INTRODUCTION

Oakland had a problem. Predatory lenders were aggressively targeting its residents, extracting exorbitant interest fees and imposing surprise balloon payments. Through the city, home values cratered and poverty levels climbed. Families faced foreclosure, leaving once-vibrant neighborhoods blighted and abandoned.

Versions of this foreclosure crisis were unfolding across the nation, but city leaders knew that Oakland’s residents — largely low income and nonwhite — were particularly susceptible. So they took decisive action. In 2001, Oakland’s city government passed a promising ordinance that strictly regulated lending practices and the secondary mortgage market.

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3 See RUSSO, supra note 1, at 2; OAKLAND, CAL., CODE OF ORDINANCES ch. 5.33, § 020 (2001) (“Predatory lending practices also lead to conditions of blight and the loss of affordable housing in Oakland, increased displacement and economic dislocation, reduce property values, erode the tax base, and increase the strain on city services.”).


5 Am. Fin. Servs. Ass’n, 104 P.3d at 832 (George, C.J., dissenting) (“The Oakland City Council . . . found that the predatory lending problem in Oakland was particularly aggravated ‘because of the high number of minority and low income homeowners . . . ’”; James Yelen, The Foreclosure Crisis in Oakland, CA, OPEN COMPUTING FACILITY: JAMES YELEN (Dec. 13, 2016), https://www.ocf.berkeley.edu/~jyelen/2016/12/3/the-foreclosure-crisis-in-oakland-before-and-after [https://perma.cc/C3QZ-ZXZM] (“In Oakland, the crisis was especially acute, with stark demographic and geographic trends.”).


gages, but to a lesser degree than Oakland’s ordinance. The state law also overlooked the secondary market entirely. And it had an additional purpose: while Oakland’s ordinance aimed to curb bad practices, California’s law also tried to preserve the mortgage market’s efficiency.

In 2005, a consumer-credit trade association sued to invalidate Oakland’s ordinance, arguing that the state law preempted it. The state legislature had not intended to override the local regulation; indeed, it had considered and rejected an express preemption provision. But no matter. In a 4–3 decision, the California Supreme Court held that “the Legislature ha[d] impliedly fully occupied the field of regulation of predatory practices in home mortgage lending.” There was no space for the city. Oakland’s prescient ordinance — enacted seven years before the Great Recession — was invalidated.

For cities, this is nothing new. State courts are quick to find local policies impliedly preempted by state statutes. This pattern merits reconsideration. At their best, municipal governments epitomize democratic values, promoting civic participation, policy experimentation, and community diversity. To realize these virtues, city halls need a doctrinal path to shore up their authority.

This Note looks to pave one, offering cities a new argument for their litigation arsenal. It proposes a substantive canon of construction — *imperium urbis* — for state courts faced with questions of implied preemption. When a court evaluates a local ordinance and a potentially preemptive state statute, the canon would tilt the scale in favor of local control. Preemption would be found only if the state statute expressly required it or if compliance with both would be impossible. Like many other substantive canons, a localist canon would ground itself in the promotion of a constitutional value: here, popular sovereignty as embodied in state constitutions’ local-government provisions.

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8 Am. Fin. Servs. Ass’n, 104 P.3d at 836 (George, C.J., dissenting) (recognizing that Oakland’s ordinance “provided for stricter regulation of certain areas of subprime lending” than did the state law). See generally Ronald Law, Note, Preventing Predatory Lending in the California Subprime Mortgage Market, 42 Loy. L.A. L. Rev. 529, 537–48 (2009) (describing the state law’s “critical problems that prevent it from being an effective deterrent to predatory lending,” id. at 548).

9 See id. at 824–25 (recognizing the Oakland ordinance could lead to “secondary purchasers being hesitant or unwilling to purchase mortgages,” id. at 824, which could “sharply curtail[]” subprime lending “despite the Legislature’s efforts to avoid such an event,” id. at 825).

10 See id. at 824.

11 Id. at 815.

12 Id. at 830–31 (George, C.J., dissenting) (examining the legislative record).

13 Id. at 820 (majority opinion).

14 See Kenneth A. Stahl, Local Home Rule in the Time of Globalization, 2016 BYU L. Rev. 177, 190 (“Oakland’s ordinance was preempted not because of anything the legislature said or failed to say, but because of the court’s own conclusion that predatory lending requires uniform statewide regulation and is therefore not an appropriate subject of local regulatory activity.”).

15 Literally, “dominion of the city.”
This Note proceeds in three Parts. Part I briefly surveys the arguments for municipal power. Part II offers a primer on local-government law and discusses the threat of implied preemption. Part III introduces the canon by describing its mechanics, outlining its doctrinal foundation, and demonstrating its potential for application.

I. CITIES AS CENTERS OF DEMOCRACY

Cities play a vital role in our democratic system. They have been described as the “perfect exercise of self-government,” a place to inculcate citizens “with civic spirit, a taste for public affairs, and political skills.” With increasing frequency, local governments are at the center of a global economy, tasked with an array of vexing policy challenges — COVID-19, policing, affordable housing, and climate change, to name a few. Cities need policymaking discretion to respond to these pressing questions. This Note takes as its starting point that local governments are a necessary component of our democratic system and that protecting local power is a normative good. This Part overviews some of cities’ most extolled virtues and acknowledges their chief critiques.

Cities are “critical sites for democratic participation and local political engagement.” As Alexis de Tocqueville put it: “Town-meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it.” At the local level, “[d]emocratic participation is more possible.” Public officials are more accessible and outreach is less costly. An individual can play a far larger role in governance at the local level than at the state or federal level — a relatively smaller populace means a relatively larger voice.

