

**FEDERALISM IN THE STATES:  
WHAT STATES CAN TEACH ABOUT  
COMMANDEERING**

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INTRODUCTION

While it has been said that the Founders “split the atom of sovereignty” in our federal system,<sup>1</sup> it must never be forgotten that splitting atoms is a risky endeavor. It should be done with caution. And it should be guided by expertise and lessons learned from laboratories of innovation. In America’s federal system, as Justice Louis Brandeis

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1. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”).

famously observed almost a century ago, states serve as such laboratories.<sup>2</sup> States—individually and as a class—make doctrinal and administrative choices that differ from those of the national government.<sup>3</sup> These include divergent choices about how to deploy interstate federalism and intrastate federalism.<sup>4</sup> In turn, state and local governments teach one another, and the nation as a whole, about the consequences of those diverse choices. This symposium Essay will focus on one area in which federal and state governments have diverged in the administration of federalism: “anticommandeering” doctrine. Whereas federal Tenth Amendment doctrine includes an anticommandeering principle that generally prevents the national government from telling state and local governments how to govern,<sup>5</sup> there is no general anticommandeering principle in the annals of state constitutional cases and law.

This kind of institutional divergence should be expected given the different roles that state and local governments play in our federal system. As Justice William Brennan once stated, “Ours is a ‘*dual* system of government,’ which has no place for sovereign cities.”<sup>6</sup> States create cities.<sup>7</sup> Indeed, Professor Richard Briffault once succinctly articulated some of the differences between state and local governments: the states have “fixed boundaries, territorial integrity, inherent law-making power, and status as basic units for the organization of the national government.”<sup>8</sup> And if the role of courts is to “protect the formal features of the federal structure” instead of relying solely on “the open-ended and value-laden assessment of the conflicting political values,” then one should expect

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2. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. (forthcoming 2021) (manuscript at 68 n.287) (observing that the Brandeis analogy “exerts a powerful ongoing influence on legal scholars”), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3776882#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776882#).

3. See generally JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

4. See generally Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191 (2016); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1551 (2012).

5. *New York v. United States*, 505 U.S. 144, 161 (1992).

6. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (alteration in original) (citation omitted) (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

7. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *City of Clinton v. Cedar Rapids & Mo. R.R.*, 24 Iowa 455, 456 (1868); *Merriam v. Moody’s Ex’rs*, 25 Iowa 163, 173–74 (1868); JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 4, 8 (1872); cf. Felipe Ford Cole, *Dillon’s Debts: Rethinking Finance Capital and Local Government in the United States, 1860-1907* (May 2020). But see Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012).

8. Richard Briffault, “*What About the ‘Isms’?*” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1306 (1994).

some differences in how the national government and states implement vertical federalism.<sup>9</sup>

Still, while this divergence is an expected outgrowth of our constitutional structure, there is value in comparing interstate federalism and intrastate federalism. Federalism cases and commentary are filled to the brim with assumptions, claims, and expectations about how well federalism's constitutive doctrines will protect values like democratic accountability, collective action problems, and egalitarianism.<sup>10</sup> America's two federalisms provide space to test, reinforce, or reexamine those assumptions, claims, and expectations. In this Essay, I call this analytic approach "intrasystemic comparative analysis"—that is, comparing governmental systems that co-exist in a single federation.

Anticommandeering doctrine offers a fruitful site to apply this mode of analysis. Defenders and critics of federal anticommandeering doctrine make a host of claims about the doctrine's impact on democratic accountability and collective action problems. In the way of democratic accountability, the anticommandeering rule purportedly helps protect state and local governments from undue control by the central government, preventing them from becoming "puppets of a ventriloquist Congress."<sup>11</sup> This rule thereby purportedly makes it apparent which government the people should hold accountable for which decisions.<sup>12</sup> Federal anticommandeering doctrine cases assume that if the federal government tells states what to do, voters will not know whom to hold accountable for resultant policy choices.<sup>13</sup> In the way of collective action problems, critics of anticommandeering sometimes offer claims about how the doctrine impedes governments' ability to mitigate such problems.<sup>14</sup> Because commandeering of cities by states is so common,<sup>15</sup> this setting provides opportunities to examine those claims empirically.

Part I provides an overview of the distinctive ways that federal and state law regulate questions of local autonomy. Under Tenth Amendment doctrine, federal constitutional law prohibits the federal government from commandeering.<sup>16</sup> By contrast, at the state level, while laws often provide varying levels of protections for "home rule" and sometimes provide prohibitions on unfunded mandates, there is no general

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9. *Id.*

10. *See infra* Part II.

11. *Printz v. United States*, 521 U.S. 898, 928 (1997).

12. *Id.* at 920.

13. *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018).

14. *New York v. United States*, 505 U.S. 144, 212–13 (1992) (Stevens, J., concurring in part and dissenting in part); David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 427–28 (2001).

15. *See infra* Section I.C.

16. *See cases cited supra* notes 11, 14.

anticommandeering principle in state law.<sup>17</sup> Part I also identifies ways that states engage in such commandeering. This happens both through direct commands and by way of what is sometimes called “deregulatory”<sup>18</sup> or “null”<sup>19</sup> preemption, in which state governments prohibit local governments from acting without providing any affirmative accompanying regulations.

Part II explores what states’ direct and indirect commands could potentially teach us about the relationship between democratic accountability, collective action problems, and commandeering. Is there evidence of voter confusion when states commandeer local governments? Do states effectively invoke commandeering to solve important collective action problems? Do states sometimes invoke commandeering in ways that worsen collective action problems? Part II does not set out to comprehensively answer these questions but instead explains why exploring these questions at the state level can meaningfully inform debates about federal anticommandeering.

Part III, which is the conclusion, offers provisional thoughts about potential doctrinal implications of these inquiries. To the extent that empirically verifiable arguments about democratic accountability and collective action problems functionally shape the contours of federal anticommandeering doctrine, consulting the experiences of the states may offer guidance about the proper path of federal anticommandeering in the future.

## I. FEDERALISM IN THE STATES

This Part compares federal and state doctrines designed to protect local decision-making, deploying what I call “intrasystemic comparative analysis.” Over the past few decades, the germane federal and state doctrines have moved in different directions. Most importantly for the purposes of this Essay, the U.S. Supreme Court prohibited Congress from

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17. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165, 1218–19 (2018).

18. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2014 (2018) (describing “the powerful deregulatory focus of much of the new preemption”); see Schragger, *supra* note 17, at 1182 (crediting Richard Briffault for the “deregulatory preemption” label); see also Rashmi Dyal-Chand, *Progressive Law, Activism, and Lawyering in an Age of Preemption*, 46 LAW & SOC. INQUIRY 252, 254 (2021) (“Another example of preemption occurs when the absence of regulation is claimed as a basis for preventing the enactment of laws by a lawmaking body lower down in the hierarchy. Such ‘deregulatory preemption’ establishes both a floor and a ceiling for regulation by a state or local body.”) (emphasis omitted).

19. Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1015 (2010) (“How free should the federal government be, not only to preempt state regulatory law, but also to choose itself to adopt no law on point?”).

forcing states to carry out federal objectives.<sup>20</sup> Under these rules, Congress may not require states to act affirmatively.<sup>21</sup> Moreover, Congress may not prohibit states from implementing policies if the federal government itself has not regulated the respective policy area.<sup>22</sup> Contemporaneously, states have applied and refined “home rule” doctrines that provide varying degrees of power to local governments to govern and sometimes protect local governance from undue state interference.<sup>23</sup> States have not, however, adopted a general anticommandeering principle.<sup>24</sup> Accordingly, states commandeering local governments in at least two ways. First, states sometimes issue direct commands to local governments, demanding affirmative compliance.<sup>25</sup> Second, states sometimes “preempt” local governments from implementing certain types of policies, even when those states have not passed rules that govern those subject matter areas.<sup>26</sup>

#### A. Intrasystemic Comparative Analysis

Comparative law has been described as “the discipline which attempts to understand the various legal systems in their totality and in their relationship to each other, without necessarily trying to avoid or minimise the existing differences between them.”<sup>27</sup> Scholars compare different nations’ legal systems and rules, offering lessons and insights that are more difficult to see if one views a single system in isolation. One rationale for these comparisons is that the world is deeply interconnected, and legal systems influence one another, whether intentionally or not.<sup>28</sup> It follows that there is value in comparing coexisting legal regimes within a single federation, like the United States.

Upon deploying this intrasystemic comparative analysis, one finds that there are lessons we can learn about two American federalisms.<sup>29</sup> The first is the relationship between the national government and the states. The second is the relationship between states and cities. The word

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20. *Printz v. United States*, 521 U.S. 898, 926, 933 (1997).

21. *Id.*; see also *New York v. United States*, 505 U.S. 144, 161 (1992).

22. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

23. See Schragger, *supra* note 17, at 1169–70.

24. *Id.* at 1165, 1218–19.

25. *Id.*

26. *Id.*

27. Ralf Michaels, *Comparative Law*, in OXFORD HANDBOOK OF EUROPEAN PRIVATE LAW (Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann eds., forthcoming) (manuscript at \_\_\_\_\_), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty_scholarship) [<https://perma.cc/RK46-K3WT>].

28. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 92 (2007).

29. See Gerken, *supra* note 4.

“federalism” is not often used to describe the second relationship. And yet it contains the definitive ingredients of federalism. Federalism is “a means of governing a polity that grants partial autonomy to geographically defined subdivisions of the polity.”<sup>30</sup> This definition applies to the state-local relationship, especially in the states that have “home rule” provisions that purport to grant partial autonomy to municipalities.<sup>31</sup> Home-rule provisions set up many of the types of conflicts that arise in the federal-state version of “Our Federalism.”<sup>32</sup> As federal courts have sometimes distinguished between what is “truly national” and “truly local,”<sup>33</sup> state courts have also frequently asked what subjects are matters of statewide concern and which ones belong to local governments.<sup>34</sup>

### *B. Divergence*

Despite overlapping aims, federal and state federalism doctrines have moved in markedly distinct directions. A key moment in the federal story came in the mid-1970s, when some state and local governments argued that Congress violated the Tenth Amendment by requiring them to pay a minimum wage and comply with federally mandated overtime standards.<sup>35</sup> In *National League of Cities v. Usery*,<sup>36</sup> the Court initially agreed, concluding that these types of laws violated the Tenth Amendment as applied to traditional state functions.<sup>37</sup> Nine years later, however, the Court reversed course, ruling in 1985 that the traditional state function test was

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30. MALCOLM M. FEELEY & EDWARD L. RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 12 (2009).

31. See, e.g., *Clarke v. Village of Arlington Heights*, 309 N.E.2d 576, 578 (Ill. 1974) (“Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.”); see also David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (observing that home rule is often associated with autonomy but contending that this result is not historically inevitable).

32. See NESTOR DAVIDSON, RICHARD BRIFFAULT, PAUL DILLER, SARAH FOX, LAURIE REYNOLDS, ERIN ADELE SCHARFF, RICHARD SCHRAGGER & RICK SU, NAT’L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE TWENTY-FIRST CENTURY* 1, 7 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/K85W-W3G4>] (“In our trilevel federal system, local governments perform a wide array of crucial governance roles.”).

33. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

34. See generally Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271 (2009).

35. Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty”* in *National League of Cities v. Usery*, 86 YALE L.J. 1165, 1165, 1172–74 (1977).

36. 423 U.S. 833 (1976).

37. *Id.* at 849.

“unworkable” and laden with policy-centric discretion that was not judicial in nature.<sup>38</sup>

This did not spell the end of Tenth Amendment jurisprudence, however. In the 1990s, the Court adopted a different approach to enforcing the Tenth Amendment: the anticommandeering principle. Under anticommandeering doctrine, the Tenth Amendment prohibits Congress from forcing state and local governments to carry out its Article I constitutional objectives.<sup>39</sup> The Supreme Court relied on this principle to invalidate a federal law that required states to police low-level radioactive waste,<sup>40</sup> as well as a law forcing local officials to help facilitate background checks for guns.<sup>41</sup> Most recently, in *Murphy v. NCAA*,<sup>42</sup> the Court relied on the anticommandeering principle to invalidate a federal law that prohibited states from licensing or authorizing sports-betting.<sup>43</sup> In so doing, the Court made clear that the doctrine does not merely prevent Congress from placing affirmative obligations on states.<sup>44</sup> Direct orders not to legislate may also run afoul of anticommandeering.<sup>45</sup>

By contrast, in state courts, the doctrine of “home rule” has played the most prominent role in protecting local autonomy from overreaching states.<sup>46</sup> In the United States, home rule generally references state constitutional provisions and statutes that provide local governments with the ability to govern affairs within their jurisdiction; protect local governments from state legislation that interferes with municipal affairs; or both.<sup>47</sup> Home rule is often cast as an antidote to Dillon’s Rule, which holds that because local governments are creations of the state, their authority is dictated and limited by state law.<sup>48</sup> Between 1875 and 1920, a wave of states adopted home rule statutes as a way of eroding the reach of Dillon’s Rule.<sup>49</sup> A second wave of home rule emerged in the middle of the

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38. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

39. *New York v. United States*, 505 U.S. 144, 155–57 (1992).

