

# RESISTING FEDERAL PREEMPTION

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## RESISTING FEDERAL PREEMPTION

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*One of the most pressing issues in constitutional law is how states may—and should—resist federal preempting laws and policies with which they disagree. It’s a problem faced by both red and blue states in an era of extreme political polarization. Despite having legitimate reasons to resist the federal government on matters that affect local citizens and interests, states seem to have few options. Conventional wisdom is that they engage in either direct resistance through litigation that challenges the constitutionality of preempting laws, or evasion by quietly enacting arguably non-compliant laws, hoping to avoid enforcement. Both strategies adopt a belligerent stance toward the federal government, one that is out of step with a growing body of literature that praises “cooperative federalism” as a means to promote democratic accountability and improve national policies.*

*This Article identifies and analyzes an overlooked third option. A growing number of states are engaging in persuasive resistance by enacting state bills that seek to recruit other states and even Congress to a dissenting policy view. The bill’s terms conflict with federal law, but they only take effect when other states enact the same bill and Congress amends the preempting federal law to eliminate the conflict. These bills operate to signal the state’s resistance, recruit other states to their cause, and present a unified position to Congress. Unlike direct resistance and evasion, they are neither legally aggressive nor passive-aggressive. Instead, they are tools for states to cooperate with one another and with Congress to solve politically complex national problems.*

*States’ persuasive resistance strategies are gaining traction, but they are not a panacea for all the problems arising from federal preemption. This Article uses case studies to compare the relative costs and benefits of states’ preemption resistance. For instance, states’ persuasive resistance that seeks to change federally mandated daylight-saving time illustrates the strategy’s political promise. In other cases, though, state actors are more likely to be drawn to strategies that seek to restrict centralized authority or to reap unique local benefits. Whether persuasive resistance is the best strategy for resisting preemption will often depend on the actor and its objectives. But in many cases, it will be an attractive alternative to more aggressive—or passive-aggressive—options.*

## INTRODUCTION

The stakes of federalism have never been higher. In the early 2000s, when President Bush unleashed new federal authorities in the so-called War on Terror, Ernie Young presciently (and rather merrily) welcomed progressive scholars “to the Dark Side” of federalism.<sup>1</sup> Those policies seem tepid compared

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1. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1311 (2004) (“The War on Terror has made for strange bedfellows in any number of respects.”).

to President Trump's promises to deport immigrants,<sup>2</sup> shrink the administrative state,<sup>3</sup> impose high tariffs in violation of trade agreements,<sup>4</sup> and eliminate social programs.<sup>5</sup> Recent developments have given progressives and conservatives a renewed appreciation for states' interventions to resist or otherwise check federal power.<sup>6</sup> Young was onto something. We're all federalists now.<sup>7</sup>

Notwithstanding the growing enthusiasm for states' resistance to national policies, the federal government continues to preempt states' regulatory authority in numerous areas—from labor rights to immigration policy to trade agreements. Under constitutional divisions of power and doctrine, certain powers, such as entering into international trade agreements with foreign actors,<sup>8</sup> remain exclusively with the federal government or are otherwise displaced by “supreme” federal laws.<sup>10</sup> Where the federal government clearly and fully preempts states, subnational governments presumably lack the

2. See German Lopez, *Donald Trump's Immigration Plans*, N.Y. TIMES (Nov. 27, 2024) (explaining how the incoming Trump administration plans to draw on federal law enforcement authority to deport millions of immigrants who are in the country unlawfully), <https://www.nytimes.com/2024/11/27/briefing/donald-trump-immigration-plans.html> [https://perma.cc/2YCE-9GNP].

3. See Daniel Wiessner & Brendan Pierson, *How Trump's Musk-Led Efficiency Panel Could Slash Federal Agency Rules*, REUTERS (Nov. 22, 2024, at 11:24 CT) (describing the prospective Department of Government Efficiency and its plans to “wipe out scores of federal regulations”), <https://www.reuters.com/world/us/how-quickly-can-trumps-musk-led-efficiency-panel-slash-us-regulations-2024-11-22/> [https://perma.cc/WL2W-JL6F]; Ian Ward, ‘A Very Large Earthquake’: *How Trump Could Decimate the Civil Service*, POLITICO (Dec. 20, 2023, at 05:00 ET) (noting that President Trump vowed to convert as many as 50,000 civil servants into political appointments to strip them of career protections), <https://www.politico.com/news/magazine/2023/12/20/trump-civil-service-00132459> [https://perma.cc/MN28-AGSZ].