Cities are also hotbeds of policy experimentation. Justice Brandeis famously defended federalism on the grounds that a state could be a “laboratory,” trying “novel social and economic experiments without risk to the rest of the country.” “If fifty states allow policy innova-

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22 Id.
tion and evaluation, then so much the better to empower ninety thousand local governments. . . .” Evaluating the success of their initiatives — be it living wages, sanctuary laws, tobacco restrictions, or environmental protections — can provide guidance on disputed policy questions. Successful policies can radiate out to other cities and up to other levels of government.

Furthermore, cities embody diversity. Cities’ proximity to their residents lets them tailor policies to local variation and adapt to changing exigencies. At the local level, racial and political minorities have a forum for expressing preferences that might be outvoted on the state or national stage. Thus, a state with strong city governments allows diverse polities to implement diverse policies. Citizens can “vote with their feet” and move to cities that best reflect their preferences. The result: a deep network of rich cities, with residents united by a common vision of what their community can be.

But for all its virtues, local power can be manipulated for pernicious ends. Cities have often been the handmaidens of inequality: adopting regressive land-use policies, barring protections for minority communities, and impeding progress during the Civil Rights

24 Davidson, supra note 19, at 975.
26 Davidson, supra note 19, at 975; Note, Conflicts Between State Statutes and Municipal Ordinances, 72 HARV. L. REV. 737, 742 (1959) (identifying cities’ responsiveness to local needs and efficiency as two advantages that municipal governments have over states). Because political heterogeneity is usually greater within a state than between states, cities are arguably better positioned to reflect the varying policy demands of diverse polities. See Richard C. Schragger, The City in the Future of Federalism, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 204, 207 (Erika Arban ed., Oxford Univ. Press 2022) (citing Is Demographic and Geographic Polarization Overstated?, NISKANEN CTR. (May 19, 2021), https://www.niskanencenter.org/is-demographic-and-geographic-polarization-overstated [https://perma.cc/JAE5-8UQ6]).
29 Hans B.C. Spiegel & Alexander R.H. Walling, Introduction to 3 CITIZEN PARTICIPATION IN URBAN DEVELOPMENT 3, 13–16 (Hans B.C. Spiegel ed., 1974) (surveying the arguments for and against the decentralization of power to the local level and noting that “[t]he single factor fallacy is evident in most attempts to improve the human condition; citizen participation and decentralization are particularly vulnerable to its excesses,” id. at 14).
31 E.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 291, 301 (6th Cir. 1997) (upholding a city charter amendment that prohibited ordinances from protecting individuals from sexual orientation–based employment discrimination).
movement. Chronically poor turnout in local elections can lead to
governing bodies selected by whiter, wealthier constituents, and local
policies can have deleterious effects that spill beyond a city’s borders.
The question, then, is how to reinforce local autonomy to realize its
benefits while avoiding the worst impulses of parochialism. Several
scholars have outlined arguments to steer cities towards more norma-
tively desirable ends. By assuming that cities can resist their most
base urges, this Note instead explores how cities can withstand legal
challenges to their authority.

II. THE IMPLIED PREEMPTION THREAT

Despite the merits of municipal governance, cities struggle to fully
assert their policymaking authority. The disputes often play out
through express and implied preemption. With the former, state legis-
latures explicitly preempt city ordinances in specified policy areas.
The latter, while less discussed by scholars, is equally pernicious.
A state legislature may pass a law that touches on the same area as a
city ordinance. Even if the legislature has not signaled its intention to
preempt a local ordinance, state courts may nevertheless read pre-
emption implicitly into the statute, invalidating the local policy. The
consequence is a hamstringing of cities’ crucial policymaking authori-
ty. This Part explores this threat. Section II.A begins with a back-
ground on the evolution of local authority and home rule, and section
II.B elaborates on the perils of implied preemption.

A. A Primer on Local Power

For the United States’s first hundred years, local governments had
no inherent lawmaking authority. State legislatures alone could create
cities, grant them authority, change their boundaries, and abolish them

not have to desegregate across district lines unless they had deliberately engaged in segregation).
33 See Hans B.C. Spiegel & Stephen D. Mittenthal, Introduction to 1 CITIZEN PARTICIPATION
IN URBAN DEVELOPMENT 3, 5–10 (Hans B.C. Spiegel ed., 1968) (summarizing scholarship that
has found low-income citizens less likely to participate in local government). But see id. at 10–11
(highlighting studies that suggest low-income residents are effective as citizen participants).
34 Davidson, supra note 19, at 976–77; see David Schleicher, Constitutional Law for NIMBYs:
A Review of “Principles of Home Rule for the 21st Century” by the National League of Cities, 81
35 See generally Davidson, supra note 19; Paul Diller, Intrastate Preemption, 87 B.U. L. REV.
1113 (2007).
36 NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF
new preemption laws have punitive force. See id. at 2002–08.
altogether. In most states, cities could exercise only those powers expressly granted by the state and those that directly followed by implication. When construing these powers, courts resolved “[a]ny fair, reasonable doubt concerning the existence of power . . . against the [city].” Moreover, the Supreme Court declined to find protection for local governments in the Constitution, infamously calling cities “creatures of the State.” With overbearing states and unprotective courts, cities lacked the autonomy and flexibility to respond dynamically to urban problems.

Cities and their advocates fought back. In the post–Civil War period, reformists introduced new constraints on states’ powers over local governments. A flurry of constitutional amendments followed, many of which prohibited “special act[]” legislation that targeted specific cities. Rather than directly expand city autonomy, these reforms constrained state power.