40. *Id.* at 149.

41. *Printz v. United States*, 521 U.S. 898, 933–35 (1997).

42. 138 S. Ct. 1461 (2018).

43. *Id.* 1476–78.

44. *Id.* at 1478.

45. *Id.*

46. Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2018–19 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)) (arguing that home rule protects local autonomy in ways Frug’s reviewed book underappreciated); Barron, *supra* note 31, at 2261 n.10 (stating “[t]hat home rule is generally understood as synonymous with substantial legal autonomy” but contending that autonomy should not be the lodestar in home rule doctrine).

47. See Hills, *supra* note 46, at 2018–19.

48. See Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1372 (2020).

49. Hills, *supra* note 46, at 2018.

last century, aided by a 1953 American Municipal Association provision that served as a template.<sup>50</sup>

In the way of protecting local governance, home rule provisions reflect a range of approaches. Some offer local governments the opportunity to govern—broadly or with respect to certain subject matters—without specific, express authorization from the state legislatures.<sup>51</sup> Other states have adopted a clear statement rule of sorts, requiring that any enforceable attempt to preempt local power be explicit rather than implicit.<sup>52</sup> Others go much further, offering local governments immunity from state regulations that impermissibly interfere with local power. For example, some such home rule provisions require that any limitation on local power be “general” or “uniform” rather than selectively singling out a jurisdiction for disparate treatment.<sup>53</sup> Others specify certain areas in which states cannot unduly interfere with local affairs, protecting local governments from attempts to regulate their structural, personnel, functional, or fiscal affairs.<sup>54</sup> Of these categories, structural and personnel are the most common carve outs.<sup>55</sup>

Among states that protect local governments’ ability to manage local affairs without undue interference, Colorado offers some of the strongest protection. There, in determining whether state law has unduly interfered on a matter of local concern, state courts consider the “need for statewide uniformity”; “extraterritorial impact” of a law beyond the municipality; and whether the subject matter is “historically and traditionally [a] matter[] of local concern.”<sup>56</sup> That third factor in particular reveals how far Tenth Amendment doctrine and home rule doctrine have diverged. While Professor Paul Diller has called constitutional home rule provisions like Colorado’s “[m]ini [t]enth [a]mendments,”<sup>57</sup> even this locally protective home rule doctrine includes a traditional-function framework that resembles the one the Supreme Court expressly rejected in *Garcia*.<sup>58</sup>

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50. Barron, *supra* note 31, at 2326.

51. Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1066–67 (2017).

52. See, e.g., *Town Pump, Inc. v. Bd. of Adjustment of Red Lodge*, 971 P.2d 349, 357 (Mont. 1998) (refusing to invalidate local alcohol regulation because the legislature had not “specifically denied” the challenged power).

53. Diller, *supra* note 51, at 1072–73.

54. *Id.* at 1066.

55. *Id.* at 1067.

56. *City of Northglenn v. Ibarra*, 62 P.3d 151, 162 (Colo. 2003); see Reynolds, *supra* note 34, at 1287–88 (analyzing this test).

57. Diller, *supra* note 51, at 1064, 1067.

58. See *supra* note 38 and accompanying text.

### C. Intrastate Commandeering

#### 1. DIRECT COMMANDS

The first category of state-local commandeering is rather straightforward. States sometimes affirmatively tell cities what to do. As Professor Richard Briffault has described, “Absent any specific limitation in the state constitution, the state can amend, abridge, or retract any power it has delegated, much as it can impose new duties, take away old privileges, or alter the locality’s boundaries.”<sup>59</sup>

States have, for example, directed municipalities to affirmatively adopt affordable housing policies and permitted agencies to veto policies that are inadequate.<sup>60</sup> And in the field of immigration, Arizona, Georgia, Indiana, Missouri, North Carolina, and Texas have all enacted laws that force cities to assist and cooperate with federal immigration officials.<sup>61</sup> Georgia recently passed a law that prohibits local governments from reducing their policing budget by more than five percent over any five-year period.<sup>62</sup> States also have often delegated the administration of federal programs to municipalities.<sup>63</sup> Direct mandates and prohibitions of this sort, when they occur at the federal level, are deemed unconstitutional commandeering.<sup>64</sup>

#### 2. COMMANDEERING THROUGH “PREEMPTION”

The second form of commandeering comes by laws that often bear the label “preemption.” Over the past decade, there has been a perceptible increase in state laws that purport to preempt local action.<sup>65</sup> Other scholars have engaged in comprehensive treatments of this development.<sup>66</sup> Indeed, Professor Richard Schragger has provided a helpful taxonomy to classify these regulations.<sup>67</sup> First, states have engaged in “industry-specific

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59. Briffault, *supra* note 8, at 1340.

60. See *infra* note 81 and accompanying text.

61. ARIZ. REV. STAT. ANN. § 11-1051 (2021); GA. CODE ANN. § 36-80-23(b) (2021); IND. CODE § 5-2-18.2-4 (2021); MO. REV. STAT. § 67.307 (2021); N.C. GEN. STAT. § 153A-145.5 (2021).

62. Nicholas Reimann, *Georgia Enacts Law that Bans Cutting Police Budgets*, FORBES (May 7, 2021, 4:53 PM), <https://www.forbes.com/sites/nicholasreimann/2021/05/07/georgia-enacts-law-that-bans-cutting-police-budgets/?sh=824132b6855d> [<https://perma.cc/LB2Q-5MST>].

63. Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017).