4. See Megan Cerullo, *Trump Tariffs Could Make These Items More Expensive*, CBS NEWS (Nov. 27, 2024, at 23:19 ET) (noting that Donald Trump has pledged 25% tariffs on all products from Mexico and Canada, which would lift prices and production costs in the United States), <https://www.cbsnews.com/news/trump-tariffs-consumer-prices-inflation-impact-what-to-buy-now/> [https://perma.cc/G5LJ-8RVT].

5. See Bill Barrow, *Here's Where Donald Trump Stands on Key Policies Ahead of His Second Administration*, PBS NEWS (Nov. 6, 2024, at 10:39 ET), <https://www.pbs.org/newshour/politics/heres-where-donald-trump-stands-on-key-policies-ahead-of-his-second-administration> [https://perma.cc/W2WB-WX5T].

6. See, e.g., Adam Edelman, *Democratic Governors Vow to Protect Their States from Trump and His Policies*, NBC NEWS (Nov. 8, 2024, at 07:18 CT) (detailing the responses of Democrat governors in opposition to the second Trump Administration) <https://www.nbcnews.com/politics/2024-election/democratic-governors-vow-protect-states-trump-policies-rcna179295> [https://perma.cc/M86D-X2SQ].

7. See, e.g., Laura Tyson & Lenny Mendonca, *Readying the Resistance, Again*, PROJECT SYNDICATE (Jan. 22, 2025) (advocating for states to “resist Trump's overreach by using the tools of progressive federalism.”), <https://www.project-syndicate.org/commentary/trump-blue-state-resistance-legal-challenges-ballot-initiatives-by-laura-tyson-and-lenny-mendonca-2025-01> [https://perma.cc/HG55-FK42].

8. For the federal government's plenary powers, see U.S. CONST. art. I, § 8, cls. 3, 10–16; *id.* art. II, §§ 2–3. For limits on the states, see *id.* art. I, § 10 (barring the states from treaty making and requiring the consent of Congress for many other foreign affairs activities).

9. The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

10. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 729 (2008) (“[P]reemption typically involves a decision to displace state law in some area in order to advance perceived federal policy goals.”).

opportunity to legislate differently.<sup>11</sup> That truism applies to federal laws and policies that undermine the values and civic responsibilities some state actors would gladly fight to uphold.<sup>12</sup>

The effect of preemption on states stands starkly against alternative cooperative regimes.<sup>13</sup> Under “cooperative” federalism, Congress preempts regulatory floors while engendering deliberative state–federal processes throughout the lifetime of regulatory approaches.<sup>14</sup> Institutional arrangements for state voice and dissent are baked into federal legislation at inception.<sup>15</sup> Enjoying overlapping spheres of regulatory authority, states’ expressions of resistance and contributions to the dialectic of policymaking are a feature of, rather than a threat to, national policymaking.<sup>16</sup>

The debate on federal preemption and the state’s position within it thus accounts for only two scenarios. Under the first scenario, states lack the same institutional arrangements to resist preemption during the lifetime of federal legislation as they do in cooperative regimes. They engage in either *direct resistance* through litigation that challenges the constitutionality of federal laws, or *evasion* by quietly enacting arguably noncompliant state laws, hoping to avoid enforcement.<sup>17</sup> Both strategies adopt a belligerent stance toward the federal government.<sup>18</sup>

11. See, e.g., Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 606 (2013) (arguing that preempted states “simply have no power to act”); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 154 (2010) (arguing that broad federal preemption pushes states “to the margins with little room to object, silencing any productive dialogue.”); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001) (arguing that federal preemption “preempts all state authority and supplants it with a unitary federal regime”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 512 (2010) (“Preemption’s effects are often striking—nullifying validly enacted state laws and preexisting state regulatory authority . . .”). This Article is interested in federal laws that displace state regulatory authority. It therefore does not consider questions of federal *agency* preemption, which raise unique issues under the emerging major questions doctrine. See *West Virginia v. EPA*, 597 U.S. 697, 729–30, 735 (2022) (striking down agency action because actions implicating economically or politically significant questions are inherently suspect).

12. See *infra* Part IV.

13. See 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, 818–19 (1998) (advancing a functionalist theory of cooperative federalism).

14. See *infra* Part I.

15. See *infra* Part I.

16. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1270–73 (2009) (crediting states’ frictions and dissent for convincing Congress to go “in a direction the federal government may not anticipate”).