As the Reconstruction Era progressed, rapid urbanization and population growth sparked a movement to strengthen local authority, and “home rule” was born. First passed in 1875 in Missouri, home rule amendments to state constitutions let residents draft, adopt, and amend their own city charters. In addition to this “initiative” power, home

38 This arrangement is known as Dillon’s Rule. NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 10 (2020). Some states did not adopt Dillon’s Rule wholesale. See, e.g., Paul A. Diller, The Partly Fulfilled Promise of Home Rule in Oregon, 87 OR. L. REV. 939, 943 (2008) (recognizing that Oregon courts had not fully embraced Dillon’s Rule when the state passed its home rule amendment).
40 To the Court, cities are mere “political subdivisions,” Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907), subject to states’ “absolute power,” id. at 179. See also Cmty. Commc’n Co. v. City of Boulder, 455 U.S. 40, 53 (1982) (noting that the United States has a “dual system of government” which has no place for sovereign cities) (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)).
43 Id. In some states, reformists also successfully limited the number of classes of local governments that a state could recognize and gave cities veto power over certain special acts. Id.
44 NAT’L LEAGUE OF CITIES, supra note 38, at 11. Chief Judge David Barron has argued that the home rule movement was less unified than scholars often assume. See generally David J. Barron, Reclaiming Home Rule, 116 HARV. L. REV. 2255 (2003). He points to three competing motivations behind home rule, see id. at 2292–321, but argues that all three “understood themselves to be dislodging a legal regime that had made cities mere legal functionaries of the state,” id. at 2321.
46 KRANE ET AL., supra note 45, at 2; NAT’L LEAGUE OF CITIES, supra note 38, at 11.
rule offered cities an area of independent policymaking discretion — a realm in which states had little-to-no override authority.\textsuperscript{47} Most commonly, this so-called “immunity” power extended to areas of purely local concern, like matters of government structure and personnel. This model rolled outwards from Missouri, and by 1912, twelve states had enacted home rule amendments.\textsuperscript{48}

Courts, however, struggled to draw a line between local and statewide affairs,\textsuperscript{49} and they inconsistently honored cities’ newfound immunity power.\textsuperscript{50} To solve these issues, a second wave of home rule reforms emerged in 1953.\textsuperscript{51} It granted local governments police powers, subject only to state-imposed restrictions.\textsuperscript{52} By removing the local-statewide distinction, this model sought to reduce courts’ roles in delineating the bounds of local power.\textsuperscript{53} In response to this proposal, nearly every state amended its existing local-government constitutional provisions or adopted new constitutions.\textsuperscript{54} Today, most states have enacted some variation of home rule amendments.\textsuperscript{55}

B. The Threat of Implied Preemption

Despite their promise, home rule amendments have fallen short of securing a robust form of municipal authority. When litigants sue to invalidate local ordinances on the grounds of implied preemption, state courts must interpret the language of constitutions’ local-government provisions and, consequently, the extent of cities’ authority.\textsuperscript{56} Frequently, courts reach outcomes that restrict local power.\textsuperscript{57}

\textsuperscript{47} Nat’l League of Cities, supra note 38, at 11.

\textsuperscript{48} Id. at 11 & n.14.

\textsuperscript{49} Id. at 11.

\textsuperscript{50} Id. at 11–12.

\textsuperscript{51} Id. at 12.

\textsuperscript{52} Id.


\textsuperscript{54} Nat’l League of Cities, supra note 38, at 12.

\textsuperscript{55} See id. at 13 & n.22. It is difficult to accurately count the number of home rule states. See Diller, supra note 35, at 1127 n.65 (comparing different accounts of the number of home rule regimes). But all accounts indicate that the vast majority of states — upwards of forty-five — have some form of home rule. See id.

\textsuperscript{56} Lynn A. Baker & Daniel B. Rodriguez, Constitutional Home Rule and Judicial Scrutiny, 86 Denv. U. L. Rev. 1337, 1338 (2009) (“Defining the scope of this local sovereignty, and thereby shaping the constitutional relationship between state and local governments, is a task that has largely fallen to the state courts.”); id. at 1344 (arguing that courts resolving home rule controversies are “dividing the total sum of governmental power between two levels of government”); cf. Richard Briffault, Our Localism: Part I — The Structure of Local Government Law, 90 Colum. L. Rev. 1, 16 (1990) (acknowledging that even “where local ordinances are supposed to govern in municipal matters, the difficulties state courts experience in defining exclusive areas of local interest erode the legal protection of local autonomy”).

\textsuperscript{57} While the prevailing view is that implied preemption cases are often resolved against the city, little relevant empirical research exists. What does exist supports this assertion. In a 1971
Local-government scholars have long commented on state courts’ anti-city disposition58 — a disposition that looms ominously in implied preemption cases. In these cases, judges wade through ambiguity; they face a local ordinance and a state law that regulate the same subject, yet they lack clear guidance from the state legislature as to how to proceed. Judges must look to state constitutions for direction, but neither of the two home rule models is a paradigm of clarity. Judges thus have a great deal of discretion, a troubling state of affairs when “reasonable doubt concerning the existence of power is resolved by the courts against the municipality.” 59

