 55 (D.D.C 2009) (standing denied in case alleging mistreatment of animals in captivity where animal handler could not establish credible evidence of personal attachment to animals). Even in cases in which the plaintiffs are found to have standing, courts routinely analyze whether the plaintiffs allege that they have suffered an individualized and particularized harm. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw, Inc., 528 U.S. 167 (2000) (holding individuals who personally used area threatened by potential discharge from wastewater treatment facility in violation of Clean Water Act had standing to challenge such conduct); Fed. Election Comm'n v. Aikins, 524 U.S. 11 (1998) (holding plaintiffs who suffered direct injury by not having information about donors to political action committee had standing to seek disclosure of such information where required by statute).

10. *Massachusetts*, 549 U.S. at 520.

recounts how several courts have dealt with the issue of the plaintiff-municipalities' standing to sue.

1. Firearms Litigation

In a sweeping decision based on both state law principles and federal precedents, in 2001 the Supreme Court of Connecticut affirmed the dismissal of an action that the city of Bridgeport in that state and its mayor commenced seeking both injunctive relief and damages from firearms manufacturers, firearms trade associations, and firearms retailers.[11] The city's complaint alleged a range of wrongful conduct on the part of the defendants, including negligent manufacturing, advertising, and distribution of firearms; violation of state unfair trade practices laws; and the creation of a public nuisance.[12]

Connecticut's high court summarized the harms the plaintiffs alleged they suffered due to the defendant's conduct as follows:

> As a result of the defendants' conduct, Bridgeport has incurred increased expenses for police services, including courts, prisons and related services, emergency services, pension benefits, health care and social services, and has been required to impose related increased tax burdens on Bridgeport taxpayers. Other harms claimed are reduced property values, and loss of investment, economic development and tax revenues due to lost productivity in Bridgeport. In addition, the plaintiffs claim the harm of victimization of Bridgeport's citizens, particularly its children, who are injured or killed by handguns, including injuries by assault, and deaths by homicide and suicide. Related harms claimed are high levels of violent crime in Bridgeport, destroying families and communities therein, particularly the minority communities, and a negative impact on the lifestyle of children in certain residential communities in Bridgeport. Finally, and in more general terms, the plaintiffs claim the harms of a detrimental effect on the public health, safety and welfare of the residents of Bridgeport, and on their ability to be free from disturbance and apprehension of danger.[13]

The court identified the key question of the appeal as whether the harms alleged were too remote from the defendants' conduct to establish

11. Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001).

12. For an overview of the plaintiffs' claims, see *Ganim*, 780 A.2d. at 108–17 (including charges that firearms manufacturers knew of the unsafe design of their products and sold them anyway; and that they marketed their products in deceptive ways, like advertising that a firearm in a home made its residents safer contrary to studies that showed the risks of maintaining a firearm in the home include an increased risk of homicide, accidental death and suicide).

13. *Ganim*, 780 A.2d at 134. *See also* Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909, at *2 (Conn. Super. Ct. Sept. 10, 1999).

the plaintiffs' standing to bring the underlying litigation. The court recognized that this type of analysis was similar to a proximate cause analysis utilized in assessing the validity of a tort claim, but nevertheless addressed the issue as one of standing, as the lower court had as well.[14]

The Supreme Court of Connecticut noted that it was persuaded by the reasoning of the federal courts, including both the Second Circuit and the U.S. Supreme Court, in prior rulings on issues of standing where plaintiffs brought suit based on derivative harm, which is how the court characterized the claims of Bridgeport and its mayor. In concluding that the plaintiffs had alleged harms too remote to establish their standing to sue in this context, the court relied on the Second Circuit's precedent in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*[15] There, the court of appeals dismissed the claims of a union health insurance fund for the costs associated with treating the smoking-related illnesses of its beneficiaries. The Connecticut court concluded from that holding that "where a plaintiff complains of injuries that are wholly derivative of harm to a third party, plaintiff's injuries are generally deemed indirect and as a consequence too remote, as a matter of law, to support recovery."[16]

The Supreme Court of Connecticut went on to cite the U.S. Supreme Court's decision in *Holmes v. Securities Investor Protection Corp.*,[17] which laid out principles for handling plaintiffs seeking standing to sue for recourse for indirect injuries:

> First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.[18]

Utilizing these factors, the court went on to trace what it described as a causal chain that was supposedly untenable under current standing jurisprudence. It outlined the steps that a handgun takes, from manufac-

14. *Id.* at 121 (addressing the overlap of these two concepts as follows: "Indeed, in federal standing jurisprudence, the courts have considered the questions of proximate cause—which we ordinarily analyze under the concept of duty—and standing as part and parcel of the same inquiry.").

15. Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999).

16. *Ganim*, 780 A.2d at 122.

17. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992).

18. *Id.* at 123 (citing *Holmes*, 503 U.S. at 269–70).

ture and lawful sale to distributors, to lawful sale to legitimate retailers, only to be passed on to consumers or illegitimate purchasers, and then on to the black market and into the hands of illegitimate consumers. "Next, either the authorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts."[19] The court then continued:

> Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer the harms delineated previously, namely, increased costs for various municipal services, increased tax burdens on Bridgeport taxpayers, reduced property values, loss of investments and economic development in the city, loss of tax revenues from lost productivity, injuries and deaths of Bridgeport's residents, destruction of families and communities in the city, and a negative impact on the lifestyle of certain children in the city and on the ability of the residents to live free from apprehension of danger.[20]

Measuring this chain of causation against the *Holmes* factors, the court found that the plaintiffs could not establish their standing to sue. First, the numerous steps "between the conduct of the . . . defendants and the harms suffered by the plaintiffs" were "strongly suggestive of remoteness."[21] Second, the court noted how difficult it would be to apportion harm resulting from the defendants' acts as opposed to other, intervening forces. Indeed, the court went on at great length, in a statement later echoed by the district court in the Baltimore subprime litigation described below, about the range of ills befalling a city like Bridgeport and how difficult it would be to apportion damages.[22]

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19. *Id.* at 123.

20. *Id.* at 123–24.

21. *Id.* at 124.

22. Specifically, the court found as follows:

> The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast "rust belt" to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at a state and national level, unemployment, and even the construction of the national interstate highway system, to name a few, reasonably may be regarded as contributing to Bridgeport's increased crime rate, including crimes committed with handguns, and assault and suicide rates, increased costs of municipal services, reduced tax base, loss of investment and development, and injuries to the communities that make up Bridgeport and to its quality of urban life. It would require us to blink

Finally, the court noted that there were other potential plaintiffs who might serve as more appropriate litigants because they would not pose the same difficulties in apportioning harm and damages.[23] The court went on to discount other arguments the plaintiffs proffered to establish their standing, and affirmed the lower court's dismissal on standing grounds.[24]

> at reality to minimize the enormous difficulty to be encountered in attempting reliably to separate out the contribution of the defendants' conduct to those harms from these other, independent factors.

Id. at 124–25.

23. *Id.* at 126–28 (holding direct victims of gun violence, like those assaulted by attackers with handguns, would be more appropriate plaintiffs than municipality in suit against handgun manufacturers).

24. *Id.* at 128–34. It is worth mentioning two additional cases that arose in the lower courts of the Third Circuit. Those firearms actions—*City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002), and *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F. 3d 536 (3d Cir. 2001)—sought, among other relief, damages and injunctions against firearms manufacturers for what was alleged to have been the negligent marketing and distribution of firearms in such a way that they ultimately fell into the hands of criminals and/or children, where their use created a drain on government resources. These cases did not deal with the standing issue directly. Instead, the courts handling these cases dismissed them at least partly on the ground that the harms alleged were too remote from the alleged illegal conduct of the defendants—a conclusion reached by reviewing the claims' merits and assessing whether the plaintiffs could prove that the defendants' actions were the proximate cause of the plaintiffs' harms.

In *Camden County*, the court recounted the defendants' arguments about the attenuated chain of causation linking them to the harm the plaintiffs alleged as follows:

> The manufacturers respond that the County's factual allegations amount to the following attenuated chain of events: (1) the manufacturers produce firearms at their places of business; (2) they sell the firearms to federally licensed distributors; (3) those distributors sell them to federally licensed dealers; (4) some of the firearms are later diverted by unnamed third parties into an illegal gun market, which spills into Camden County; (5) the diverted firearms are obtained by unnamed third parties who are not entitled to own or possess them; (6) these firearms are then used in criminal acts that kill and wound County residents; and (7) this harm causes the County to expend resources to prevent or respond to those crimes. The manufacturers note that in this chain, they are six steps removed from the criminal end-users. Moreover, the fourth link in this chain consists of acts committed by intervening third parties who divert some handguns into an illegal market.

Camden County, 273 F.3d at 539 (citation omitted).

Construing New Jersey law as requiring "a degree of control by the defendant over the source of the [nuisance]" alleged, the Court of Appeals found defendants to lack the necessary control over the perpetrators of handgun violence within the county, finding the "causal chain . . . simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim." *Id.* at 541.

Similarly, in the *City of Philadelphia* case the Third Circuit dismissed the action after focusing on the lack of defendants' control over the perpetrators of the gun violence as well as the attenuated chain of causation between the defendants and the ultimate harm to the plaintiffs. *City of Philadelphia*, 277 F.3d at 425–26.

In the first firearms case in which a court determined that municipal plaintiffs had standing to sue, *White v. Smith & Wesson*[25] involved a lawsuit by the mayor of the city of Cleveland, Ohio, with the city itself as an additional party. The plaintiffs alleged, as in other cases where the complaints were dismissed on standing grounds,[26] that the firearms industry had caused the city harm in the nature of decreased tax revenues and increased costs for police and emergency services. The district court recounted the plaintiffs' allegations as follows:

> The City alleges that as a result of Defendants' unreasonably dangerous and negligently designed handguns: the City has suffered harm; lost substantial tax revenue due to lower productivity; and, "has been obligated to pay millions of dollars in enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care."[27]

The defendants in *White* argued that the plaintiffs' claims were barred by what they described as the "remoteness" doctrine.[28] However, the district court noted that "no such independent doctrine exists;" rather, the court explained that

> [r]emoteness,' as the term is used in legal doctrine and in the cases cited by Defendants, either relates to, and is merely an element of, whether a plaintiff properly has standing to bring a claim or whether a plaintiff has shown the existence of proximate causation as an element of a specific claim.[29]

Treating the defendants' arguments as challenging the *White* plaintiffs' standing to bring the underlying lawsuit, the court addressed the defendants' attempt to assert that the harm the plaintiffs alleged was too far removed from defendants, and thus that the "injury in fact" arm of the standing analysis was not satisfied.[30] The court rejected this attempt to bring an aspect of the "causation" arm to the injury-in-fact standing element. "[C]ausation (*i.e.*, who caused the injury)," the court concluded, "is a prong two question in the standing analysis, and should not be considered under prong one's question of whether there was, in fact, an actual injury."[31] After separating out injury-in-fact from causation, the court concluded: "In the matter at hand, the City itself was injured; an injury that has continuing, present adverse effects. Thus, the City was injured in fact and prong one is satisfied."[32]

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25. 97 F. Supp. 2d 816 (N.D. Ohio 2000).

26. *See, supra*, n. 24.

27. *Id.* at 824 (citation omitted).

28. *Id.* at 823.

29. *Id.*

30. *Id.* at 824 ("Defendants respond that Plaintiffs' injuries are not particularized or 'injuries in fact' because their claims are too remote and derivative.").