64. See *New York v. United States*, 505 U.S. 144, 188 (1992).

65. See Schragger, *supra* note 17, at 1171–81.

66. See, e.g., *id.*

67. See *id.* at 1170–83.

preemption.”<sup>68</sup> That is, states have preempted local laws on issues like firearms, tobacco, predatory lending, broadband internet, and ridesharing.<sup>69</sup> Indeed, forty-three states have preemptive laws regarding firearms regulation, with eleven states preempting the entire field.<sup>70</sup> Most states have laws that prohibit certain local regulations regarding tobacco.<sup>71</sup> A quarter of states now have laws banning local governments from providing broadband internet.<sup>72</sup>

Second, states have preempted local regulations on issues related to “labor, employment, and antidiscrimination.”<sup>73</sup> For example, about half of the states have laws that prohibit local minimum wage or living wage laws.<sup>74</sup> In addition, some states prohibit local governments from passing antidiscrimination ordinances.<sup>75</sup> The most politically charged example of the latter came in North Carolina.<sup>76</sup> Charlotte passed an antidiscrimination ordinance that protected people from discrimination on the basis of gender identity.<sup>77</sup> North Carolina pushed back, ultimately passing a law that prevented all local governments from enacting antidiscrimination ordinances.<sup>78</sup>

Third, states have engaged in “local authority preemption.”<sup>79</sup> At least thirty-five states have placed limits on local officials’ ability to enact taxes, including laws that require voter approval for any tax increase or new debt.<sup>80</sup> Moreover, at least eleven states have prohibited cities from passing certain affordable-housing requirements.<sup>81</sup> Additionally, Josh Sellers and Erin Scharff have recently highlighted a subset of local-authority preemption that they call “structural preemption”;<sup>82</sup> some states have preempted local laws on matters such as election dates, voting eligibility, and campaign finance reform.<sup>83</sup>

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68. *Id.* at 1170–74.

69. *Id.* at 1170–72.

70. *Id.* at 1170.

71. *Id.* at 1171.

72. *Id.* at 1172.

73. *Id.* at 1174–78; Olatunde C. A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 *INDUS. & LAB. RELS. REV.* 1179, 1186–90 (2021).

74. Schragger, *supra* note 17, at 1174.

75. See N.C. GEN. STAT. § 143-422.2 (2021) (emphasizing that it is the public policy of “this State” to protect and safeguard the equal protection right of employees); UTAH CODE § 34A-5-102.5 (West 2021).

76. See Mark Dorosin, *North Carolina’s H.B.2: A Case Study in LGBTQ Rights, Preemption, and the (Un)democratic Process*, 122 *W. VA. L. REV.* 783, 784–85 (2020).

77. *Id.*

78. *Id.*

79. Schragger, *supra* note 17, at 1179–81.

80. See *id.* at 1179.

81. *Id.*

82. Sellers & Scharff, *supra* note 48, at 1364.

83. *Id.* at 1387–90, 1392.

Fourth, states have engaged in what Professor Schragger calls “punitive” and “vindictive preemption.”<sup>84</sup> That is, sometimes states create punishments or penalties for cities that pass local ordinances that conflict with the states’ regulatory bans. One particularly aggressive version of this is an Arizona law that, at the request of any state legislator, requires the state’s attorney general to investigate local laws.<sup>85</sup> As Schragger explains, “[i]f the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within thirty days or face a loss of shared state money.”<sup>86</sup>

While these regulatory actions by states are generally called “preemption,”<sup>87</sup> some are better described by another label: “commandeering.” Some state preemptive measures do nothing more than tell cities what they may not do. As described in Section I.A, commandeering not only occurs when the federal government imposes affirmative obligations on state governments. In *Murphy v. NCAA*, the Court relied on the anticommandeering principle to invalidate a federal law that prohibited states from licensing or authorizing sports-betting.<sup>88</sup> In so doing, the Court made clear that the doctrine does not merely prevent Congress from placing affirmative obligations on states.<sup>89</sup> Direct orders *not* to legislate may also run afoul of anticommandeering.<sup>90</sup> To be sure, the federal government can enact laws and regulations and, in protecting those regulatory choices, prohibit states from passing legislation on that subject.<sup>91</sup> That is preemption, and it is permissible because federal laws are supreme in our constitutional system.<sup>92</sup> But when the federal government has *not* enacted legislation on a topic, it may not prohibit states from enacting policies on that topic.<sup>93</sup> Such an exertion of supremacy crosses from permissible “preemption” into the unconstitutional abyss of “commandeering.”<sup>94</sup> When Congress purports to order states not to regulate, without any accompanying federal regulation, that constitutes the type of direct order that the Tenth Amendment does not countenance. Likewise, when state laws tell local governments what they may not do, with no accompanying substantive legislation, it is clarifying for us to call that what it is: commandeering.

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84. Schragger, *supra* note 17, at 1181–83.

85. *Id.* at 1182.

86. *Id.*

87. *See id.* at 1169.

88. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

89. *Id.* at 1478.

90. *Id.*

91. *See id.* at 1480.

92. *Id.* at 1479.

93. *See* Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 360–61 (2020).

94. *See id.* at 361.

## II. LESSONS IN THE STATES

As outlined in Part I, states commandeer local governments. This feature of intrastate federalism renders it distinct from its national, interstate counterpart. And, among the states, there is a wide degree of variation in terms of *when* such type of commandeering is permitted and when home rule provisions provide local governments with a measure of protection. Because of this divergence between the federal and state systems and the variation among the states themselves, there are resultant opportunities to test assumptions and claims that tend to accompany debates about anticommandeering doctrine. Debates about federalism, localism, and decentralization often involve empirical assumptions.<sup>95</sup> Discussions about the merits of anticommandeering are no exception. In particular, assertions about democratic accountability and collective action are prevalent among courts and commentators when describing the relative merits and costs of anticommandeering doctrine. This Part describes these debates, situating them within broader discussions about the benefits of federalism and decentralization in the American system. This Part also explores how commandeering in the state systems—its existence and its diversity—can help empirically inform these debates.

## A. Democratic Accountability

## 1. FEDERALISM AND DEMOCRACY

A persistent puzzle pervades American federalism. How can the government claim to be “sovereign” when the ultimate power rests with the people themselves?<sup>96</sup> This puzzle has long been the most pronounced, for example, when doctrines like sovereign immunity obstruct citizens’ attempts to hold states accountable.<sup>97</sup> In his oft-cited work, *Of Sovereignty and Federalism*, for example, Akhil Amar urged courts to adopt a jurisprudence that “replace[s] ‘Our Federalism’ with their federalism, and government sovereignty with popular sovereignty.”<sup>98</sup>

More broadly, those extolling the virtues of a federalist system often make claims about ways that it amplifies the voice of the people themselves.<sup>99</sup> This is true in at least three ways. First, the claim has often

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95. Cf. Briffault, *supra* note 8, at 1323 (“Unfortunately, no necessary linkage of federalism and freedom has ever been demonstrated.”).

96. See, e.g., Akhil Reed Amar, *Of Sovereignty and Freedom*, 96 YALE L.J. 1425, 1435–37 (1987).

97. See *id.* at 1466–92.

98. *Id.* at 1427.