Strong state constitutional protections do not immunize cities from implied preemption challenges. California’s constitution, for example, vests cities with wide latitude.60 Cities can enact “all ordinances and regulations in respect to municipal affairs”61 that are “not in conflict with general laws.”62 The basis of many legal disagreements lies in this last phrase: “[N]ot in conflict with general laws.”63 To determine whether a local ordinance impermissibly conflicts with state general laws, courts look first to the law’s text. If there is no express preemption, courts assess the totality of the regulatory scheme, looking for “indicia of intent” that the legislature wanted to “fully occupy” an

study of New York cases, Professor Frank Macchiarola compared fifty random cases implicating home rule from 1937 to 1939 with forty-seven cases from 1960 to 1963, during the state’s home rule movement. Macchiarola, supra note 53, at 350–51. Of the older cases, forty-four percent were decided in favor of cities. Id. at 352. Of the newer cases, seventy percent were. Id. at 356. Macchiarola concludes that this era witnessed an “expansion of local government power” by the courts. Id. at 358. But crucially, Macchiarola recognizes that municipal wins are usually in areas without state regulation; when there is a state scheme, courts often rule against the city. See id. at 357–58. While outdated, this study supports this Note’s contention: when faced with questions of implied preemption, courts tend to rule against cities. See also Terrance Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 652 (1964) (recognizing implied preemption as one of the most difficult local-state challenges for courts).

58 See, e.g., KRANE ET AL., supra note 45, at 15 (“Crabbed judicial interpretations have continued to construe local government power very narrowly, even when the legislature has indicated that it has a contrary intent.”); Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 WIS. L. REV. 83, 86 n.23 (“[C]ommentators generally agree that courts have read home rule provisions much more narrowly than their drafters intended.”); see also id. at 121 n.200 (collecting sources).


60 Nadav Shoked, Quasi-Cities, 93 B.U. L. REV. 1971, 1996 n.121 (2013) (observing that California’s home rule amendment, “at least on paper, is one of the most ‘empowering’”).

61 CAL. CONST. art. XI, § 5(a).

62 Id. § 7.

63 Litigants will also spar over the proper scope of “municipal affairs.” See Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles, 812 P.2d 916, 917 (Cal. 1991) (recognizing that California courts “have parsed that cryptic [‘municipal affairs’] phrase in literally scores of cases” and calling them “wild words”); see, e.g., id. at 930 (invalidating a local tax on savings banks because it was a statewide matter, not a municipal affair).
area. The analysis involves judicial discretion, leaving the fate of local ordinances in the hands of state judges, who are elevated by and arguably beholden to state party machinery. As Oakland experienced with its predatory-lending ordinance, judges often resolve ambiguity against cities, even when strong constitutional language might counsel otherwise.

The consequences reach beyond individual cases. In every challenge to a local ordinance, courts interpret the language of constitutions’ local-government provisions, defining the contours of local power through an ad hoc process. A decision against a city does not just invalidate an ordinance — it signals that the city has less power than it had thought, closing off a potential avenue for future policies. Inconsistent preemption analyses also create “a confusion that invites preemption challenges.” Businesses commonly bring suit, looking to invalidate local ordinances that would impose on them new burdens, be it through a higher minimum wage, a smoking ban, or a plastic bag prohibition. The mere threat of legal challenges has a chilling effect on local officials, dampening their willingness to develop forward-looking policies. For these reasons, scholars have described implied preemption as a “problematic shadow” over cities, one that imposes “severe constraints on local policy innovation.”

While harmful, the ambiguity inherent in implied preemption cases presents an opportunity for cities to advance new legal arguments. Over time, favorable decisions would expand and buttress local authority. This Note now turns to that task.

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65 See Richard C. Schragger, The Attack on American Cities, 96 TEX. L. REV. 1163, 1221 (2018) (“Courts, however, are generally wary of broad grants of local power…. And because state judges tend to rise through state party political systems, their allegiance is unlikely to run to cities. State judges are by definition part of a statewide professional, political, and cultural apparatus. Many are elected and thus have to be responsive to a political party…. ”); Daniel B. Rodriguez, Localism and Lawmaking, 32 RUTGERS L.J. 627, 639 (2001) (“State courts are most frequently made up of state judges who stand for election or re-election; they are beholden to state voters, and not local governments, for their decisions.”).
66 See Diller, supra note 35, at 1116.
67 Diller, supra note 35, at 1116.
68 See, e.g., id. at 1114.
70 Diller, supra note 35, at 1116 (quoting Barron, supra note 44, at 2366).
71 Id. (quoting Rodriguez, supra note 65, at 640).
III. LAUNCHING A CANON

A new substantive canon for state courts — *imperium urbis* — offers a possible solution. This Part introduces the canon. Section III.A outlines the canon’s mechanics, section III.B describes its doctrinal foundation, and section III.C sketches a possible application.

A. Mechanics

The *imperium urbis* canon is straightforward in its operation. A state court presented with a local ordinance and a potentially conflicting state statute would presumptively uphold the former. The state law would override only if there was an explicit preemption statement or if compliance with both laws would be impossible. The canon would effectively permit only express or impossibility preemption. Because it operates like a clear statement rule, *imperium urbis* would require state legislatures to expend political capital before expressly preempting cities.

*Imperium urbis* resembles the federal presumption against preemption, which disfavors federal preemption of state laws. Similar to how the federal presumption justifies itself by reference to federalism, *imperium urbis* grounds itself in the value of popular sovereignty. It would, however, be even stronger. While the federal presumption does not preclude a court from finding field and conflict preemption, *imperium urbis* would foreclose both.