31. *Id.*

32. *Id.* at 824–25.

Turning to causation, the court next concluded:

> The injury will be fairly traceable to the challenged action if Plaintiffs are correct in their allegation that the handguns manufactured by Defendants are unreasonably dangerous and negligently designed. . . . Plaintiffs' claims, as alleged in their Complaint, are the "fairly traceable" result of Defendants' actions of allegedly designing and manufacturing unreasonably dangerous products.[33]

Finally, the court found a favorable ruling by the court would likely redress the injuries.[34]

The court then turned to Sixth Circuit "prudential standing restrictions" for a somewhat more thorough review of the plaintiffs' allegations.[35] Those requirements demand that a plaintiff may not assert the rights or interests of third parties, must be more than generalized grievances, and must fall within the "zone of interests" of a particular statute, where a cause of action is based on statutory grounds.[36]

In reviewing these requirements, the court concluded that the plaintiffs had claimed direct harm that they themselves had suffered. According to the court, the drain on municipal services is a harm that the municipality itself suffers, and is not derived from the harm that others suffer. Moreover, the grievances were not generalized, because they were focused on the particular harm that only the municipality had suffered and was suffering. Finally, where the plaintiffs had raised claims under Ohio products liability law, that law explicitly provided that government entities were authorized claimants under the law.[37]

Admittedly, the *White* court's ruling was less detailed than Connecticut's *Ganim* decision, which denied a municipal plaintiff standing. However, several months later, in *City of Boston v. Smith & Wesson Corp.*, the Supreme Judicial Court of Massachusetts engaged in a more thorough analysis of the standing issues than the *White* court, and reached the same conclusion—that a municipal plaintiff had standing to sue the defendants for the alleged costs associated with the proliferation of handguns in city limits.[38]

In *City of Boston*, the plaintiffs asserted that the activities of manufacturers, distributors, and sellers of firearms caused extensive harm to the municipality. The court described these harms as follows:

> Plaintiffs allege that Defendants' conduct undermines the Commonwealth's public policy regarding handguns. Plaintiffs further allege that Defendants' conduct has caused Plaintiffs harm,

33. *Id.* at 825.
34. *Id.*
35. *Id.*
36. *Id.* (citing Coyne v. Am. Tobacco Co., 183 F.3d 488, 494 (6th Cir. 1999)).
37. *Id.* at 825–26.
38. No. 199902590, 2000 WL 1473568 (Mass. Super. July, 13, 2000).

> including substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants; increased spending on law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values.[39]

The plaintiffs raised a number of claims, including that the defendants designed and manufactured their products in such a way that made it more likely that the firearms would make it into the hands of unauthorized users of those firearms, including criminals and children.[40]

Similar to the defendants' arguments in *White*, the defendants in *City of Boston* challenged the plaintiffs' allegations on the grounds that the harms alleged were too "remote" from the defendants' actions. Unlike the *White* court, however, the *City of Boston* court analyzed the issue of remoteness as part of the proximate cause analysis of the underlying claims, and not as a standing inquiry, reviewing both the U.S. Supreme Court's precedent in *Holmes* and the Second Circuit's ruling in *Laborers Local 17* for guidance.[41] Citing *Holmes*, the court highlighted the importance of establishing "some direct relation between the injury asserted and the injurious conduct alleged"[42] and that the harm alleged cannot be a result of harm to a third party; in other words, it cannot be "'purely contingent on' or 'wholly derivative of' harm to the third party."[43]

Turning to an analysis under *Holmes*, the court distinguished cases denying relief to health care providers for the cost of providing care to alleged victims of a tortfeasor's conduct by characterizing the plaintiffs' alleged harm as direct, and not dependent on some harm befalling a third party.[44] The court concluded that the plaintiffs' harm was not derivative

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39. *Id.* at *3.

40. *See id.* at *1–3 (describing the plaintiffs' allegations in detail).

41. *City of Boston*, 2000 WL 1473568 at *4.

42. *Id.* at *4 (quoting *Holmes*, 503 U.S. at 268).

43. *Id.* at *5 (quoting *Laborers Local 17*, 191 F.3d at 236, 237). The court referenced the following portion of the complaint in its analysis of the plaintiff's allegations:

> Defendants' conduct has caused [Plaintiffs] to incur public costs to respond to both intentional and accidental gunshot injuries. The harm to [Plaintiffs] includes substantial financial costs necessary for prevention, amelioration and abatement of the ongoing public nuisance caused by [D]efendants. Moreover, [Plaintiffs] ha[ve] suffered economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs. Boston has further been damaged by lower tax revenues and lower property values.

Id. at *5 (alterations in original).

44. *Id.* at *6.

of harm suffered by others because "harm to [the] Plaintiffs may exist even if no third party is harmed."[45] Indeed, the plaintiffs would have to spend greater resources on police, schools, and city streets because of the proliferation of handguns, even if no actual injuries were caused to third parties. The court cited the following example:

> Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct.[46]

Similarly, "diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals."[47] As a result, the court concluded, the harm the plaintiffs suffered "is in essence the type of harm typically suffered by municipalities due to public nuisances."[48] Furthermore, "much of the harm alleged is of a type that can only be suffered by these plaintiffs."[49] As a result of these findings, the court concluded that "remoteness" was not a barrier to the plaintiffs' action.[50]

Following the *City of Boston* decision, litigation that the city of Cincinnati had initiated reached the Ohio Supreme Court. After being dismissed by a trial court, a ruling that was upheld by Ohio's mid-level appellate court, the state's highest court reinstated the action, finding, among other things, that the plaintiffs in the action were not alleging harm that was too remote from the allegedly tortious conduct of the defendants.[51] There, reviewing the U.S. Supreme Court's *Holmes* precedent and its three-part test, as the *City of Boston* court had also done, the *City of Cincinnati* court concluded that the harms the plaintiffs alleged were not so remote from the alleged misconduct of defendants as to bar relief.[52]

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at *7.
51. City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002).
52. The court reviewed both the *White* and *City of Boston* decisions on this issue, and summed up its findings on the remoteness issue as follows:

> With regard to whether causation is too remote in this case, we turn to the three factors outlined in *Holmes*. The first concern, difficulty of proof, is minimal in this case, since appellant is seeking recovery, in part, for police expenditures and property repairs, which can be easily computed. Under the second factor, there is little risk of double recovery, since appellant is seeking recovery

Finally, in the last case of this analysis, former Mayor Sharpe James and the city of Newark filed suit in New Jersey state court for the municipal expenditures and losses associated with gun violence stemming from the distribution of firearms on the black market.[53] The appellate court in *James* affirmed the trial court's ruling on several issues, including causation and standing. However, since the court in this case addressed many of the same issues as those in the cases already discussed, and because at least some of the *James* decision was premised on state law, I will not prolong the discussion in the text here.[54]

> for injuries to itself only. Finally, no other person is available to bring suit against appellees for these damages. Under the third factor, *Holmes* asks whether "the general interest in deterring injurious conduct" will be better served by requiring that suit be brought by more directly injured victims. Although appellant is indirectly attempting to protect its citizens from the alleged misconduct by the gun manufacturers and trade associations, appellant is seeking recovery for its own harm. Under these circumstances, the general interest will be best served by having this plaintiff bring this lawsuit. We believe that appellant can withstand scrutiny under the *Holmes* test. Consequently, we find that the court of appeals erred in concluding that appellant's claims were too remote for recovery.

Id. at 1149 (citations omitted) (quoting *Holmes*, 503 U.S. at 269).

53. James v. Arms Tech. Inc., 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003).

54. Relying on New Jersey law on causation, which permits a plaintiff to show proximate cause by proving a defendant's conduct was a "substantial contributing factor" in the harm alleged, the *James* court found that the plaintiffs' allegations reduced the chain of causation between the harm suffered and the conduct challenged "to a single link." *Id.* at 39.

> The City alleges that defendants purposely or negligently flood the gun market, knowing that their steady supply of guns will feed or facilitate the illegal sale of weapons to criminals and other unlawful users. Indulgently read, its allegations further charge that defendants individually and collectively failed to develop and in fact discourage the development of reasonable safeguards over the distribution scheme, and that defendants refuse to oversee or supervise the control of handgun distribution in order to prevent the foreseeable channeling of guns to such an illegal market. This conduct, the City asserts, is a natural and proximate cause of its injury.

Id.

Thus, the knowing or negligent release of handguns into the illegal market is precisely the conduct that causes the drain on municipal resources. By interpreting the facts in this way, the *James* court's ruling is distinguishable from the holdings in *Camden County* and *City of Philadelphia*, discussed above, where the courts accepted the defendants' description of a tortured and attenuated chain of causation between the defendants' conduct and the harm alleged by the plaintiffs.

Similarly, adopting the approach to the facts that the *City of Boston* and *Cincinnati* courts used, as outlined above, the *James* court noted that the harm the city suffered was distinct from, and even independent of, any harm that might or might not inflicted on third parties.

> Here, the City is not alleging that it has suffered economic damages for the medical treatment of injuries arising out of illegal gun use. The City's entire claim is bottomed on the cost of governmental services. Those costs are entirely distinct and separate from the medical expenses incurred in the treatment of

2. Financial Crisis Litigation

In the wake of the financial crisis, several cities have initiated litigation against lenders and investment banks for the harm the proliferation of their subprime mortgage products allegedly caused those cities. Just as in the climate change and firearms litigation, cities are bearing the brunt of the fallout from the financial crisis. Studies consistently show that home foreclosures reduce the property values of neighboring properties.[55] This reduction brings about a lowered tax base for municipalities and other localities. Foreclosed homes, when they stand vacant and unattended, become a magnet for crime, and drain local government coffers due to the provision of police and fire services to such properties.[56]

Many cities and communities have been and will continue to be harmed by risky lending practices carried out during the lead-up to the financial crisis.[57] Millions of homes have been foreclosed in the last two years and millions more will face foreclosure before the crisis abates.[58] These foreclosures have a severe impact on the property values of both foreclosed properties and properties near those foreclosed properties.[59] One study of the impact of foreclosures in Chicago in 1997 and 1998

> the victims of gun violence. Indeed, the City's direct expenditures in investigating a gun-related crime occurring within its jurisdiction may involve no injury at all.

Id. at 41.

Turning to the standing issue, and recognizing that New Jersey standing doctrine is less exacting than the federal standard, the court found that the city met its burden of establishing it had standing to initiate the underlying action.

> The City is not asserting the right of a third party; it clearly has a "sufficient stake" in seeking redress for damages to it directly attributable to defendants' conduct. In fact, no other party has a more direct interest in protecting the public fisc than the City itself. Moreover, as previously noted, the expenses incurred by the City are "direct" and independent of the costs of treating the victims of gun violence.

Id. at 45.

55. *See, e.g.*, DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), *available at* http://www.nw.org/foreclosuresolutions/reports/documents/TGTN_Report.pdf (studying foreclosures in the City of Chicago in the 1990s and finding that each foreclosure reduced the property values of all residences within one-eighth of a mile by approximately 1% for each foreclosure).

56. WILLIAM C. APGAR ET AL., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 10-11 (2005), *available at* http://www.995hope.org/content/pdf/Apgar_Duda_Study_Full_Version.pdf.

57. WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 7 (2005), *available at* http://www.995hope.org/content/pdf/Apgar_Duda_Study_Short_Version.pdf.

58. Janet Morrissey, *Still Hunting for a Bottom in Housing*, TIME, Jan. 7, 2010, *available at* http://www.time.com/time/business/article/0,8599,1952132,00.html.