99. See, e.g., THE FEDERALIST NO. 51, at 353 (James Madison) (Jacob E. Cook ed., 1961) (“It is no less certain . . . that the larger the society . . . the more duly capable it will be of self government.”).

been made that when the people are able to speak through two different voices, dual (and dueling) governments are able to serve as checks on one another, thereby enhancing individual liberty and freedom.<sup>100</sup> A second claim focuses the consequentialist benefits of experimentation when the people are able to speak with multiple voices. By allowing people to speak through multiple voices, states become laboratories of democracy where the ideas can be tested and the best ideas can spread accordingly.<sup>101</sup> Third, claims are made about how states are closer to the people themselves. This enhances opportunities for political participation and amplifies any individual voter's will.<sup>102</sup>

## 2. COMMANDEERING AND DEMOCRACY

Anticommandeering is a prominent site of democratic claims, especially among arguments that feature the importance of state and local "autonomy" as opposed to "sovereignty."<sup>103</sup> Professor Deborah Merritt, for example, has observed that the Supreme Court's attempt in the 1970s and early 1980s to simply protect states in the "areas of traditional governmental functions" . . . distracted litigants from the Court's primary objective of protecting the independence of state governments and generated endless disputes over which government services were "traditional."<sup>104</sup>

Key arguments for anticommandeering doctrine emphasize this autonomy-focused conception of federalism, contending that the doctrine helps individuals govern themselves. Specifically, anticommandeering cases reason that the doctrine helps voters know whom to hold responsible for which decisions. This assertion appears prominently in the leading anticommandeering case, *New York v. United States*, in which the Court contended that when "the Federal Government compels States to regulate,

100. See, e.g., *Bond v. United States*, 564 U.S. 211, 220–22 (2011); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

101. See, e.g., Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233–36 (1994).

102. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010); Robert A. Shapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005).

103. See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 938–39 (1998); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1361–75 (2001); cf. Gerken, *supra* note 102, at 7 ("Even as scholars regularly announce the death of sovereignty, they remain haunted by its ghost.") (footnote omitted).

104. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 14 (1988) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976)).

the accountability of both state and federal officials is diminished.”<sup>105</sup> The Court reasoned,

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>106</sup>

On this view, then, when the central government commandeers, voters will hold the wrong elected officials accountable. Voters will direct their ire for unpopular opinions to the government that was forced to act by a ventriloquist central government, the theory goes. And the central government escapes this wrath, even though it is actually responsible for the policy.

In offering this conclusion, the Court cited in part to a classic 1988 article by Professor Merritt.<sup>107</sup> In that piece, among other things, Merritt canvassed lower court cases that relied on this claim when expressing doubts about federal laws that commandeered states.<sup>108</sup> The Fifth Circuit, for example, had concluded that commandeering “blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.”<sup>109</sup>

Merritt emphasized the particular challenges for accountability that unfunded mandates create. Merritt cited to the Ninth Circuit’s observation that “[i]f the federal government could command state governments to implement federal programs, . . . state citizens would lose control over disbursement of their state-generated tax funds.”<sup>110</sup> That court added, “This disassociation of the power to spend and the power to tax would destroy popular accountability and ‘encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government.’”<sup>111</sup>

By contrast, some critics of anticommandeering have questioned the premise that commandeering creates concerning problems of democratic accountability. On their view, there are democratic features that make the

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105. *New York v. United States*, 505 U.S. 144, 168 (1992).

106. *Id.* at 169.

107. *Id.* at 157.

108. *See* Merritt, *supra* note 104, at 26–29.

109. *Id.* at 63 (quoting *Texas v. United States*, 730 F.2d 339, 354 (5th Cir. 1984)).

110. *Id.* at 28.

111. *Id.* (quoting *Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977)).

concern about democratic accountability less harsh than it appears on the surface. Professor Daniel Halberstam has argued, “[P]roper lines of accountability can be preserved when component States are vigilant in publicizing the respective roles of the federal and State policy-makers on any given issue. Given proper information, citizens should find the lines of accountability reasonably clear.”<sup>112</sup> Professor Neil Siegel has offered an endorsement of this view, expressing that it is unclear “that commandeering inevitably generates serious accountability concerns regardless of what Congress, the states, the news media, or citizens may do to address potential problems.”<sup>113</sup> Voters “who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.”<sup>114</sup> Moreover, government officials have electoral incentives to take credit for popular actions and to make apparent why they are not responsible for unpopular regulations.<sup>115</sup>

### 3. STATE COMMANDEERING AND ACCOUNTABILITY

Looking to the states—and deploying intrasystemic comparative analysis—can help inform our understanding of whether, how, or to what extent commandeering impedes democratic accountability. States are often allowed to, and regularly do, commandeer local governments.<sup>116</sup> They can and do issue direct mandates.<sup>117</sup> They pass state laws that local officials are obliged to enforce. They delegate some federal regulatory obligations to local governments.<sup>118</sup> And under the veneer of deregulatory “preemption,” they disable local policymaking in ways that earn the “commandeering” label when Congress acts in similar ways.<sup>119</sup> This offers

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112. Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 231 (Kalypso Nicolaidis & Robert Howse eds., 2001).

113. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *VAND. L. REV.* 1629, 1632 (2006).

114. *Id.* at 1632.

115. *Id.* at 1632–33.

116. Joseph F. Zimmerman, *The State Mandate Problem*, 19 *ST. & LOC. GOV'T REV.* 78, 78 (1987).

117. *Id.*

118. *Id.*

119. NICOLE DUPUIS, TREVOR LANGAN, CHRISTIANA MCFARLAND, ANGELINA PANETTIERI & BROOKS RAINWATER, *NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS* 3 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/76HC-QN47>].

an opportunity, then, to explore at least three vexing questions about anticommandeering.

*First*, to what extent does commandeering undermine democratic accountability? Professor Vicki Jackson has summarized three plausible ways that commandeering invites concerns about democratic accountability:

First, voters may hold state officers politically accountable for a choice that was not theirs, or which the officers were forced by federal law to make, without appreciating the source of the substantive rule or the forced nature of the decision, respectively. Second, voters may fail to hold federal officials politically accountable for choices they do make that impose further choices, or costs, on state governments. And third, federal legislators may not themselves feel as politically accountable, and responsible, if they can direct states to carry out programs (especially if these programs are not financed from federal revenues).<sup>120</sup>

There are empirical dimensions to each of these assertions. And states can help us test their efficacy. If commandeering by a central government causes voter confusion, for example, then one would expect to see evidence of a kind of confusion in state systems that rely on this regulatory tool. That is, one would expect to see examples of voters holding local officials accountable for the decisions that are attributable to state officials. And one would expect to see evidence of voters failing to hold state officials accountable for their decisions. Likewise, if commandeering causes government officials in the central governments to feel less politically accountable, we would expect this to be true of state officials when they commandeer local officials.