At the state level, *imperium urbis* is not functionally new. In 2020, the National League of Cities proposed a suite of model constitutional provisions designed to modernize state-local relations. Recognizing the threat of preemption challenges, its proposal included an amendment that would prohibit implied preemption. While functionally similar, the National League of Cities’s proposal requires a constitu-

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72 For a summary of the different types of preemption, see generally JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 17–28 (2019). Under *imperium urbis*, preemption would be less commonly found than under the existing federal preemption doctrine. Several Justices, however, have expressed skepticism at both obstacle and field preemption. See Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1908 (2019) (Gorsuch, J.) (plurality opinion) (discussing obstacle preemption and the risk of "displacing the legislative compromises actually reflected in the statutory text"); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) ("[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.").
74 See id.
75 See infra section III.B, pp. 1211–17.
76 See infra section III.B, pp. 1211–17.
77 NAT’L LEAGUE OF CITIES, supra note 38, at 5.
78 Id. at 35, 53–55; see also Briffault, supra note 21, at 264–65 (arguing that "[i]mplied pre-emption should be strongly disfavored," id. at 264).
tional amendment; *imperium urbis* relies on existing constitutional values. Although more enduring, a constitutional amendment would require a significant and coordinated campaign, offering no immediate relief. In the meantime, advocates can turn to *imperium urbis*.

A few states already have something akin to this canon. Some state constitutions demand a “liberal construction” of local power to provide for “maximum local self-government.” This constitutional mandate has heft. The New Mexico Supreme Court has observed that its home rule amendment, which has a liberal-construction clause, “was clearly intended to devolve onto home rule municipalities remarkably broad powers” and “the utmost ability to take policymaking initiative.” Relying on a similar rationale, the Supreme Court of Illinois has stated that a state statute “must contain an express statement” to preempt a local ordinance. And relatedly, Alaska’s courts have disavowed field preemption. Although these constitutional protections often lead to more pro-city outcomes, cities remain vulnerable to implied preemption challenges. For these cities, *imperium urbis* would not be a standalone canon. Its arguments would instead be deployed to demand a more faithful application of these liberal-construction mandates.

Other scholars have advocated for state-specific canons rooted in their respective constitutional texts. For example, Professor Roderick

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79 Nat’l League of Cities, supra note 38, at 54 (identifying Illinois, Florida, and Maine as examples of states with an “express-only” approach to preemption).

80 E.g., N.M. Const. art. X, § 6(E) (“The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.”); Alaska Const. art. X, § 1 (similar); Kan. Const. art. XII, § 5(d) (“Powers and authority granted cities . . . shall be liberally construed for the purpose of giving to cities the largest measure of self-government.”); Wyo. Const. art. XIII, § 16(d) (similar); Ill. Const. art. VII, § 6(m) (“Powers and functions of home rule units shall be construed liberally.”); S.D. Const. art. IX, § 2 (same).

81 New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1158 (N.M. Ct. App. 2005).


83 Jefferson v. State, 527 P.2d 37, 43 n.33 (Alaska 1974) (“We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law.”). Alaska courts permit only express preemption and, in certain extreme circumstances, conflict preemption. Id. at 43.

84 Nat’l League of Cities, supra note 38, at 55 (“Where the ‘express-only’ approach is employed, home rule governments have successfully blocked preemptive findings in state court.”).

85 See Krane et al., supra note 45, at 136 (“Although the [Illinois] courts and legislature usually have respected the prerogatives of home rule units, incursions have occurred.”); see also Law v. City of Sioux Falls, 804 N.W.2d 428, 432 (S.D. 2011) (holding that “municipal corporations possess only those powers given to them by the Legislature,” id. at 432, even though the state constitution allows municipalities to “exercise any power or perform any function” not otherwise prohibited, id. at 431 (citing S.D. Const. art. IX, § 2)). Compare Baessler v. Freier, 258 P.3d 720, 725 (Wyo. 2011) (holding, without discussion of its home rule amendment, that a state law preempted local ordinances), with id. at 730 (Kite, C.J., dissenting) (critiquing the majority for interpreting the state law “contrary to the constitutional directive” of the liberal-construction provision).
Hills, Jr., has argued for New York courts to adopt an anti-preemption canon, basing his argument in the state constitution’s liberal-construction provision.86 Although New York’s constitutional language resembles that of Illinois,87 courts in New York have not adopted the same express-only approach.88 An anti-preemption canon, Hills writes, would “preserv[e] the structural value of home rule.”89

*Imperium urbis* is motivated by a similar desire to fortify home rule and local control, but it has a different justification. As discussed below, *imperium urbis* relies on the value of popular sovereignty, not the value of home rule itself. It is justified not by what the local-government provisions say but by the very fact of their existence. Accordingly, the strength of *imperium urbis* does not depend solely on constitutional text. Cities, regardless of whether they benefit from liberal-construction language, can invoke the logic of *imperium urbis*.

**B. A Doctrinal Foundation**

Substantive canons are “policy-based principles and presumptions that derive from the Constitution, common law practices, or normative concerns related to particular subject areas.”90 Although their applications differ — for example, the rule of lenity applies to ambiguous criminal statutes, the avoidance canon to cases implicating serious constitutional problems — their operation is similar: they put a thumb on the scale toward a particular outcome.91 A canon’s presumption is usually overcome only by clear statutory language.92 This section develops a framework for justifying substantive canons and then demonstrates how this framework supports the creation of *imperium urbis*.

Despite the ubiquity of substantive canons in Supreme Court cases,93 the Court has never clearly outlined what constitutes a substantive can-

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87 Compare ILL. CONST. art. VII, § 6(m) (“Powers and functions of home rule units shall be construed liberally.”), with N.Y. CONST. art. IX, § 3(c) (“Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.”).