59. *See* Eric C. Seitz, *U.S. Subprime Crisis: H.R. 3915—A Far-Sighted Solution to the Mortgage Crisis*, 14 L. & BUS. REV. AM. 759, 764 (2008) (citing Luke Mullins, *Nightmare on Main Street*, U.S. NEWS & WORLD REP., Mar. 10, 2008, at 42) (explaining

showed that the property values of homes dropped approximately 1% each for all single-family homes within one-eighth of a mile of a foreclosed property,[60] and that on average, each foreclosed property decreased the aggregate value of neighboring properties between $159,000 and $371,000.[61] The study estimated that the foreclosures reduced property values in the city as a whole by between $598 million and $1.39 billion.[62] More recent studies predict a range of cumulative losses to homeowners nationally at between $356 billion and $1.2 trillion in home values as a result of the present foreclosure crisis.[63] However, because different regions face different foreclosure rates—with the most alarming occurring in California, Florida, Nevada, Ohio, and Arizona—certain communities are more affected than others.[64]

With these losses in mind, cities have begun to initiate lawsuits, but they have had limited success to date. Litigation in this arena has come in three different forms. First, in January 2008, the mayor and city council of Baltimore, Maryland, brought suit against lender Wells Fargo for what the plaintiffs alleged are violations of the Fair Housing Act evident in the bank's lending patterns in the city.[65] Second, the city of Cleveland, Ohio, commenced an action against well over a dozen investment banks under the theory that those financial institutions promoted the sale of subprime mortgage products with the full knowledge that those loans

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that foreclosed properties are often sold at less than market value, which typically reduces the appraised valuation neighboring properties).

60. DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), *available at* http:// www.nw.org/foreclosuresolutions/reports/documents/TGTN_Report.pd.

61. *Id.* at 11.

62. *Id.* at 13.

63. *Compare* THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 10 ex. 1 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf (predicting a $356 billion loss in home value due to rise in foreclosures), *with* GLOBAL INSIGHT, THE MORTGAGE CRISIS: ECONOMIC AND FISCAL IMPLICATIONS FOR METRO AREAS 2 (2007), *available at* http://www.usmayors.org/metroeconomies/1107/report.pdf (predicting a $1.2 trillion total loss in home values due to the subprime mortgage crisis).

64. *See* Gregory D. Squires, *Urban Development and Unequal Access to Housing Finance Services*, 53 N.Y.L. SCH. L. REV. 255, 263 (2008) (citing David Cho & Nell Henderson, *Where the Wolf Comes Knocking; Areas Already in Economic Distress Feel Rise in Housing Foreclosures Most*, WASH. POST, Mar. 15, 2007, at D1) ("[M]acro-economic effects are harshest in depressed communities, particularly the Gulf Coast and industrial Midwest. Subprime foreclosure rates in the fourth quarter of 2006 ranged from less than 3% in Washington, D.C., Maryland, and Virginia, to over 7% in Mississippi, and over 9% in Indiana, Michigan, and Ohio.").

65. For an overview of the Baltimore litigation, see Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 175–79 (2009).

were risky and likely to cause harm where they were sold.[66] Third, Buffalo, New York,[67] and Cincinnati, Ohio,[68] have commenced litigation for the failure of banks, once they foreclose on properties, to maintain those properties, causing a drain on municipal resources.

While the Buffalo and Cincinnati cases have not progressed very far, both the Baltimore and Cleveland cases have been dismissed. In Cleveland, Federal District Court Judge Sara Lioi dismissed that city's case, finding that an Ohio law prohibited municipalities from regulating mortgages. Because the city's commencement of the litigation was itself an effort to regulate mortgages, the court concluded, it was barred by the statute.[69] The city is appealing this decision; the following discussion assesses that portion of the trial court's decision that was related to standing.

The Cleveland litigation, one of the first of its type, targets a host of investment banks including some of the nation's largest, like Goldman Sachs & Co. and JP Morgan's mortgage-backed securities arm. The city is seeking to recoup both the costs of responding to crime and other emergencies caused by foreclosed properties that had been saddled with subprime mortgage debt, and the concomitant drop in the tax base that these foreclosures caused.[70] It claims that while the investment banks did not make the subprime loans themselves, they built up a market for mortgage-backed securities (MBS) fed by subprime loans. This market environment was inappropriate for Cleveland given the weakness of its economy, the city claims, and it was foreseeable that many of these mortgages would fall into arrears and ultimately end up in foreclosure.[71]

The defendants in the action raised many of the same arguments used in the firearms litigation described above, including that state law

66. *Ameriquest Mortgage Sec.*, 621 F. Supp.2d at 514-515 (describing allegations of complaint).

67. *See* Jason Szep, *Cities Grapple with Surge in Abandoned Homes*, REUTERS, Mar. 25, 2008, *available at* http://www.reuters.com/article/marketsNews/idUSN1162941020080325 (describing how Buffalo filed suit against lenders holding foreclosed properties for the costs of maintenance and/or demolition of such properties).

68. Dan Monk, *City Sues Deutsche Bank, Wells Fargo*, BUS. COURIER (CINCINNATI), Dec. 24, 2008, *available at* http://www.bizjournals.com/cincinnati/stories/2008/12/22/daily45.html (describing Cincinnati action).

69. *See Ameriquest Mortgage Sec.*, 621 F. Supp. 2d at 518–20 (granting dismissal of complaint). Additional grounds for dismissal included that the action was barred by the economic loss rule; that the City's allegations "fail[ed] to demonstrate an unreasonable interference with a public right"; and that the city was unable to demonstrate "that Defendants' conduct was the proximate cause of its alleged damages." *Id.* at 536. Since this action was unique among the municipal litigation currently pending, it is unclear whether this decision, if not reversed on appeal, will have any impact on the other pending actions, though it will likely discourage other municipalities within Ohio from bringing actions based on similar allegations.

70. *Id.* at 515–16.

71. *Id.* at 515–17 (summarizing the city's allegations).

preempted the city's litigation, that lawful conduct cannot create a public nuisance, and that the city's harms were too remote from the defendants' actions for those actions to have proximately caused those harms.[72] Although the district court found several bases upon which to dismiss the city's action, I will focus only on the proximate cause issue here.

Relying on the Supreme Court's opinion in *Holmes*, the court assessed the defendants' alleged misconduct to determine whether it was the proximate cause of the plaintiff's harms or whether there were "too many independent events and potential intervening causes lying in between,"[73] as the defendants asserted, defeating the claim. The court then outlined what it described as a "lengthy chain of events" between the plaintiff's harms and the defendants' conduct.[74] The court described the defendants as "stand[ing] atop" this chain of events, "far removed from the City's ultimate damages."[75]

The court then recounted the course of conduct that led to the harms the city alleged it suffered, starting with the defendants providing funding for MBS, which itself provided the funds necessary to capitalize subprime lenders so that they could make subprime loans.[76] Mortgage brokers then partnered with subprime mortgage originators to make subprime loans. These mortgages were packaged and sold to the defendants, who, in turn, sold them as securities on the securitization market. Borrowers then defaulted on the loans.[77] Any property securing such a mortgage was foreclosed upon (usually not by the defendants), the property fell into disrepair, and "it eventually became an eyesore, a fire hazard, or otherwise deteriorated in condition to such a degree that the City was required to incur costs either maintaining the property or demolishing it."[78] The court then summed up its assessment of this chain of events as follows:

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72. *Ameriquest Mortgage Sec.*, 621 F. Supp.2d at 516.

73. *Id.* at 532.

74. *Id.* at 534.

75. *Id.*

76. *Id.*

77. The court outlined the likely intervening factors that might have caused the borrower to fall into arrears on his or her mortgage as follows:

> This occurred for any number of reasons. For example, the borrower may have lost a job, kept a job but did not have the wherewithal to repay in the first place, suffered a catastrophic injury, borrowed too much on credit cards, been unable to refinance the original loan, taken out a second mortgage that the borrower was unable to afford, suffered investment losses that depleted savings that were to be used to repay the mortgage, or, despite an ability to pay, simply decided to walk away from the mortgage because the expense was not justified by the property's declining value—all of which the [city] conveniently ignores.

Id.

78. *Id.*

> This confluence of events certainly was no small problem given the large volume of foreclosures in Cleveland and the city's budgetary constraints, but under no circumstances can it be described as having been directly caused by Defendants' conduct. As the foregoing discussion illustrates, the potential number of intervening causes borders on incalculable.[79]

The court went on to distinguish the *City of Cincinnati* firearms decision of the Ohio Supreme Court, described above, by saying that "the guns that comprised the illegal firearms market [in that case] originated with the defendant gun manufacturers, while in this case, Defendants did not originate the underlying subprime loans or initiate foreclosures in Cleveland, but merely provided funding for subprime lending."[80]

Furthermore, the court noted that in the firearms context the harm to the city—for example, the cost of policing in a city as a result of an increase in illegal firearms—could arise "irrespective of whether third-parties [sic] were actually injured by gun violence."[81] In contrast, the city's claim in the subprime mortgage context "hinges entirely on the foreclosure activity for which Defendants were at best indirectly responsible."[82] The court went on to conclude that the city could not claim that "it was injured by the mere issuance of subprime loans or MBS."[83] The court also concluded that other parties—including subprime borrowers and investors in MBS—would likely be better plaintiffs in an action against investment banks than the city, because they were more closely linked to those banks' activities.[84] Based on this three-part *Holmes* analysis, the court ultimately concluded that the city could not establish the requisite proximate cause to maintain the suit.[85]

Following the decision in the Cleveland case, a district court in Alabama dismissed for lack of standing a case the city of Birmingham filed

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79. *Id.*

80. *Id.* at 536.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 533.

85. The court concluded as follows:

> The City's allegations fail to demonstrate any direct relationship between its alleged injury and Defendants' conduct. It would be tremendously difficult, if not completely impossible, to determine which of the City's damages are attributable to Defendants' alleged misconduct and not to some absent party. In addition, even if Defendants' securitization activities were somehow unlawful, subprime borrowers and MBS investors stand in closer proximity to Defendants' conduct and have potential claims and remedies available to vindicate their legal rights.

Id.

under the Fair Housing Act and state common law tort theories.[86] The court concluded that that harms alleged were too remote and attenuated from the defendants' conduct, which, it was alleged, constituted "reverse redlining"—i.e., the targeting of communities of color for loans on terms less favorable than loans a lender would make to whites.[87]

In its dismissal the court did find, however, that the plaintiffs could at least meet the first prong of the standing test: injury-in-fact. Recounting the city's allegations, the court wrote:

> The City alleges that it has suffered, *inter alia,* the following "injuries in fact": reduced property values, reduced property tax revenues, increased spending on police and fire protection, and increased spending to secure foreclosed homes that are abandoned. The court finds that, assuming the factual allegations in the complaint are true, the City's alleged financial injuries constitute "injuries in fact" for the purpose of determining standing.[88]

The court found, however, citing the Supreme Court's precedent in *Lujan*, that the plaintiffs could not meet the second prong of the standing inquiry—specifically that their harms were "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."[89] Admitting that this analysis is "something like a moving target,"[90] the court turned to precedent from a district court in North Carolina, *Tingley v. Beazer Homes Corp.*, where the court dismissed an action by homeowners against lenders who had made predatory loans to third-party borrowers who then defaulted on their loans, causing the reduction in the plaintiff-homeowners' property values.[91] The court in that case found the plaintiffs' harms wanting because the third-party, defaulting mortgagors could have defaulted for any number of reasons, not just that the loans were unfair. Accordingly, the homeowners' harms were not fairly traceable to defendants' conduct or free of the intervening acts of third parties not before the court.[92] Following this precedent, the court in *Birmingham* concluded that the city's claims were actually more attenuated than the claims of the homeowners in *Tingley*, and thus they could not establish a "fairly traceable" link between the defendants' conduct and the harm the city suffered.[93]

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86. City of Birmingham v. Citigroup, CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 123123 (N.D. AL Aug. 19, 2009).