The settings that one could examine for such evidence are voluminous and varied. When, for example, the governor of Florida recently banned local schools from adopting mask mandates during the midst of a current pandemic,<sup>121</sup> did local voters have confusion about where this command came from? Is there evidence they held local officials accountable rather than the governor? Or when North Carolina famously banned local governments from passing antidiscrimination and wage

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120. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2201 (1998).

121. Vanessa Romo, *Florida Is Blocking Money from 2 School Districts Over Mask Mandates, Defying A Judge*, NPR (Aug. 31, 2021, 8:48 PM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/31/1033067718/florida-schools-mask-mandates-desantis> [<https://perma.cc/4DXJ-2AXL>].

laws,<sup>122</sup> did voters hold cities like Charlotte responsible for the absence of such protections? Or the state officials who created the ban?

*Second*, does commandeering produce more voter confusion than other regulatory methods, like preemption? While critics of the Supreme Court's strict, unyielding version of anticommandeering sometimes accept the view that commandeering undermines accountability,<sup>123</sup> these critics simultaneously raise compelling questions about whether commandeering creates *more* democratic accountability concerns than other modes of regulation in our federal system. Professor Vicki Jackson observes, "Federal commandeering of states . . . can risk confusing the lines of political accountability—but the extent to which this is likely (or more likely than in other forms of federal-state action) depends on the substance and substantiality of the burden."<sup>124</sup> Similarly, Professor Evan Caminker has noted, "Commandeering precludes state officials from being directly and exclusively responsive to their constituency's desires, but so does conventional preemption. . . . Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary."<sup>125</sup> Likewise, Professor Daniel Halberstam has contended that "the danger of blurring lines of accountability in the case of commandeering is not categorically different from what happens in the case of federal pre-emption, which the Court accepts."<sup>126</sup> He explains, "In both cases, the component State's actions or inactions are only partially determined by State politicians, yet citizens are likely to view the component State officials as fully responsible whenever the latter are the most salient agents involved."<sup>127</sup>

The state-local relationship provides space to test these theories as well. Given that states engage in traditional preemption and commandeering, is there more voter confusion when states commandeer than when states regulate a subject matter while displacing local regulations? Because the federal government cannot commandeer, assertions about the relative effects of these two regulatory methods often rely on (often very thoughtful) logical deductions and extrapolations rather than real-world comparisons of the relative democratic costs and benefits of each. By contrast, both within states and between states, traditional preemption and commandeering are widely used, providing a site for intrasystemic comparative analysis of the sort advanced here.

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122. Dorosin, *supra* note 76, at 784–85.

123. Jackson, *supra* note 120, at 2201.

124. *Id.* at 2205.

125. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054–55 (1995).

126. Halberstam, *supra* note 112, at 231.

127. *Id.*

*Third*, does the availability of commandeering reduce instances of preemption? Professor Neil Siegel has argued that one cost of anticommandeering doctrine is that it can potentially push the central government to engage in more preemption, wherein the central government adopts a broader set of regulations than it otherwise would have and displaces state policymakers' judgments. In Siegel's words, "[A]nticommandeering doctrine does not serve federalism values when the Court's application of the rule ultimately results in a greater number of preemptive responses, because preemption generally causes a greater compromise of federalism values than does commandeering."<sup>128</sup>

State governments offer a compelling place to explore this intriguing thesis further. After all, states do sometimes ban *some* types of commandeering and even *some* types of preemption. On the former, fifteen states have banned unfunded state mandates,<sup>129</sup> and some of the leading local government scholars of our time have urged more states to do the same.<sup>130</sup> As for limits on preemption, home rule doctrines sometimes mean that on some specified subjects, when state and local law conflict as to a local matter, local law carries the day.<sup>131</sup> This creates the possibility for instances in which a specific type of commandeering (like an unfunded mandate) is prohibited in a state while preemption remains an option.<sup>132</sup> And it also means there are other states in which both regulatory methods remain on the table when governing the same subject matter. This variation offers compelling sites to explore the relationship between the frequency of preemption and the availability (or unavailability) of commandeering.

### *B. Collective Action*

#### 1. FEDERALISM AND COLLECTIVE ACTION

With autonomy comes resistance, or "uncooperative" postures by state and local governments.<sup>133</sup> And with this autonomy to resist comes a potential complication: inhibiting a central government's ability to deal

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128. Siegel, *supra* note 113, at 1673.

129. JOSEPH F. ZIMMERMAN, STATE-LOCAL GOVERNMENTAL INTERACTIONS 79–81 (2012).

130. See, e.g., Erwin Chemerinsky, *Empowering States when It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1332–33 (2004); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002).

131. See *supra* notes 47–50 and accompanying text.

132. See DAVIDSON ET AL., *supra* note 32, at 7 ("In our trilevel federal system, local governments perform a wide array of crucial governance roles.").

133. See Bulman-Pozen & Gerken, *supra* note 100.

with collective action problems. This tension is as old as the republic.<sup>134</sup> “Collective action” problems refer to situations in which (1) the normatively optimal result requires multiple entities or persons to act in a certain manner; but (2) each individual entity has incentive to act in an alternative, counterproductive manner (or not to act at all).<sup>135</sup> These moments are ripe for negative “externalities,” in which many of the negative costs of an entity’s non-optimal behavior are internalized by others.<sup>136</sup> It can also result in positive “spillovers,” in which entities acting in non-optimal ways benefit from the expenditures of other actors; this also reduces the incentive for each to act optimally given that they can enjoy benefits without paying for them.<sup>137</sup>

Prior to the adoption of the Constitution, under the Articles of Confederation, states’ considerable autonomy and sovereignty facilitated collective action problems.<sup>138</sup> The federal government could not raise revenue without state approval, for example.<sup>139</sup> One result of this arrangement was that the central government had substantial difficulty solving collective action problems.<sup>140</sup> If some states made contributions to the federal government, all states enjoyed the resultant spillover effects, reducing the incentive for any individual state to contribute. Professors Robert Cooter and Neil Siegel have argued that even if the Founders did not have the language of “collective action” as they confronted these problems, those were among the chief issues they aimed to solve in adopting the Constitution.<sup>141</sup> In those two scholars’ view, this overarching purpose of the Constitution should inform one’s understanding of the intended scope of congressional powers in Article I of the Constitution.<sup>142</sup> As they thoughtfully put it:

The Framers lacked the tools and language of modern social science, but they knew a collective action problem when they saw it. When activities spilled over from one state to another, the Framers recognized that the actions of individually

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134. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

135. *Id.* at 135–37.