88 See Hills, supra note 86, at 655–56.

89 Id. at 658.


91 Id.


93 Professor Nina Mendelson calculated that the Roberts Court considered substantive canons, including agency-deference canons, in forty-five percent of issues, and approvingly applied at least one canon in thirty-two percent of issues. Id. at 99. Professor Anita Krishnakumar’s study found a much lower rate of reliance on substantive canons — 14.4% from the 2005 to 2011 Terms. See Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 850 tbl.2 (2017). Mendelson attributes this to differences in what their studies coded as substantive canons. See Mendelson, supra note 92, at 100.
Commentators even disagree on whether a Court pronouncement is a sufficient or even necessary condition for an interpretive rule to reach canon status. The debate is contentious, the answer unsettled.

While there are several ways in which the Court justifies its canons, the promotion of a constitutional value is the most common. The Court frequently deploys a canon to protect a constitutional value when it lacks a hard-line rule to do so. As examples, the rule of lenity protects the constitutional norm of due process, and the federalism canons protect state sovereignty and the vertical distribution of powers.

Considering these canons and others, then-Professor Amy Coney Barrett identified two prerequisites for a substantive canon: it “must be connected to a reasonably specific constitutional value” and “must actually promote the value it purports to protect.” Other scholars have similarly concluded that, where the Supreme Court “fail[s] to enforce a provision of the Constitution to its full conceptual boundaries,” substantive canons are a “backdoor mechanism” to enforce constitutional norms. Although these norms are unenforceable as strict limits on congressional power, strong substantive canons force Congress to consider constitutional values through the political process.

94 See Krishnakumar & Nourse, supra note 90, at 189–90 (observing that some canons are never formally declared, whereas others are announced with little thought as to their future applicability); id. at 190 n.126 (discussing the “elephants in mouseholes” canon — first articulated in 2001 and since referenced in thirteen cases — that has never been called a “canon” by the Court but has received that designation from scholars and lower courts).

95 Id. at 167 (“What counts as a canon of construction? This is a notoriously unresolved question . . . .”), William Baude & Stephen E. Sachs, The Law of Interpretation, 130 HARV. L. REV. 1079, 1121 (2017) (“At the same time, scholarly attempts to enumerate the canons have created endless disagreement and confusion.”).

96 One justification is historical linguistic practice. See Baude & Sachs, supra note 95, at 1123.

97 An empirical study reveals that the six canons most often used by the Roberts Court justify themselves by reference to a constitutional value. See Krishnakumar, supra note 93, at §6.


99 Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. REV. 109, 178 (2010). For then-Professor Barrett, a canon protecting “fairness” would be too broad, but a canon protecting state sovereignty would be appropriate. Id. at 179.


101 Id.; see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 286 (1994) (“While a Court that seeks to avoid constitutional activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms. One way is through canons of statutory construction.”).

102 Eskridge & Frickey, supra note 98, at 597 (“[S]tructural constitutional protections . . . are underenforced constitutional norms. They are essentially unenforceable by the Court as a direct limitation upon Congress’s power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake . . . .”). But see John F. Manning, Clear Statement Rules and the Constitution, 110
Jurists of different judicial philosophies accept this constitutional-value approach. A committed textualist, Justice Barrett has doubted both the existence of some underlying constitutional norms and the connection between some norms and their implementing canons. Yet she still accepts canons that actually promote a valid underlying norm. Professors William Baude and Stephen Sachs’s originalist interpretive framework, while unsupportive of some canons, would likely still permit canons rooted in constitutional values. Finally, a purposivist judge could reason that a canon protecting an under-enforced constitutional norm effectuates the Constitution’s purpose.

At its core, imperium urbis is a pattern of argument that gives rise to a canon-like thumb on the scale. If enough courts adopt it, imperium urbis might be recognized as a canon. But so long as courts accept the logic of imperium urbis, whether they formally call it a “canon” is beside the point; cities’ ordinances will survive legal challenges with greater frequency.

The constitutional value that underpins imperium urbis is popular sovereignty. It is a value that lies deep in America’s philosophical roots.
and that grounded the Founders’ understanding of legitimate government. The Supreme Court has recognized that “while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people.” From popular sovereignty flows a corollary principle: citizens have a right to alter or abolish their governments. The Tenth Amendment — with its reservation of power “to the States respectively, or to the people” — provides direct textual support for popular sovereignty as a federal constitutional principle.

Popular sovereignty does not end with the Federal Constitution; the powers of states flow directly from their residents. Every state constitution but one has an explicit textual commitment to popular sovereignty — some version of “all political power is vested in and derived from the people,” government “originates with the people,” or state power comes from “the consent of the governed.” These provisions refer to both the original right of people to create their governments and their continuing right to change them. Because they

112 Amar, supra note 109, at 749; see also id. at 762–66 (tracing this idea to the Federalist Papers).
113 U.S. CONST. amend. X (emphasis added).
115 Thomas Brennan, The Last Prerogative, 6 HARV. J.L. & PUB. POL’Y 61, 64 (1982) (“Their powers are traceable to their respective constitutions adopted by their respective people.”).
116 The exception is New York. See N.Y. CONST.
118 The initial ratification happened both formally and through informal popular approval. See Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 24 (1910). Nonetheless, all of these early constitutions had some textual commitment to popular sovereignty. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 477 (1994).
119 See Bulman-Pozen & Seifter, supra note 117, at 870; Bybee, supra note 114, at 566 (observing that the Tenth Amendment “recognizes some pre-existing power that the people of a state have retained for their own purposes — including the purpose of granting (or not) the exercise of this power to the state”); Brenda Erickson & Joan Barilla, Legislative Powers to Amend a State Constitution, Spring 2022, at 1, 3, https://www.ncsl.org/print/aslcs/erickson.pdf [https://perma.cc/
Home rule cities embody popular sovereignty in two ways. First, the passage of local-government amendments is an opportunity for citizens to reshape the powers and structures of their government. When citizens add these provisions to their state constitutions, they are imposing new limits on state power and vesting new rights in themselves. Accordingly, a state must overcome new procedural hurdles before disrupting the boundaries, operations, or existence of a city; for example, a state might be prohibited from passing special legislation or be barred from chartering new cities. And as these amendments curtail state powers, they return power to citizens — the power to draft a city charter, vote on it, and incorporate a city. These provisions are thus a reallocation of sovereignty from the state back to the people.