87. *Id.* at *11–12.

88. *Id.* at *8.

89. *Id.* (quoting *Lujan*, 504 U.S. at 560).

90. *Id.* at *9.

91. Tingley v. Beazer Homes Corp., No. 3:07cv176, 2008 WL 1902108 (W.D.N.C. April 25, 2008).

92. *Id.* at *4.

93. The court concluded as follows:

Similarly, and most recently, a district court judge dismissed a lawsuit filed by the mayor and city council of Baltimore against Wells Fargo bank and its affiliates under the Fair Housing Act on the grounds that the plaintiffs' claims that they suffered cognizable harms at the hands of the defendants were not "plausible" in accordance with recent Supreme Court precedents.[94] My research indicates that this is the first case out of the thousands of cases that have cited these precedents to dismiss a case on standing grounds using the "plausibility standard" of these holdings.

In *Mayor of Baltimore*, the judge first assigned the case denied the bank's motion to dismiss, finding that the plaintiffs had presented evidence of direct discrimination,[95] which meant the case should go forward. However, Federal District Court Judge Frederick Motz, to whom the case was later re-assigned, subsequently found that the plaintiffs had presented scant evidence that the properties secured by loans originated by the defendants were more than a "negligible portion" of the city's vacant housing stock.

> Thus, using the City's own figures, Wells Fargo is responsible for only a negligible portion of the City's vacant housing stock. This fact alone demonstrates the implausibility of any alleged causal connection between Wells Fargo's alleged reverse redlining activities and the generalized type of damages claimed by the City, e.g., decline in value of homes and decreased property tax revenues resulting, increased criminal and gang activities, and increased police and fire protection resulting from building vacancies. Moreover, the alleged connection is even more implausible when con-

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> Just as in *Tingley*, a series of speculative inferences must be drawn to connect the injuries asserted with the alleged wrongful conduct by the Defendants. Like in that case, the minority borrowers in this case could have defaulted on their mortgages for a number of reasons, none of which related to the Defendants' alleged "reverse redlining." Also, the Defendants' decisions to foreclose on the properties after the borrowers defaulted could be, as in *Tingley*, for reasons totally apart from the alleged "reverse redlining." Furthermore, it is quite speculative that the depreciation in value of the neighboring homes in the City was caused by the foreclosures of minority borrowers' properties rather than as a result of "a myriad of other factors," which, as the *Tingley* court noted, could include "rising unemployment in the region, changes in the housing market, or other economic conditions."

City of Birmingham, 2009 U.S. Dist. LEXIS 123123, at *12–13 (quoting *Tingley*, 2008 WL 1902108, at *5).

94. Mayor and City Council of Baltimore v. Wells Fargo, N.A., 677 F. Supp. 2d 847 (D. Md. 2010). For the recent Supreme Court jurisprudence on pleading requirements, see Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (requiring that allegations of a complaint meet a threshold of "plausibility" in order to satisfy Rule 8 of the Federal Rules of Civil Procedure), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (requiring the same).

95. Mayor of Baltimore v. Wells Fargo Bank, N.A., 631 F. Supp. 2d 702, 704 (D. Md 2009).

> sidered against the background of other factors leading to the deterioration of the inner city, such as extensive unemployment, lack of educational opportunity and choice, irresponsible parenting, disrespect for the law, widespread drug use, and violence. . . . It may be entirely reasonable to posit—as the City's allegations amply support—that unscrupulous lenders took advantage of inner city [sic] residents living in a dysfunctional environment to induce them to make loans they could not afford. It does not follow, however, that it is reasonable to infer—as the City argues—that the unscrupulous lenders themselves created the dysfunctional environment they exploited.[96]

The court invited plaintiffs to submit an amended complaint.[97]

While these cases still may succeed after amendment of the pleadings, as in the Baltimore case, or after appeal, as in the case filed by the city of Cleveland, to date municipal litigation in the wake of the financial crisis has yet to achieve any lasting victories in the courts. On the environmental front, however, government litigants, including municipalities in some instances, have had greater success, particularly on the standing issue. It is to this area of law that I now turn.

3. Climate Change Litigation

The third area of potential municipal litigation, one that is only likely to expand in coming years, involves lawsuits to combat the harmful effects of global climate change. Unlike in the firearms and financial crisis settings, however, there is a Supreme Court pronouncement on the specific issue of government entity standing. Moreover, in that pronouncement, *Massachusetts v. EPA*, the Court found Massachusetts suitable as the action's lead plaintiff not just because it was a state, but also because it was a property owner with property allegedly affected by rising sea tides due to climate change.[98] What makes the case even more likely to expand standing doctrine is both the extent to which the chain of causation involved there appears attenuated, and the somewhat tenuous potential for redressability—neither of which prevented the Court from finding standing.

In *Massachusetts*, the state and several other plaintiffs sought to compel the U.S. Environmental Protection Agency (EPA) to determine whether it needed to promulgate regulations of so-called greenhouse gas emissions under the Clean Air Act (CAA).[99] The plaintiffs alleged that the EPA's failure first, to make a determination on whether it needed to

96. *Mayor of Baltimore*, 677 F. Supp. 2d at 850–51 (footnote and citation omitted).

97. *Id.* at *4.

98. Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

99. *Id.* at 505.

regulate these gases, and second, actually to regulate those gases assuming the agency found it needed to do so, contributed to global warming and endangered the Massachusetts coastline.[100] Massachusetts sought relief both as a state and as a landowner of seaside properties likely affected by rising tides due to global warming.[101] Under the CAA, the EPA can issue regulations concerning control of "air pollutants."[102] Because the EPA had chosen not to make a determination as to whether greenhouse gases were air pollutants, it would not issue rules regulating such gases,[103] despite the plaintiffs' request that the EPA do just that.[104]

Writing for the majority, Justice Stevens noted that Congress had authorized the type of suit in question: a litigant challenging the EPA's failure to issue regulations under the CAA with respect to a particular pollutant.[105] Quoting Justice Kennedy's concurring opinion in *Lujan* at length, the majority opinion reviewed the broad power Congress possesses to confer standing in many situations:

> "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.[106]

While the majority recited the *Lujan* standing elements of actual or imminent injury, traceable to the defendant and redressable by the court,[107] the opinion stressed:

> [A] litigant to whom Congress has "accorded a procedural right to protect his concrete interests"—here, the right to challenge agency action unlawfully withheld—"can assert that right without meeting all the normal standards for redressability and immediacy." When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will

100. *Id.*

101. *Id.* at 515 (quoting Massachusetts v. EPA, 415 F.3d 50, 65–66 (D.C. Cir. 2005) (Tatel, J., dissenting), *rev'd*, 549 U.S. 497 (2007)).

102. *Id.* at 528 (citing 42 U.S.C. § 7521(a)(1) (2006)).

103. *Id.* at 513–14 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930–33 (Sept. 8, 2003)).

104. *Id.* at 510.

105. *Id.* at 516.

106. *Id.* at 516–17 (citations omitted) (quoting *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in judgment)).

107. *Id.* at 517 (citing *Lujan*, 504 U.S. at 560–61).

> prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.[108]

The majority went on to recognize that Massachusetts met the injury-in-fact element. Because the Commonwealth owned "'a substantial portion of the state's coastal property,'" it had "alleged a particularized injury in its capacity as a landowner."[109]

Turning to causation, the Court noted that the EPA did not argue that there is no causal connection between greenhouse gas emissions and global warming, but instead that the particular relief sought—to have the EPA review such gases as pollutants and consider specifically whether to issue regulations about new vehicles' emission of the gases—contributed "insignificantly" to the harms plaintiffs were alleging.[110] The Court rejected the EPA's contentions, however, indicating that even "a small incremental step" to mitigate an injury gives rise to judicial review.[111] Finally, with respect to redressability, the Court noted that even with expected increases in global emissions from other parts of the world, a "reduction in domestic emissions [of greenhouse gases] would slow the pace of global emissions increases, no matter what happens elsewhere."[112]

Admittedly, the Court did note the "special position and interest of Massachusetts" and the "considerable relevance" to the standing discussion of the fact that the party seeking review was a sovereign state.[113] As a result, the state was entitled to "special solicitude" in the standing analysis.[114] At the same time, the Court noted that Massachusetts owned "a great deal" of the coastline affected by greenhouse gas emissions and this fact "only reinforces the conclusion that [the state's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."[115] Perhaps because of the fact that the state is also a landowner, the Court concluded, "it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process."[116] This language, all taken together, seems to indicate that while the Court believed that a lower showing was required of the state to establish standing, Massachusetts nevertheless had shown that it owned property affected by the challenged action such that the "most demanding" standing test could also be met.

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108. *Id.* at 517–18 (citations omitted) (quoting *Lujan*, 504 U.S. at 572 n.7) (citing 42 U.S.C. § 7607(b)(1) (2006)).

109. *Id.* at 522.

110. *Id.* at 523.

111. *Id.* at 524.

112. *Id.* at 526.

113. *Id.* at 518.

114. *Id.* at 520.

115. *Id.* at 519.

116. *Id.* at 521.

The literal ruling of the Court was that a state can bring such a challenge, but that does not end the discussion. In *Massachusetts*, the Court addressed, at least nominally, "procedural harms" and the power of Congress to confer standing to challenge agency action that causes such harms.[117] The Court has also recognized this power in other opinions.[118] Even Justice Scalia recognized Congress's power to confer standing based on such harms in *Lujan*, where the Court otherwise rejected the standing of individual plaintiffs who failed to allege they suffered specific harm from agency policies and inaction.[119]

A key aspect of the *Massachusetts* ruling is that the plaintiffs were seeking to vindicate a *state's* procedural rights. Because of these two elements—the nature of the claim and the litigant—it is possible to consider the Court's ruling as limited to situations where similar claims and parties are present. At the same time, the Court assessed the standing of the plaintiff state suing in its capacity as a landowner, and noted that the nature of the injuries and the relief sought were such that the Commonwealth met the most exacting requirements of standing. Nowhere did the Court indicate that its causation and redressability findings were limited

117. For a discussion of procedural harms giving rise to standing, see Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 176 (2006) (discussing procedural injury cases and exploring a circuit split over whether a programmatic rule, rather than a "site-specific agency rule," provides plaintiff's standing in procedural injury cases); Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v Defenders of Wildlife, 62 U. CHI. L. REV. 275, 277 & n.7 (1995) (exploring the different methods courts have used in analyzing procedural injury standing, noting possible methods that courts could use and evaluating these methods while considering the effects of *Lujan*); Miriam S. Wolok, Note, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 NAT. RESOURCES J. 163, 164 (1992) (reviewing the development and application of procedural injury to create standing for environmental groups (citing Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, *Lujan*, 504 U.S. at 555)).

118. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

119. Writing for the Court in *Lujan*, Justice Scalia recognized the viability of a plaintiff's standing to sue for procedural harm, provided that there is still some concrete injury flowing from that harm, like owning property adjacent to the land affected by the disputed agency conduct:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 572 n.7.

to cases involving a state as litigant, or to cases involving solely procedural harms. It is not a surprise then that litigants have attempted to apply this precedent to other settings. Most notably, in decisions reached within less than a month of each other in the fall of 2009, both the Second and Fifth Circuits ruled independently that the standing analysis in *Massachusetts* could be applied to both state[120] and private litigants[121] suing under common law theories. I will next discuss each of these decisions in turn.

First, in 2004, eight states and the city of New York brought a public nuisance action against six power companies, alleging violations of federal common law, or, in the alternative, state law.[122] The plaintiffs alleged that the defendants were responsible for "'ten percent of all carbon dioxide emissions from human activities in the United States.'"[123] The plaintiffs alleged that one of the states—California—was already experiencing the impacts of global warming due to increased snowpack melt in the Sierra Nevada Mountains resulting from increased average temperatures, pushed back fall freezes, and moved-up spring thaws.[124]

In addition to this suit, a group of land trusts filed a companion action against the same defendants, alleging that the lands they hold in trust are in danger from global warming. Specifically, they claimed "that the accelerated sea level rise and coastal storm surges caused by global

120. Connecticut v. Am. Elec. Power Co. Inc., 582 F.3d 309 (2d Cir. 2009) (finding that states had standing to bring federal common law nuisance claims related to defendant-power companies' alleged contributions to global warming).

121. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) (finding that private parties had standing to bring state common law nuisance claims against oil and energy companies for their contributions to global warming, which allegedly made Hurricane Katrina more powerful and destructive).

122. *Am. Elec. Power*, 582 F.3d at 314.

123. *Id.* at 316 (citation omitted).

124. *Id.* at 317. In terms of future and threatened injuries, the court described the plaintiffs' allegations as follows:

> With regard to future injuries, the complaint categorizes in detail a range of injuries the States expect will befall them within a span of 10 to 100 years if global warming is not abated. Among the injuries they predict are: increased illnesses and deaths caused by intensified and prolonged heat waves; increased smog, with a concomitant increase in residents' respiratory problems; significant beach erosion; accelerated sea level rise and the subsequent inundation of coastal land and damage to coastal infrastructure; salinization of marshes and water supplies; lowered Great Lakes water levels, and impaired shipping, recreational use, and hydropower generation; more droughts and floods, resulting in property damage; increased wildfires, particularly in California; and the widespread disruption of ecosystems, which would seriously harm hardwood forests and reduce biodiversity. The States claim that the impact on property, ecology, and public health from these injuries will cause extensive economic harm.

Id. at 317–18.

warming would permanently inundate some of their property, salinizing marshes and destroying wildlife habitat."[125]

The defendants challenged the plaintiffs' claims in these actions on several grounds, including that there was no federal common law cause of action to abate the emission of greenhouse gases, and that the plaintiffs lacked standing. The district court, Chief Judge Loretta Preska of the Southern District presiding, dismissed the actions on the ground that the complaints raised political questions that were not justiciable, finding that the issues the litigation presented were "transcendently legislative [in] nature."[126] Having dismissed the matter as incapable of judicial resolution, the lower court did not reach the standing issue.

On appeal, the Second Circuit addressed both the justiciability of the plaintiffs' claims and the plaintiffs' standing to sue. Rejecting the district court's conclusion on justiciability, the appellate court found that courts routinely handle "familiar public nuisance precepts, grapple[ ] with complex scientific evidence, and resolve[ ] the issues presented, based on a fully developed record."[127] As a result, the issues the plaintiffs presented were not beyond judicial expertise or power. The court next turned to the issue of standing.

The court noted that the states were suing both in their *parens patriae* and proprietary capacities (i.e., as owners of property), and New York City and the land trusts were suing in their proprietary capacities as well.[128] Turning first to the states' *parens patriae* standing, the court recounted the Supreme Court's standard, articulated in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,[129] which requires states to make the following showing: that they are articulating an interest separate from particular private parties; that they are asserting claims as quasi-sovereigns; and that they have alleged an injury to a sufficiently substantial segment of a state's population.[130] With this standard in mind, the court had no difficulty finding that the states had standing in their *parens patriae* capacity.[131]

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125. *Id.* at 318.

126. Connecticut v. Am. Elec. Power Co. Inc., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

127. *Am. Elec. Power*, 582 F.3d at 327 (citation omitted).

128. *Id.* at 334.

129. 458 U.S. 592 (1982).

130. *Am. Elec. Power*, 582 F.3d at 335–36 (citations omitted). The *American Electric* court also highlighted the fact that the Second Circuit adds an additional requirement in such settings—specifically that individuals on whose behalf a state is suing cannot obtain complete relief through a private suit. *Id.* at 336 (citation omitted).

131. The Second Circuit found as follows:

> Their interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities. Their quasi-sovereign interests involving their concern for the "health and well-being-both physical and economic-of [their] residents in general," are classic examples of a

With respect to the standing of the states, New York City, and the land trusts in their proprietary capacities, the court next relied on the *Lujan* factors. It turned first to the injury-in-fact requirement, and separated out those injuries the plaintiffs alleged they currently experienced from those injuries threatened in the future. Addressing the present injuries the state of California alleged—injuries resulting from melting snowpack—the court found those injuries to be concrete, particularized, actual and imminent, and not conjectural or hypothetical. In other words, they satisfied the injury-in-fact requirement.[132]

The land trusts' claims were equally wide-ranging, including allegations that rising sea levels will inundate coastal lands they hold in trust, and that the salinization of marshes on their properties will destroy fish and migratory bird habitats.[133] The groups also alleged harm not only to their proprietary interests but also their organizational goals:

> [The land trusts] assert that global warming "will diminish or destroy the particular ecological and aesthetic values that caused [them] to acquire, and cause them to maintain, the properties they hold in trust," and will undermine their objectives by "interfering with their efforts to preserve ecologically significant and sensitive

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state's quasi-sovereign interest. The States have alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations. Moreover, it is doubtful that individual plaintiffs filing a private suit could achieve complete relief.

Id. at 338 (alteration in original) (citations omitted).

132. *Id.* at 341–42. In terms of the future injuries alleged by the state and city plaintiffs, it was extensive, and described by the court as follows:

> The bulk of the States' allegations concern future injury. For example, those Plaintiff States with ocean coastlines, including New York City, charge that a rise in sea level induced by global warming will cause more frequent and severe flooding, harm coastal infrastructure including airports, subway stations, tunnels, tunnel vent shafts, storm sewers, wastewater treatment plants, and bridges, and cause hundreds of billions of dollars of damage. In addition, they assert that some low-lying public property would be permanently inundated unless protective structures are built, with the cost falling heavily on those coastal Plaintiffs. Further, a rise in sea level would salinize marshes and tidelands, destroy habitat for commercial and game species, migratory birds, and other wildlife; accelerate beach erosion, and cause saltwater intrusion into groundwater aquifers. Global warming threatens Plaintiff States bordering the Great Lakes with substantial injury by lowering the water levels of the Great Lakes, which would disrupt hydropower production. Warmer temperatures would threaten agriculture in Iowa and Wisconsin and increase the frequency and duration of summer heat waves with concomitant crop risk. Global warming will also disrupt ecosystems by negatively affecting State-owned hardwood forests and fish habitats, and substantially increase the damage in California due to wildfires. Plaintiff States predict these injuries will come to pass in the next 10 to 100 years.

Id. at 342.

133. *Id.*

> land for scientific and educational purposes, and for human use and enjoyment."[134]

The court then addressed defendants' objections that the plaintiffs' harms were not imminent because plaintiffs could not specify a date certain by which such harms would occur.[135] The Second Circuit then reviewed precedent from the Supreme Court,[136] as well as the Seventh Circuit[137] and its own precedent,[138] to conclude that the "imminence" of an injury was not related to temporal specificity as to when it would occur, but rather the *certainty* that the alleged harms would occur at all. The court turned to its prior decision in *Baur v. Veneman*, where it found that a plaintiff's risk of exposure to illness due to the defendants' conduct was the harm that gave rise to that party's standing, not contracting the illness itself. There, the Second Circuit found that "'only the *exposure must be imminent*, not the actual onset of disease."[139] The court, in turn, found that the facts before it were more compelling than the facts in *Baur*, because the defendants were "*currently* emitting large amounts of carbon dioxide and will continue to do so in the future," and "the processes producing [the harms] have already begun."[140]

Turning to the causation element of the standing inquiry, the court rejected the defendants' contentions that because there were many other causes and potential causes of the plaintiffs' alleged injuries, and because the plaintiffs could not pinpoint which injuries the defendants caused, the plaintiffs could not satisfy this prong of the standing analysis. Indeed, the defendants argued that the emissions "allegedly account for 2.5% of man-made carbon dioxide emissions," and "only the collective effect of worldwide emissions allegedly causes injury."[141] The court dispensed with this objection, however, finding as follows:

> Plaintiffs have sufficiently alleged that their current and future injuries are "fairly traceable" to Defendants' conduct. For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.[142]

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134. *Id.* at 342 (alteration in the original) (quoting Complaint at 29–30, *Am. Elec. Power*, 406 F. Supp. 2d 265).

135. *Id.* at 342–43.

136. *Lujan*, 504 U.S. at 564, n.2.

137. 520 S. Michigan Ave. Assocs. Ltd. v. Devine, 433 F.3d 961 (7th Cir. 2006).

138. Baur v. Veneman, 352 F.3d 625 (2d. Cir. 2003).

139. *Am. Elec. Power*, 582 F.3d at 344 (citing *Baur*, 352 F.3d at 641).

140. *Id.*

141. *Id.* at 347.

142. *Id.*

With respect to redressability, the court turned again to the Supreme Court's precedent in *Massachusetts* to counter defendants' arguments that even if the court were to intervene on behalf of the plaintiffs, global warming will continue due to the actions of entities beyond the reach of the court's remedial powers. Turning to that precedent, the Second Circuit noted that the Court there recognized that remedies that could "slow or reduce" global warming were sufficient to satisfy the redressability prong of the standing test.[143] Ultimately, the court endorsed the plaintiffs' position that "[e]ven if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less if Defendants' emissions are reduced than they would be without a remedy," thereby rejecting defendants' objections and accepting the plaintiffs' arguments that they met the "redressability" prong of the standing inquiry.[144]

Less than a month after this Second Circuit ruling, the Fifth Circuit joined the wave of courts endorsing the standing of litigants bringing climate change-related lawsuits. It found that property owners along the Mississippi Gulf Coast could proceed in their suit against oil and energy companies whose emissions, it is alleged, contributed to the ferocity of Hurricane Katrina, causing damage to those property owners' lands.[145] There, the plaintiffs had sought claims for compensatory and punitive damages against the defendant-companies on a number of theories, including state common law theories of nuisance, trespass, and negligence, among others.[146]

In the now-familiar pattern of such cases, the defendants challenged the plaintiffs' standing. However, the court found that since these plaintiffs were landowners who suffered concrete harms to their property, and that damages awards would compensate them for such harms, they easily satisfied the first and third prongs of the Article III standing requirement.[147] Indeed, the defendants did not even challenge the plaintiffs' ability to satisfy these elements of the test, but instead chose to focus on

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143. Paraphrasing that precedent, the Second Circuit explained its import as follows:

> In other words, that courts could provide some measure of relief would suffice to show redressability, and the proposed remedy need not address or prevent all harm from a variety of other sources. Moreover, the Court observed that although EPA regulation of greenhouse gas emissions might not reverse global warming, in light of the fact that China and India were "poised to increase greenhouse gas emissions substantially over the next century," the remedy sought—reduction of domestic emissions—"would slow the pace of global emissions increases, no matter what happens elsewhere."