136. *Id.*

137. *Id.*

138. See *id.* at 143 (“[T]he nation’s experience under the Articles of Confederation included important examples where two states failed to cooperate.”).

139. See *id.* at 121.

140. *Id.*

141. *Id.* at 117.

142. *Id.* at 117–19.

rational states produced irrational results for the nation as a whole—the definition of a collective action problem.<sup>143</sup>

## 2. COMMANDERING AND COLLECTIVE ACTION

The collective-action strand of federalism literature informs debates about the efficacy and proper scope of anticommandeering doctrine. Indeed, the facts of *New York v. United States* itself presented a classic collective problem.<sup>144</sup> Congress commanded that states take title to their low-level radioactive waste in part because some states were amenable to allowing safe disposal states and others were not.<sup>145</sup> And by not properly disposing of such waste, the state necessarily exported the negative externalities (by way costs and risks) to neighboring states.<sup>146</sup> Justice Stevens’s partial dissent observed this feature of the problem Congress was aiming to solve, criticizing a doctrine that disabled Congress’s ability to deal with this pressing collective action problem.<sup>147</sup>

Scholarly critics of the doctrine have similarly described ways that anticommandeering can make it difficult for the central government to mitigate collective action problems. Professor Siegel has observed that the federal law at issue in *New York v. United States* “was obviously directed at solving serious, multistate collective action problems.”<sup>148</sup> Moreover, now-Judge David Barron has argued that because anticommandeering doctrine can harm a central government’s ability to solve such problems, the doctrine can actually undermine, rather than protect, local autonomy. He explains,

[If Congress] wishes to empower localities to overcome the irresponsible actions of holdouts, then it must enact a rule system that permits collective solutions, even though they are not

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143. *Id.* at 117.

144. *See New York v. United States*, 505 U.S. 144 (1992).

145. *Id.* at 150–51.

146. *See id.* at 159–60.

147. *Id.* at 212–13 (Stevens, J., concurring in part and dissenting in part). Justice Stevens wrote,

[W]e unquestionably have the power to command an upstream State that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command.

. . . Indeed, even if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. If this Court has such authority, surely Congress has similar authority.

*Id.* (citation omitted).

148. Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1957 n.111 (2013).

approved unanimously. That is the kind of choice central law faces when it seeks to protect local autonomy. In making that choice, the central government will not unambiguously vindicate local autonomy no matter how it acts; it will infringe it by attempting to promote it or by choosing one idea of local autonomy at the expense of others. But that is inevitably the case when the limits on local power come from some source other than the visible intervention of the central government itself.<sup>149</sup>

### 3. STATE COMMANDEERING AND COLLECTIVE ACTION

It is difficult to seriously dispute that commandeering can help resolve collective action problems. To understand how commandeering can resolve collective action problems, one need do nothing more than read the facts of *New York v. United States*.<sup>150</sup> Still, there are at least two relevant questions that could be more comprehensively answered by consulting intrastate arrangements.

*First*, what are the circumstances in which commandeering has been used to resolve collective action problems? One prominent problem is exclusionary zoning, wherein local governments (formally or functionally) ban low-income housing within their jurisdiction.<sup>151</sup> The results of such laws often are not limited to the single town that enacts it. Instead, the “adverse consequences extend to neighboring communities.”<sup>152</sup> Localities need teachers, police officers, sanitation workers, and grocery store stockers to function. When one town in a region excludes moderate and low-income residents, another town picks up the slack. The net result is that some wealthy, exclusive jurisdictions have large tax bases with fewer expenditures.<sup>153</sup> Meanwhile, other inclusive jurisdictions in the region have smaller tax bases while subsidizing a need that aids the entire region.<sup>154</sup> This is a classic collective action problem. If exclusionary zoning is adopted, the negative results can create negative externalities for other communities in the same region.<sup>155</sup> And while all in the region would benefit if each political subdivision contributed to, or created, affordable housing, individual political subdivisions can gain an unfair benefit by passing the costs to other jurisdictions.<sup>156</sup>

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149. Barron, *supra* note 14, at 428.

150. See *New York v. United States*, 505 U.S. at 150–51.

151. Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 410 (1994).

152. *Id.* at 411.

153. See *id.* at 409.

154. See *id.* at 411–12.

155. *Id.*

156. *Id.* at 380, 408–09, 428.

Some of the tools that states have adopted to deal with this problem can fairly be called commandeering. The Massachusetts Low-and Moderate-Income Housing Act, which is often called an “anti-snob zoning law,” permits a state agency to override local decisions that block affordable housing.<sup>157</sup> The New Jersey Fair Housing Act of 1985, created in response to a seminal state supreme court opinion,<sup>158</sup> created a state council that assesses the need for low to moderately priced affordable housing for each of the state’s regions.<sup>159</sup> The initial act required every municipality to create a plan demonstrating how it would provide its fair, relative share of affordable housing in its region.<sup>160</sup> Moreover, California, Florida, and Oregon have required local governments to adopt plans for affordable housing.<sup>161</sup> States, then, provide opportunities to study the role of commandeering in resolving collective action problems by examining the problems commandeering has been used to resolve; patterns in the political economies that facilitate these interventions; and how often commandeering is used for these purposes as opposed to others.

*Second*, the recent pandemic has provided reason to ask the opposite question: how and when is commandeering used in ways that worsen collective action problems? The infectious disease COVID-19 has created or exposed collective action problems on multiple levels, including the individual level and polity level. On an individual level, the choices one makes impact others. Physical isolation reduces the risk of spreading the virus.<sup>162</sup> And yet isolation can prove costly if it interferes with one’s ability to earn a living. Given the costs of isolation, there are sometimes economic incentives to make decisions that are not for the good of the whole. Likewise, on the governmental level, the choices one jurisdiction makes have externalities for other jurisdictions.<sup>163</sup> And still, making choices that reduce the spread of the virus—such as closing non-essential businesses and gatherings—could prove costly by interfering with a community’s economy.<sup>164</sup> If all make these choices, the virus might spread less quickly,

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157. MASS. GEN. LAWS. ch. 40B, §§ 20–23 (2021); *accord MA Affordable Housing Overview: MGL 40B “Anti-snob Zoning Act,”* DELPHIC ASSOCS., <https://delphicassociates.com/mgl-40b-anti-snob-zoning-act-overview/> [<https://perma.cc/A4XE-8Y9M>] (last visited Oct. 11, 2021).