Second, the process of chartering a city also exemplifies popular sovereignty. When residents follow the procedures of a home rule amendment to ratify a new charter and form a city government, they are relocating power from the state capitol to their city hall. In effect, it is a reclamation of the power to create and to govern cities. Importantly, the specifics of and eligibility for the chartering process vary from state to state, and not every city that can adopt a charter has done so. But when they do, cities demonstrate that they are not creatures of the state — they are creatures of the people.

So conceptualized, home rule amendments are reclamations of sovereign power by the citizenry, a striking instantiation of popular sovereignty. To respect this exercise of the people’s sovereignty, state courts should be reluctant to permit legislatures to trample on cities’ policy-making discretion. Imperium urbis encourages such restraint. Litigants...
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could wield this argument, urging courts to apply a stringent pre-emption standard to promote the constitutional norm of popular sovereignty. Over time, a pattern of reasoning would emerge, eventually gaining recognition as a formal canon.

The logic of imperium urbis buttresses other arguments for city power. Because it grounds itself in the value of popular sovereignty, the canon does not rely on the specific text of any one local-government provision. Other localist arguments do, like Hills’s anti-preemption canon, which is based on a liberal-construction mandate.126 Rather than compete, these arguments reinforce one another. The stronger the buy-in to popular sovereignty as a constitutional value, the more likely it is that a court will generously construe a liberal-construction provision. And the stronger the liberal-construction mandate, the more likely a court will find popular sovereignty manifested in it. City litigants should filter these different arguments through their own constitutions—looking at the language of popular-sovereignty amendments, the strength of cities’ regulatory power, and the dictates of liberal-construction provisions—to craft compelling defenses of their authority.

Further, imperium urbis is not an argument that there is some unwritten constitutional right to local government. Others have eloquently argued for the existence of such a right, claiming that the Constitution presupposed the existence of local governments as necessary political vehicles127 and that individuals thus have an implied right to form cities.128 A few scholars have connected this inherent right of local self-government with popular sovereignty.129 While intriguing, this argument has never succeeded in court.130 For it to now

126 See Hills, supra note 86, at 648.
128 See People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 108 (1871) (Cooley, J., concurring) (“[L]ocal government is [a] matter of absolute right; and the state cannot take it away.”).
129 See Williams, supra note 58, at 88 (discussing Justice Thomas Cooley’s theory of inherent local-government sovereignty, which postulates that “the sovereign people had delegated only part of their sovereignty to the states” with the “remainder [preserved] for themselves in written and unwritten constitutional limitations on governmental actions,” which included “the people’s right to local self-government”); see also TOQUEVILLE, supra note 20, at 81 (“Municipal independence in the United States is, therefore, a natural consequence of this very principle of the sovereignty of the people.”).
gain traction would require a court to recognize a right that somehow always existed but has never been identified. By contrast, imperium urbis does not require the recognition of a preexisting right. Rather, it argues that the operative moment is the passage of local-government amendments. It is that act — the act of reallocating sovereignty from the state to the local level — that exemplifies popular sovereignty.

Notably, this reading of home rule amendments does not let cities escape all oversight. At the federal level, the Supreme Court develops its strongest canons where Congress has its broadest authority; when a strict limitation on Congress’s power would be inappropriate, a canon forces Congress to consider certain constitutional values. This reasoning applies well to city-state relations. State constitutions vest their legislatures with the authority to preempt local ordinances. This power has merit: states can serve as a check on harmful or discriminatory local policies, and statewide coordination is sometimes more effective than an assortment of local efforts. Rather than displace this authority, imperium urbis would require preemption to be explicit and intentional, forcing state officials to consider that city governments are exercises of popular sovereignty.

With this theory in place, consider an example.

C. Application

Texas is an ideal state for imperium urbis. Its hostile state government has targeted liberal cities with express preemption, making it even more important for cities to avoid implied preemption to assert the bounds of their policymaking discretion. Fortunately, Texas has the tools for a successful imperium urbis argument: a strong commitment to popular sovereignty and a rich history of home rule. Illustratively, this section looks to a 2018 implied-preemption case, re-
counting its anti-city opinion and describing how the city could have advanced an *imperium urbis* argument.

By way of background, Texas courts proclaim a pro-city posture, insisting that the state legislature can only “preempt a subject matter normally within a home-rule city’s broad powers” with “unmistakable clarity.”137 The courts, however, take an inconsistent approach to “unmistakable clarity,” sometimes finding against the city even though the statutory text is loaded with ambiguity.