Id. at 348–49 (quoting *Massachusetts*, 549 U.S. at 525–26).

144. *Id.* at 349.

145. *Comer*, 585 F.3d 855.

146. *Id.* at 859–60.

147. *Id.* at 863–64. The court had already found that the plaintiffs had satisfied Mississippi's more liberal standing requirement. *Id.* at 862.

whether the harms alleged were traceable to the defendants' conduct. The court summarized the defendants' arguments as follows: "Essentially, they argue that traceability is lacking because: (1) the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated, and (2) the defendants' actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability."[148]

The court rejected the defendants' arguments, stating that the Supreme Court had already "accepted as plausible the link between man-made greenhouse gas emissions and global warming."[149] Moreover, the court accepted the landowners' arguments because the *Comer* plaintiffs were alleging a chain of causation that was one link shorter than the chain described in *Massachusetts*, which the Supreme Court had endorsed as satisfying the redressability prong.[150] Finally, the court found that since the plaintiffs alleged that the defendants contributed to the harms the plaintiffs suffered, those allegations were sufficient to satisfy the traceability prong of the standing analysis. Once again, the Fifth Circuit relied on the Supreme Court's precedent in *Massachusetts* for this point.[151]

Although the court ultimately concluded that there were no Article III barriers to the plaintiffs' nuisance, negligence, and trespass claims, the court did conclude that prudential barriers existed to preclude the plain-

148. *Id.* at 865.

149. *Id.* (citation omitted).

150. The Fifth Circuit summed up the import of the Supreme Court's holding in *Massachusetts* as follows:

> Thus, the Court accepted a causal chain virtually identical in part to that alleged by plaintiffs, *viz.*, that defendants' greenhouse gas emissions contributed to warming of the environment, including the ocean's temperature, which damaged plaintiffs' coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina. In fact, the *Massachusetts* Court recognized a causal chain extending one step further—*i.e.*, that because the EPA did not regulate greenhouse gas emissions, motor vehicles emitted more greenhouse gasses than they otherwise would have, thus contributing to global warming, which injured Massachusetts lands through sea level rise and increased storm ferocity.

Id. (footnotes omitted).

151. Interpreting once again the *Massachusetts* holding, the *Comer* court found as follows:

> In rejecting the EPA's argument that its regulation of domestic new car emissions would have insignificant, if any, salutary effect on global warming, the Court concluded that "[a]t a minimum . . . EPA's refusal to regulate [greenhouse gas] emissions 'contributes' to Massachusetts' injuries," and therefore sufficiently demonstrates traceability so as to support Massachusetts' standing. Thus, the Court recognized, in the same context as the instant case, that injuries may be fairly traceable to actions that *contribute* to, rather than solely or materially cause, greenhouse gas emissions and global warming.

Id. at 866 (alterations and emphasis in original) (citation omitted).

tiffs' claims based on unjust enrichment, fraudulent misrepresentation and civil conspiracy.[152]

II. THE STANDING OF MUNICIPALITIES: PUBLIC ACTIONS, PRIVATE RIGHTS, AND THE IMPACT OF *MASSACHUSETTS V. EPA*

A. *Public Actions, Private Rights and Individualized Harm*

1. Municipalities and Nuisance Actions

As stated previously, the law of standing has suffered from an ideological "tug-of-war" between those who wish to narrow it considerably (or abolish it altogether), and those who see its broad application as central to preserving the proper role of the federal courts in the federal constitutional structure.[153] For proponents of the broad view, the federal courts' proper role is to adjudicate "cases" or "controversies" in accordance with the original grant of judicial power found in Article III of the Constitution. This grant, they argue, restricts the application of the federal judicial power to those types of cases recognized by the courts in the first years after the founding of the republic. And they maintain that doing so reflects the Founders' understanding of the meaning of the term "cases and controversies."[154]

Justice Frankfurter's made this argument explicitly and succinctly in his concurring opinion in *Joint Anti-Fascist Refugee Commission v. McGrath*,[155] where he argued that the "case" and "controversy" requirement of Article III:

> mean[s] that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.[156]

Consistent with this view of standing, only individuals who are the "objects" of government actions that have invaded a common law or statutory right are afforded standing to sue to remedy such an invasion. Pro-

152. *Id.* at 867–69.

153. Tyler Welti, Note, Massachusetts v. EPA*'s Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1756 (2008).

154. In support of this viewpoint, then-Judge Scalia authored a law review article, published in 1983, asserting that the standing requirement has its origins in the vesting of "the judicial power" over "cases" and "controversies" in Article III of the U.S. Constitution, and that this requirement is consistent with "the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 882 (1983).

155. 341 U.S. 123 (1950).

156. *Id.* at 150 (Frankfurter, J., concurring).

fessor Cass Sunstein has attributed this approach to two seemingly divergent jurisprudential developments: a *Lochner*-era resistance to the new administrative state at the time and a New Deal-era resistance to those who might challenge this state.[157] It has been labeled the "private-law model of public law,"[158] and Sunstein describes its origins and effects as follows:

> Not fully developed until the New Deal, the private-law model played a large role in legal doctrine between the late 1930s and the early 1960s. The principal problem with that model—widely recognized in the 1960s and 1970s—was that it distinguished sharply between the legal rights of regulated entities on the one hand and those of regulatory beneficiaries on the other. The interests of regulated industries could be protected through the courts, whereas the interests of regulatory beneficiaries were to be vindicated through politics or not at all.[159]

Opposing the private-law model are those who support a broader notion of the power of Article III courts and, more importantly, Congress's power to give meaning to the term "cases and controversies." According to this view, Congress can identify harms it wishes to remedy, through judicial action if necessary, and grant a cause of action to those suffering such harms. The judicial review provisions of the Administrative Procedures Act (APA) enshrine this view, providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[160] Although adopted in 1946, it was not until the 1960s that courts recognized the APA's expansive view and conferred standing not just on direct objects of government regulation, but also on beneficiaries of regulatory statutes seeking to vindicate the protections that such regulation afforded them.[161] Proponents of this view argue that it is consistent with the constitutional structure that Congress can identify harms, create causes of action, and confer standing on those aggrieved within the meaning of Congressional directives. It is considered the "public-law" model of standing.[162]

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157. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988) ("The use of common-law notions, sharply distinguishing between statutory benefits and nineteenth century private rights, was the central mark of the jurisprudence of the *Lochner* period."); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–96 (1988).

158. Sunstein, *supra* note 157, at 1436.

159. *Id.* at 1433.

160. 5 U.S.C. §702 (2006).

161. Sunstein, *supra* note 8, at 183–85.

162. *See, e.g.*, Fletcher, *supra* note 8, at 255–65 (comparing the Court's approach to administrative law cases from "the 1930's and 1940's when it invoked analogies to common law injuries to infer congressional intent" to "what the Court has done more

A central component of the private law model is that litigants must show some individualized harm to have standing to challenge the conduct causing such harm. A historical analysis of the underpinnings of the private law model shows that various causes of action were available to litigants where they did not need to show any particularized injury, however. Furthermore, a plaintiff could be the beneficiary of a legal duty and not merely its object, and could raise the rights of others or even the community as a whole. One example is the mandamus action, where one could assert that a duty was owed the public generally, regardless of whether the defendant's failure to comply with the law harmed the plaintiff bringing the action specifically.[163] Similarly, the informer's action permitted a private party to bring a claim alleging that a public officer was failing to uphold a legal duty. In such a case, the plaintiff would share a portion of the financial proceeds from the action.[164] A third example is the *qui tam* action, where a private plaintiff could sue to enforce the criminal law against an offending party, regardless of whether that plaintiff was in fact injured by that conduct. This type of action was readily available at the common law in early American law.[165] Given this background, the historical basis for the "individualized harm" requirement of standing doctrine is called into question.

In a forceful dissent in *Flast v. Cohen*, Justice Hearlan noted that, historically, courts recognized causes of action brought by representative plaintiffs, and not just those who were able to show some discrete and individualized injury.[166] He wrote:

> Surely it is plain that the rights and interests of taxpayers who contest the constitutionality of public expenditures are markedly different from those of "Hohfeldian" plaintiffs, including those taxpayer-plaintiffs who challenge the validity of their own tax lia-

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recently[,]" and concluding that "the Court may properly invoke background assumptions about the functions of judicial review in certain areas, and about traditional categories of recognized injuries and permissible plaintiffs in those areas").

163. For an analysis of early state court cases in which writs of mandamus were sought to enjoin threatened illegal conduct that might harm a community, but were not based on some particularized and individual harm to an individual plaintiff, see Winter, *supra* note 157, at 1399–1404. In such cases, the author concludes, "[t]here was no requirement of injury-in-fact or typicality as with the representation of the interests of a class in the modem class action." *Id.* at 1403. *See also* Union Pac. R.R. v. Hall, 91 U.S. 343 (1875) (finding merchants could sue railroad for exercise of a duty owed to the entire public, not just to those plaintiffs).

164. Winter, *supra* note 157, at 1406–09 (outlining availability of "informers" suits during colonial and post-colonial times where a member of the public could sue to ensure government agent compliance with the law, and receive a bounty for costs savings to the government that resulted). In such cases, "[s]uits by those without personal injury who were acting as representatives of others were not viewed as raising constitutional problems under article III." *Id.* at 1409.

165. Sunstein, *supra* note 8, at 175.

166. 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).

> bilities. We must recognize that these non-Hohfeldian plaintiffs complain, just as the petitioner in *Frothingham* sought to complain, not as taxpayers, but as "private attorneys-general." The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike. These are and must be, to adopt Professor Jaffe's useful phrase, "public actions" brought to vindicate public rights.
>
> It does not, however, follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution from the jurisdiction of the federal courts. This and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest."[167]

In addition to the categories of cases brought by representative plaintiffs noted above, another area that has enjoyed scant attention in this debate is public nuisance law. The ability of governmental bodies to punish and seek to enjoin public nuisances is said to be of "ancient origin."[168] Joseph Story traced the authority back to the reign of Queen Elizabeth,[169] and one of the earliest nuisance cases, from 1535, noted with approval the ability of the crown to punish public nuisances.[170]

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167. *Id.* 119–20. Thus, as this quote indicates, although Harlan disagreed with the outcome in *Flast*, where the Court granted taxpayer standing to challenge alleged Establishment Clause violations in Congressional appropriations, he agreed with the main thrust of the holding of the majority in that decision: i.e., that, throughout history, Article III's "case and controversy" requirement has not prohibited individuals from bringing derivative or representative claims.

168. City of Chicago v. Festival Theater Corp., 91 Ill. 2d 295, 303 (1982) (citations omitted).

169. *See* JOSEPH STORY, EQUITY JURISPRUDENCE, §§ 921–24 (13th ed. 1998), cited in Mugler v. Kansas, 123 U.S. 627, 672–73 (1887); *see also* RESTATEMENT (SECOND) OF TORTS, §821B, com. a, (1979) ("In its inception a public, or common, nuisance was an infringement of the rights of the Crown. . . . By the time of Edward III the principle had been extended to the invasion of rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town.").