158. N.J. STAT. ANN. §§ 52:27D-301 to 302 (West 2021).

159. § 52:27D-305.

160. § 52:27D-309.

161. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 917 (2006).

162. *Quarantine & Isolation*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html> [<https://perma.cc/YTW7-V7N9>].

163. *See* Johnstone, *supra* note 151, at 411–12.

164. AARON KLEIN & EMBER SMITH, *EXPLAINING THE ECONOMIC IMPACT OF COVID-19: CORE INDUSTRIES AND THE HISPANIC WORKFORCE* 4–5 (2021),

creating the possibility that it could be controlled, and all economies could more safely open.<sup>165</sup> But given the costs, there are economic incentives to make policy decisions that are good for the polity in the short term but not for the good of the whole.

While states have used their commandeering power over the course of the pandemic to mitigate collective action problems, they have also used those powers in ways that do not self-evidently make that choice. Recently, the governor of Florida prohibited local school districts from requiring the use of facemasks to reduce the risk of spreading the virus.<sup>166</sup> The governor of Georgia also banned local governments from requiring facemasks, suing the City of Atlanta when it asked locals to wear masks when in public and indoors.<sup>167</sup> These choices remind that amidst critical collective action problems, commandeering by a central government will not necessarily resolve those problems. It may actually worsen them in two ways: (1) by consolidating political choices in ways that allow that central government to pass on costs to other jurisdictions dealing with the same problem; and (2) by incentivizing individuals to make choices that harm the collective group.<sup>168</sup> This cost of commandeering—monopolizing political choices in ways that worsen collective action problems rather than mitigate them—is an important part of any comprehensive conversation about anticommandeering doctrine.

### III. IMPLICATIONS FROM THE STATES

This Essay has advocated for what I call “intrasystemic comparative analysis” to examine the lessons that can be learned from comparing multiple institutional legal arrangements in a single federal system. In the United States, horizontal and vertical federalism are oft-discussed features of the relationships between the federal government and states and between the states themselves. But within states, there are federalist systems, too, which set up some of the same questions about democratic

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[https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1001&context=brookings\\_policybriefs\\_reports](https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1001&context=brookings_policybriefs_reports) [<https://perma.cc/9RLP-FTM6>].

165. Rachel Werner & David Grande, Perspective, *The Only Way to ‘Reopen the Economy’ Is to Stop the Spread of the Coronavirus*, WASH. POST (Mar. 30, 2020), <https://www.washingtonpost.com/outlook/2020/03/30/only-way-reopen-economy-is-stop-spread-coronavirus/> [<https://perma.cc/9NHE-AXJN>].

166. Romo, *supra* note 121.

167. Vanessa Romo, *Georgia Gov. Brian Kemp Sues Atlanta Mayor Keisha Lance Bottoms Over Face Mask Order*, NPR (July 16, 2020, 7:19 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/16/892109883/georgia-gov-brian-kemp-sues-atlanta-mayor-keisha-lance-bottoms-over-face-mask-or> [<https://perma.cc/T33Y-XVJD>].

168. See Jackson, *supra* note 120, at 2258 (“Unaccountable and irresponsible behavior in larger, more centralized units can do more harm than such behavior in smaller units.”).

accountability and collective action that guide dialogue about the federal-state relationship. By way of example, this Essay has shown how commandeering plays a role in intrastate federalism that is fundamentally distinct from the role that it plays in interstate federalism. Moreover, the role of commandeering differs amongst the states themselves. Accordingly, this Essay has shown how intrastate commandeering can inform discussions about how anticommandeering doctrine interacts with both democratic accountability and collective action problems.

These observations have practical or doctrinal import. When it comes to federal anticommandeering, the principle of democratic accountability is a core and foundational aspect of extant doctrine.<sup>169</sup> Indeed, the record is mixed as to whether the doctrine is sustainable on other grounds.<sup>170</sup> It is difficult to justify it as a matter of text, and some scholars have argued that it is not justifiable as a matter of history.<sup>171</sup> Further, even those who have defended anticommandeering as a matter of history have argued that extant doctrine nonetheless outpaces that history.<sup>172</sup> Thus, theorems about the probable behavior of voters and government officials are not a sideshow when it comes to anticommandeering doctrine. Democratic accountability is the plot, the stage, and the set in the main event. If the premise is wrong, another justification is needed for the doctrine. If the premise is overstated, perhaps a softer version of the doctrine is warranted. If the premise is right, but there are other equally or more important constitutional premises that anticommandeering doctrine also affects, this also suggests that revisions to the doctrine might be justified.

Over the decades, scholars like Professors Vicki Jackson and Neil Siegel have offered visions about what such a reformed doctrine might look like. Professor Jackson has broadly advocated for

focusing on the adequacy of congressional process to justify assertions of federal power over private citizens, and attending to the actual risks of politically nonaccountable behavior in particular programs of commandeering state facilities would help move the doctrine toward a “sufficiently principled” basis for achieving the goal of maintaining states as constitutionally important locations of power in a strong and effective national union based on the rule of law.<sup>173</sup>

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169. See, e.g., *id.* at 2200–01.

170. See, e.g., Caminker, *supra* note 125, at 1042–47; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1996–97 (1993).

171. See, e.g., Caminker, *supra* note 125, at 1042–50.

172. See, e.g., Prakash, *supra* note 170, at 1996.

173. Jackson, *supra* note 120, at 2258.

Relatedly, Siegel has proposed a presumption against anticommandeering under some specified circumstances absent a compelling government interest.<sup>174</sup>

The goal here is not to identify the precise metes and bounds of what a reformed anticommandeering doctrine should look like. Rather, when working to achieve the optimal balance, we can learn lessons by looking to state laboratories. Consulting the results of their experiments reduces the risks of American federalism's atom-splitting.

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174. Siegel, *supra* note 113, at 1635 (“The upshot of this analysis is that instances of commandeering should carry a presumption of unconstitutionality when preemption is not a feasible alternative in the short run, the federal mandate is unfunded and expensive, and the federal government makes little effective effort to alleviate reasonable accountability concerns. Only a substantial governmental interest should suffice to overcome this presumption. By contrast, commandeering should be held constitutional as far as the Tenth Amendment is concerned when preemption constitutes a feasible alternative in the short run and such preemption would reduce state regulatory control relative to the commandeering at issue, the federal mandate is fully funded or relatively inexpensive to carry out, and the federal government takes effective measures to maintain lines of accountability (or accountability is for some other reason not seriously threatened).”).