For example, Austin in 2018 passed an ordinance mandating that employers provide an hour of paid sick leave for every thirty hours worked.138 Several Texas business associations initiated a challenge.139 Among other things, the plaintiffs argued that the Texas Minimum Wage Act preempted the local ordinance.140 A Texas court of appeals agreed.141

In doing so, the court noted that the Act expressly barred Austin from imposing a higher minimum wage on private employers.142 To determine whether Austin’s paid-sick-leave ordinance fell within the Act’s scope, the court considered the meaning of the word “wage.”143 The Act itself gave no definition, so the court adopted a dictionary’s and held that paid sick leave fell within its ambit: because an employer would have to pay an employee who uses sick leave for hours that the employee did not work, the employee’s hourly pay would effectively be increased.144

In briefing, Austin parried this argument. If paid sick leave was considered wages, an employee’s minimum wage would include the value of their sick leave benefits.145 Thus, an employer that provided paid sick-leave could pay an hourly rate less than Texas’s minimum wage and still satisfy the statutory requirement.146 Given this absurdity, Austin asserted that the Act simply did not contemplate paid sick leave.147 The court left this argument unaddressed.

Admittedly, the court’s reasoning is plausible. But so is Austin’s. Troublingly, the court navigated this interpretive ambiguity by finding against the city, ignoring the requirement that a state law preempt a


139 Id.

140 Id.

141 Id. at 439.

142 Id.

143 Id.

144 See id. at 440.


146 Id.

147 Id.
local ordinance only if it does so with “unmistakable clarity.” *Imperium urbis* could have encouraged the court to adhere to the unmistakable-clarity standard, potentially leading it to a different result.

Such an argument would begin with the Texas Constitution. It provides a rousing recognition of popular sovereignty: “[A]ll political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.”148 The people of Texas “have at all times the inalienable right to alter, reform or abolish their government.”149 As a state court put it, “true sovereignty lies in the people of Texas, not the government they created.”150

Applying a popular-sovereignty patina, consider the history of Texas’s Home Rule Amendment. The Constitution of 1876 — which remains in effect today151 — originally vested full control over cities in the state legislature. Cities of fewer than ten thousand residents were subject to generally applicable laws, and larger cities were subject to special legislation.152 When Texas had just a few large cities, the legislature had the bandwidth to pass special legislation for each of them.153 But as the number of large cities grew, requests from local governments swamped the legislature; by 1911, over twenty-five percent of the state’s legislation related to municipal affairs.154 City residents were eager for more control, and the legislature was willing to cede it.155

Pursuant to Texas’s constitutional amendment process, the state legislature sent a Home Rule Amendment to voters.156 In an exercise of their inherent sovereignty, the people of Texas approved the amendment in 1912.157 The Amendment provides that cities of more than five thousand may, by a majority vote, adopt a charter.158 Once adopted, a city can exercise any power granted to it by its charter, so

148 TEX. CONST. art. I, § 2.
149 Id.
152 TEX. CONST. art. XI, §§ 4–5 (1876).
155 Blodgett, supra note 153, at 2 (noting that Texans, by approving the Home Rule Amendment, “told the legislature that they wanted their cities to have more freedom and local autonomy”).
156 Id.
157 See Krane et al., supra note 45, at 400.
158 TEX. CONST. art. XI, § 5.
long as it is not inconsistent with the state’s laws and constitution. 159 A contemporaneously adopted provision stripped the state of its power to charter cities and regulate their internal structures. 160 Anxious for autonomy, twenty-four cities drafted charters before the amendments took effect. 161

Today, citizens continue to exercise their sovereign right to charter a city. During a 2013 campaign to ratify a city charter and become a home rule city, Sunnyvale, Texas, recognized that it was then subject to the “general laws of the State.” 162 Home rule offered the alluring alternative of “self-governance in its ultimate form,” guided by a charter “based on community norms, values and priorities.” 163 In a home rule city, Sunnyvale residents could “define for themselves how they want to be governed.” 164 The citizens of Sunnyvale ultimately voted to adopt a charter and create a home rule city — a reclamation of government power and an exercise of popular sovereignty. 165

The contours of a Texas imperium urbis argument are now sketched. In sum: Article I of the Texas Constitution enshrines the value of popular sovereignty, recognizing the right of Texans to create and shape their government as they see fit. 166 With the passage of the Home Rule Amendment, Texans exercised their sovereignty by reorganizing their government, shifting power from the state to the local level. And every time Texans vote to charter a city, they reclaim and localize political power — itself an act of popular sovereignty. 167

The City of Austin could have followed this roadmap in its paid-sick-leave litigation. It could have urged the court to apply a more robust “unmistakable clarity” test — Texas’s version of imperium urbis — to

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159 Id.; see also Forwood v. City of Taylor, 214 S.W.2d 282, 286 (Tex. 1948) (“It is necessary to look to the acts of the legislature not for grants of power to [home rule] cities but only for limita-


161 BLODGETT, supra note 153, at 2–3.


163 Id.

164 Id.


166 See TEX. CONST. art. I, § 1.

167 See id. art XI, § 5.
vindicate the value of popular sovereignty as embodied in local governments. In turn, the court could have acknowledged that the state law does not directly resolve the question. Because implied preemption is forbidden, the local ordinance would stand, an act of respect for the sovereign people’s decision to vest regulating power in their local government.

* * *

At all levels, governments face a panoply of pressing policy questions: climate change, immigration, abortion access, affordable housing. Cities are often on the frontlines.168 And with dysfunction at the state and national levels, local governments are left with much of the responsibility for addressing these challenges.169

Implied preemption undermines cities’ capacity to dynamically respond. *Imperium urbis* is a roadmap to help cities navigate the morass: by invoking popular sovereignty, litigants can encourage courts to favor cities in local-state preemption disputes. Alone, it will not resolve all the issues facing local governments, but it arms cities with a doctrinal tool to start tackling them.

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169 Davidson & Schragger, supra note 18, at 1388.