170. In the famous "anonymous" case from the King's Bench in 1535, a dissenting judge posited a hypothetical, in dictum, about the need for a special injury when a private individual brings a public nuisance action. Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535), *reprinted in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949). It is often argued that the "special injury" rule can be traced from this decision. But in the text of the majority opinion, it is assumed that the Crown had standing to sue, regardless of the presence of a special injury:

> It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the Leet and there he has his redress, because it is a common nuisance to all the King's lieges . . . .

Historically, governmental bodies have long held the power to commence public actions without proof of special injury. The authority to commence litigation to enjoin a public nuisance is said to vest in governmental bodies;[171] just which public body, though, is subject to some debate. It is without question that under U.S. law states have long enjoyed the ability to commence cases in equity to enjoin public nuisances.[172] In nuisance law generally, the difference between a public nuisance and a private nuisance has traditionally been that only a governmental body with the authority to commence such actions has standing to bring a public nuisance action—i.e., one that seeks to enjoin actions that harm the public generally—unless an individual can show some special damages from the allegedly offensive conduct.[173] According to black letter law, when the appropriate governmental body is seeking relief from a public nuisance, it need not plead and prove special injury; rather, harm to the community is all it must show. With such public nuisance cases, then, the "private-law model" of standing—one that embraces the notion of individualized injury—is inconsistent with what courts have been doing with these cases for centuries.

If a governmental body can pursue a public nuisance action, it begs the question: what is an appropriate governmental body to commence such an action? State governments, in their quasi-sovereign capacity, are the traditional entities to wield such authority.[174] State legislatures can

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Id. For a discussion of the "anonymous" case, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755, 790–96 (2001); *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 90, at 646 (5th ed. 1984). It is worth noting that nowhere in this opinion is there any mention of the King needing to allege some special injury to his proprietary interest in order to bring suit.

171. RESTATEMENT (SECOND) OF TORTS §821C(2) (1979) ("In order to maintain a proceeding to enjoin to abate a public nuisance, one must . . . (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter . . . ."); DAN B. DOBBS, DOBBS' LAW OF TORTS, §467 (2000) ("In the absence of a statute allowing citizens to enforce the public's rights, those rights are normally enforced only by public authorities.") (footnote omitted).

172. *See* Alfred L. Snapp & Son v. Puerto Rico *ex. rel.* Barez, 458 U.S. 592, 603–05 (listing state actions involving suits to enjoin public nuisances); *see also* JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES, §437 (1906) (outlining the power of states to bring nuisance actions). Admittedly, this power is often considered a part of the *parens patriae* authority of the state, which municipalities do not generally enjoy. On the issue of municipalities and *parens patriae* standing, see Jonathan L. Entin & Shadya Y. Yazback, *City Governments & Predatory Lending*, 34 FORDHAM URB. L.J. 757, 762–66 (2007).

173. DOBBS, *supra* note 171 at § 467. The private litigant's need to show special injury is contrasted with the governmental authority's freedom to bring suit in the absence of a special injury. This contrast undercuts the argument that even governmental bodies must show some harm to a proprietary interest.

174. *See, e.g.*, Missouri v. Illinois, 180 U.S. 208, 241 (1901) ("It is true that no question of boundary is involved, nor of direct property rights belonging to the com-

grant municipalities, counties, and localities the ability to pursue such claims through state constitutions and "home rule" legislation.[175] Under the common law, however, courts have often said that such local governmental bodies have the ability to commence public nuisance actions on their own, independent of grants of power by the legislature.[176] Similarly,

plainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."). A state's ability to rein in public nuisances is said to derive from its stature as a quasi-sovereign within the federal constitutional structure, *Alfred L. Snapp & Son*, 458 U.S. at 602, whereas a municipality's authority to regulate public nuisances derives from the police power, which is often delegated to localities through state constitutional provisions. 6A McQuillin, Mun. Corp. § 24.65 (3d ed. 2010).

175. For a discussion of "home rule" legislation and municipal standing, see Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 366–67 (2006). *See also* Town of East Troy v. Soo Line. R.R. Co., 653 F.2d 1123, 1126–27 (7th Cir. 1980) (discussing Wisconsin home rule legislation granting localities ability to bring nuisance actions but requiring showing of "peculiar" injury). The U.S. Supreme Court did issue one curious opinion in the early nineteenth century in which it held that the "corporation" of the town of Georgetown lacked the authority to bring a public nuisance action to enjoin a company acting pursuant to an Act of Congress because such power was not set forth in the plaintiff's corporate charter. The court did not appear to recognize any governmental role for the corporation. Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 99–100 (1838). Contrast that with *Coates v. Corporation of New York*, where New York's highest court recognized the right of the city of New York to bring a public nuisance action around the same time. 7 Cow. 585 (N.Y. Sup. Ct. 1827) (recognizing authority of municipality to rein in public nuisances where "a contrary doctrine would strike at the root of all police regulations).

176. *See, e.g.*, City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1290 (N.D. Okla. 2003) (holding that municipality had standing to sue over injunction based on common law and state statutory authority); Duncan v. City of Tuscaloosa, 60 So.2d 438 (Ala. 1952) (holding that city has authority to sue over public nuisance even in the absence of statutory authority); Pearson v. Birmingham, 47 So. 80 (Ala. 1908) (holding "settled" that municipalities can bring actions to abate public nuisances on city streets); City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 162 (Ill. 1982) (holding authority of municipality to pursue public nuisance action was not defined by statute); City of Grand Rapids v. Weiden, 56 N.W. 233 (Mich. 1893) (entertaining suit by municipality to enjoin operation of slaughterhouse without questioning authority to sue); City of New York v. Montague, 145 A.D. 172, 175 (N.Y. App. Div. 1911) ("The right of the city to maintain an action to abate a public nuisance is too well settled to require the citation of authorities."); City of Huron v. Bank of Volga, 66 N.W. 815 (S.D. 1896) (ruling on merits of nuisance claim of city without questioning municipality's ability to bring suit); *see also* JOYCE & JOYCE, supra note 161, at §439 (outlining authority of municipalities to seek to enjoin nuisances affecting health of local inhabitants); FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE, §864 (1929) (noting recognition of municipalities to bring public nuisance actions); JOHN NORTON POMEROY, EQUITY JURISPRUDENCE, 2078 (2d ed. 1892) ("A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the Commonwealth, in this country."); John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 298–99 (2001) ("Even absent such an express grant of authority, decisional

at least two federal circuit courts have already held that municipalities have standing in their own right to pursue public nuisance actions under federal common law.[177]

This review of historical approaches to public nuisance law calls into question the relevance of the private-law model of standing to such actions. Devised in an era of the expansion of government regulations, which were themselves a response to the perceived inadequacies of the common law in protecting the public, the rise of standing doctrine—at least the private-law approach—is a reflection of an attempt by the courts to limit access for those plaintiffs who wish to challenge regulatory action or inaction. When such plaintiffs do not share attributes with litigants who would have had causes of action or interests under the common law, the private-law view of standing doctrine would deny such plaintiffs their day in court, especially when they are the beneficiaries of government regulation and not the objects of that regulation.[178] Thus, the private-law model confers standing on those who are the objects of regulation, and not its beneficiaries, and on those private parties who would have causes of action under the common law. Because of this focus, it would seem that the private-law model is simply inapplicable when entities with common law authority to regulate certain conduct use a well-recognized and traditional common law tool for regulating that conduct—i.e., activities that create a public nuisance.[179] As such, it would seem to have no place, and its application would appear irrelevant, in actions long familiar under the common law—e.g., the governmental public nuisance action. Admittedly, who can bring such actions raises a separate question. But the fact remains that courts have long recognized the viability of the public nuisance action apart from any individualized harm suffered by the plaintiff-governmental body. In other words, to bring such an action a governmental body need only show that a nuisance harms a community

law has recognized the implicit right of a local authority to abate nuisances within its limits."); 6A McQuillin Mun. Corp. § 24:75 (3rd ed.) ("Municipal corporations generally are entitled to appropriate judicial relief against public nuisances.").

177. *Am. Elec. Power*, 582 F.3d at 359–60; City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979). In *Am. Elec. Power*, it was alleged that New York City was threatened with harm to its "coastal infrastructure" from rising tides due to global warming. 582 F.3d at 342 In *City of Evansville*, the appellate court endorsed the right of municipal plaintiffs to bring a federal common law nuisance claim seeking compensation for the cities' cleanup costs associated with the defendants' alleged toxic releases into the local water supply. 604 F.2d at 1017-1019.

178. In his opinion for the majority in *Lujan*, Justice Scalia made this objects-beneficiaries distinction explicit. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (citing Allen v. Wright, 468 U.S. 737, 758 (1984)).

179. OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW, §115 (3d ed. 2009) (noting historical role of nuisance actions to regulate land use control).

as a whole, and not that it has suffered some special and individualized injury sufficient to grant it standing under the *Lujan* analysis.

To the extent that the other "irreducible constitutional minimum of standing"[180]—causation and redressability—still must be established, the next section takes up these issues, with particular emphasis on the ways in which the Supreme Court's decision in *Massachusetts* addressed the proper treatment of such elements of the standing inquiry. But first, a brief review of other aspects of the "individualized injury" inquiry, specifically as it relates to the types of harms cities can allege, is in order.

2. *Massachusetts v. EPA* and the Harm to Proprietary Interests

After noting the "special solicitude" states enjoy in the standing analysis, the Court in *Massachusetts* went on to note that Massachusetts had met the most exacting standing requirements because it was itself a property owner and owned lands that were threatened by rising water levels due to climate change.[181] This analysis offers guidance to courts seeking to apply the *Lujan* factors to municipal lawsuits, even where such municipalities may enjoy the state law right to bring public nuisance actions on their own to protect community interests.

a. Impact on City-Owned Property

Municipalities are landowners. Whether it is commercial real estate where municipal offices can be found, properties seized for delinquent taxes, or park land, municipalities own property and hold it in their proprietary capacity. As a result, municipalities can allege damage to such property due to actions that diminish the value of that property. The question in such cases will necessarily be whether the defendant's actions cause the diminution in the value of the property and whether courts can offer redress. I will return to those questions in a moment.

b. Harm to the Tax Base: Gladstone Realtors *and the Fair Housing Act*

In the context of fair housing litigation, the Supreme Court has already found that municipalities can assert harm to their tax base as a cognizable harm to be taken into account in the standing analysis. In *Gladstone Realtors v. Village of Bellwood*, a municipality brought an action against real estate brokers for steering prospective white and black homeowners to certain neighborhoods within the city, which, it was alleged, might have resulted in the creation of segregated neighborhoods in the city.[182] The plaintiffs alleged further that such segregation might suppress property values. The Court accepted these allegations, noting:

180. *Lujan*, 504 U.S. at 560.
181. *Massachusetts*, 549 U.S. at 521.
182. 441 U.S. 91, 109–11 (1979).

> The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services. Other harms flowing from the realities of a racially segregated community are not unlikely. As we have said before, "[t]here can be no question about the importance" to a community of "promoting stable, racially integrated housing." If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.[183]

The questions of causation and redressability are nowhere to be found in the court's *Gladstone Realtors* decision, a point to which I will return shortly.

B. *Causation*

The Court's decision in *Massachusetts* clarifies the application of the causation prong of the standing analysis.[184] There, the Court found as follows:

> EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.
>
> EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so

183. *Id.* at 110–11 (citations and footnote omitted) (quoting Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85, 94 (1977)).

184. In the Court's discussion of the causation and redressibility elements of the standing inquiry in *Massachusetts*, the majority opinion draws no distinction in its analysis under these prongs between Massachusetts's position as a quasi-sovereign and its status as a landowner, suggesting that there are no separate standing tests for governmental plaintiffs as opposed to private plaintiffs. Thus, the "special solicitude" afforded public plaintiffs appears relevant in the standing analysis only to the first prong of the inquiry: i.e., when assessing the harm a public litigant is alleged to have suffered. Similarly, the Court in *Massachusetts* failed in its analysis of the harm suffered by the plaintiff-state to make a clear distinction between procedural harms and non-procedural harms. For a discussion of those aspects of the *Massachusetts* decision that relate to so-called procedural harms and the Court's lack of clarity with respect thereto, see Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 Wm. & Mary L. Rev. 1701, 1747-1752 (2008).

> insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.[185]

The Court did not dispute any of these assertions, but went on to accept the plaintiffs' allegations that vehicle emissions from cars in the United States constituted 6% of global greenhouse gas emissions—even though the litigation was over whether the EPA would regulate emissions from *new* motor vehicles, which would necessarily entail a fraction of even this fractional share of global emissions. Nevertheless, and despite the fact that there are obviously other entities that contribute to global emissions—i.e., the sources of the other 94% of global greenhouse gas emissions—the Court concluded that the EPA "overstat[ed] its case."[186] It found:

> Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.[187]

The fact remains, however, that the EPA does not *cause* greenhouse gas emissions. Rather, it was alleged, only a small fraction of all greenhouse gases emanate from U.S. motor vehicles. Even then the litigation was not over *present* greenhouse gases, but rather the greenhouse gases that would come from *new* motor vehicles *in the absence of the EPA's decision to regulate carbon dioxide emissions from such vehicles in the future.* Thus, the harm the EPA "caused" was the threat that new vehicle emissions would continue the pace of global warming. This pace would, in turn, threaten the coastline of Massachusetts. Of course, this chain of causation contains many variables, most of which are beyond the power of the EPA to control. First, the EPA could decide to set weak limits on greenhouse gas emissions (admittedly, this is in the agency's power to

185. *Massachusetts*, 549 U.S. at 523–24.
186. *Id.* at 524.
187. *Id.* (citations omitted).

control). Moreover, other sources of such emissions, literally millions of them, could increase their rate of emissions, thus negating any reduction of greenhouse gas emissions from new motor vehicles in the United States—if any were achieved in the first place. Given the countless sources of greenhouse gas emissions that also contribute to global warming, at best the harms that might befall the plaintiffs in the future might be only of a minimally lesser degree in the event the EPA decides to rein in new vehicle emissions.[188]

The harm the EPA allegedly causes is that it has failed to regulate greenhouse gas emissions from new U.S. motor vehicles. Along with many other factors (contributing an overwhelming majority of the gases that cause global warming), this failure contributes to global warming, at most, to just a slim fraction of all greenhouse gas emissions. Despite these countless other sources of greenhouse gas emissions, the plaintiffs in *Massachusetts* nevertheless showed that the EPA has "caused" the harm to a sufficient degree to satisfy the causation requirement. Thus, even though the countless other parties completely beyond the control of the defendant-EPA contribute the vast majority of gases to increase global warming, and the EPA does not itself emit any global emissions, its failure to regulate greenhouse gas emissions nevertheless satisfies the "causation" prong of the standing inquiry.

Thus, the Court's holding can fairly be read to say that if one can trace a government entity's failure to regulate a third party to the fact that one is harmed by that failure to regulate—even to some small degree and despite the fact that many other third parties beyond the defendant's control cause the lion's share of one's injuries—the "causation" element of the standing inquiry is satisfied. When one sues the third party itself then, even a third party that contributes only a small percentage toward the injuries, "causation" should similarly be established.

Given the evolution of the law of standing with respect to causation that *Massachusetts* reveals, it appears that courts need to take a fresh look at causation in municipal lawsuits; indeed, the ways in which courts have looked at causation at times appears to contradict the Court's treatment of the issue in *Massachusetts*.[189] Actions that *contribute* to harm, even

188. Chief Justice Roberts summarized the plaintiffs' standing argument as follows:

> Petitioners view the relationship between their injuries and EPA's failure to promulgate new motor vehicle greenhouse gas emission standards as simple and direct: Domestic motor vehicles emit carbon dioxide and other greenhouse gases. Worldwide emissions of greenhouse gases contribute to global warming and therefore also to petitioners' alleged injuries. Without the new vehicle standards, greenhouse gas emissions—and therefore global warming and its attendant harms—have been higher than they otherwise would have been; once EPA changes course, the trend will be reversed.

Id. at 543 (Roberts, C.J., dissenting).

189. *See, e.g.*, *Mayor of Baltimore*, 677 F. Supp. 2d at 847.

when other forces may also be responsible for that harm, even overwhelmingly, are actionable. For example, where a reduction in a municipality's tax base is due to an increase in foreclosures, the forces that contribute to those foreclosures may be subject to suit. In such a suit, the municipality should be able to satisfy the causation prong of the standing analysis, since an action that contributes to an actionable harm is considered to "cause" that harm for the purpose of the standing inquiry.[190] Where illegal loan terms contribute to the reasons that individual borrowers end up defaulting on their mortgages, the causation prong is met. To what degree, and in what proportion to other causes those loan terms have contributed to the municipality's losses in tax base, or the depreciation of properties the municipality owns, is a separate inquiry—one that must be resolved in, for example, the damages phase of the proceedings. But whether the standing test's causation prong is satisfied at least seems to be answered in the affirmative after the *Massachusetts* decision.

Similarly, in *Gladstone Realty*, there was no question about whether the broker-defendants in that case were the only potential causes of segregation in a community. There are many forces that can lead to segregation, apart from the action of real estate brokers in steering potential homebuyers to certain neighborhoods depending on the race of those homebuyers. Bank practices like redlining, and the historical practice of government entities insuring mortgages in communities based on the race of the borrowers and the demographics of the neighborhood in which the borrower wishes to purchase property, also contribute to segregation.[191] It is hard to argue that the brokers in *Gladstone Realty* were more than merely one in a chain of actors allegedly contributing to segregation, yet the Supreme Court found that the municipality, which alleged a potential drop in its tax base due to these brokers' actions, had standing to challenge their behavior.

Turning to the context of municipal firearms litigation, the *Massachusetts* precedent helps shore up the arguments in favor of standing here

190. In the Cleveland subprime mortgage litigation, the district court pointed out that "Defendants stand atop a lengthy chain of events, far removed from the City's ultimate damages." 621 F.Supp.2d at 534. Regardless, in light of the *Massachusetts* ruling, whether there is a lengthy chain of causation or not, the correct inquiry is whether a party contributes to the ultimate harm caused, not merely whether they are arguably remote from that harm. In light of the fact that there the defendant investment banks did indeed "stand atop" a chain of conduct by providing funding for the very mortgage products that turned out to be toxic, suggests that they did indeed "contribute" the harms the city alleges resulted from such conduct.

191. For an overview of federal housing policy and ways in which it contributed to racial segregation in housing, see, DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87-108 (2004); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and out of Reach for Blacks*, 115 YALE L. J. 186 (2005).

too. To the extent that the presence of illegal firearms *contributes to* harm to a municipality's tax base/property values due to increased crime, municipal plaintiffs can meet the causation prong of the standing inquiry. Such a showing would require the plaintiffs to establish that the acts of the firearms manufacturers and distributors contribute to the crime bringing down property values. Although there might also be other causes of the crime, if the manufacturer distributes firearms in such a way that they easily fall into the hands of criminals, and if that actually contributes to the level of crime in a community, that should be sufficient to establish the causation necessary to establish that element of the standing analysis. On the other hand, if the design, marketing, or distribution of firearms do not contribute to the level of crime in a community, municipal plaintiffs would not be able establish the causation necessary to meet the standing test. In any event, to what *degree* a faulty product contributes to a state of affairs causing actionable harm is not an issue for resolution at the pleading stage; rather, the degree of culpability—that is, the extent to which a particular actor contributed to the harm—is more appropriately resolved at the damages phase of the proceeding.

C. *Redressability*

The Supreme Court's holding on redressability is perhaps the most wide-reaching aspect of *Massachusetts*. The Court addressed the issue as follows:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.
>
> . . .
>
> In sum—at least according to petitioners' uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the

> relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.[192]

Thus "slowing or reducing the pace" of global warming is sufficient to meet the redressability prong of the standing inquiry, even if the problem itself is not eradicated altogether by court intervention. This obviously has broad potential impact on standing analysis for years to come, and suggests that courts and litigants must rethink their approach to standing in a number of areas, let alone in municipal lawsuits.

Turning to municipal lawsuits specifically, in the financial crisis litigation the extent to which judicial intervention could slow the pace of foreclosures, and the decline in property values that result, should be enough to find that municipal litigants have satisfied the redressability requirement. Even if a large number of banks are involved in lending in a particular community, if one bank's practices prove to be actionable, and an injunction would prevent that bank from foreclosing on properties with illegal terms,[193] such intervention would necessarily *slow the rate of foreclosures* in that community. Such a reduction in the foreclosure rate will necessarily reduce the overall impact of foreclosures—that is, the reduction in property values that flow from foreclosures—on that community.

Similarly, in the firearms setting, to the extent the distribution of firearms with features that tend to promote their use in criminal activity increases the crime rate in a given community, if an injunction would *slow the growth of the crime rate*, a litigant alleging such a fact would meet the redressability requirement of the standing analysis. If a municipal litigant can allege facts that tend to show that an injunction would have a beneficial impact on the crime rate—even by slowing its growth, let alone reducing it—that party would also be able to satisfy the redressability prong of the standing inquiries.

III. CONCLUSION

Local governments often experience the fallout of destructive social and economic trends acutely, more so than other levels of government. Whether it is failing schools, economic distress, job loss, or violent crime, these issues often play themselves out at the street level, where local governments must find ways to deal with them day in and day out. To combat the range of the social and economic challenges that cities face, municipalities have sought to invoke a power that is said to be of "ancient origin": the power to abate nuisances. The ability to wield this power is sometimes limited by statute or state constitutions, but the

192. *Id.* at 525–26 (citations and footnotes omitted).

193. *See, e.g.*, Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548 (Mass. 2008) (upholding injunction against bank foreclosing on loans with predatory loan terms).

power does exist, and cities are exploring ways that they can deploy this authority effectively. This review has assessed the viability of one aspect of such claims: municipal standing to sue. I submit that this review reveals not only a long-standing body of doctrine in which municipalities have the ability to commence nuisance actions on their own, but also other avenues through which they can attempt to invoke this power—i.e., by identifying the harm that those municipalities suffer to their proprietary interests, as well as their tax bases.

The Supreme Court's decision in *Massachusetts v. EPA* also addresses, if indirectly, the standing of municipalities to commence actions to combat a range of social ills. With its approach to the "causation" and "redressability" prongs of the standing test lightening the burden plaintiffs must meet to establish their standing to sue, all plaintiffs, including municipalities, should have a far easier time overcoming the standing hurdle in the types of lawsuits described here, and others that might arise in the future.

The municipal lawsuit has its origins in a common law that is centuries old. Yet the common law, and statutes that supplement it, can be flexible to address the present needs of municipalities and other local governments seeking powers that can combat present and future social, economic and environmental problems. Rethinking traditional standing doctrine in light of the history of municipal nuisance actions, as well as the Supreme Court's recent decision in *Massachusetts*, should shed new light on these legal challenges, opening the courthouse door to future actions not only in the situations described above, but also for those still unknown issues that may arise to plague local governments in the future.