17. See *infra* Part II.A.

18. See, e.g., Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORN. L. REV. 851, 896 (2016) (arguing that state attorneys general will pursue the interests of their own states with “little incentive to be mindful of the national public interest in the enforcement (or non-enforcement) of federal law”); Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001) (“[I]n pressing multistate cases, state attorneys general violate fundamental principles of federalism and separation of powers.”); Michael S. Greve, *Federal Preemption: James Madison, Call Your Office*, 33 PEPP. L. REV. 77, 87–88 (2005) (quoting James Madison) (advocating for expansive federal preemption given states’ tendency to exploit loopholes in federal legislation “to evade it”); Ryan M. Scoville,

Under the second scenario, states depend on Congress to craft a cooperative regime offering states institutional arrangements to express resistance and pose alternatives when implementing their designated responsibilities.<sup>19</sup> Scholars appear to favor this scenario as a means to promote democratic accountability and enhance national policies.<sup>20</sup>

That limited account has led to a near-categorical dismissal of cooperative tools of state resistance to federal preemption. This Article corrects that oversight by introducing a third scenario: *persuasive resistance*, where states enact a bill that seeks to recruit other states and even Congress to a dissenting policy view—without directly conflicting with existing federal law. The bill’s terms conflict with federal law, but they only take effect when other states enact the same bill and Congress repeals the preemptive federal law.<sup>21</sup> By conditioning their conflict, states cooperate with one another and Congress to advance new approaches to preempting laws and policies.

To illustrate, this Article details how dozens of states have adopted bills to advance an alternative to the biannual daylight saving time required under the Uniform Time Act (UTA)<sup>22</sup>—a federal law that expressly preempts states’ time zones.<sup>23</sup> Those bills only go into effect when specifically named states adopt the same bill and Congress revises the UTA. Although those bills have no legal effect, they are galvanizing interstate and state–federal deliberations over the UTA years after its passage. Drawing on legislative testimony, this Article demonstrates how state legislators discuss each other’s bills and express a sense of urgency to join their state neighbors.<sup>24</sup> States like Vermont have withdrawn and reconsidered their bills after considering contrary approaches in neighboring state bills.<sup>25</sup> Members of Congress discuss states’ legislative efforts when deliberating over potential UTA amendments.<sup>26</sup>

Will a strategy developed in an immutable area, daylight saving time, be transferable to other preempting laws and policies addressing issues of political

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*The International Commitments of the Fifty States*, 70 UCLA L. Rev. 310, 312 (2023) (pointing out that although federal law requires the federal government to publish international agreements, it does not require states to publish their memoranda of agreements with foreign governments evading preempting international agreements).

19. Cooperative federalism has been applied by scholars to investigate not only floor preemption but also foreign affairs preemption. *See, e.g.*, Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2134 (2017) (“Much of foreign affairs federalism — indeed, I suspect most of foreign affairs federalism — is now cooperative or uncooperative.”)

20. *See infra* Part I.C.

21. *See* Mallory E. SoRelle & Allegra H. Fullerton, *The Policy Feedback Effects of Preemption*, 2024 POL’Y STUD. 235, 236–40 (2023) (examining the feedback effects of preemption on preempted actors and how preemption may produce interpretive effects on those who instigate preemption, failing to consider how feedback from preempted entities engenders changes to preempting approaches).

22. Uniform Time Act of 1966, 15 U.S.C. §§ 260–64.

23. *See infra* Part II.

24. *See infra* Part II.

25. *See infra* Part II.

26. *See infra* Part II.

significance? This Article argues that it will. Drawing from game theory, it shows how states' bills, even if not in effect, signal preferences and facilitate interstate coordination.<sup>27</sup> That coordination contradicts federal assumptions about collective action problems, which often lead to federal preemption in the first place.<sup>28</sup> By leaving state and federal actors autonomous to decide the merits of alternative laws and policies, states' persuasive resistance strategies may engender greater participation and ownership through ongoing legislative conversations. As the Trump Administration's anti-immigrant, anti-worker, anti-trans, and anti-rights approach to preempting legislation manifests, states may employ this strategy to coordinate and cooperate, as well as empower federal allies, if not to catalyze immediate change, then to prime the regulatory landscape for an eventual new administration.

States' persuasive resistance strategies are gaining traction, but they are not a panacea for all of the problems arising from preemption. This Article uses case studies to compare the relative costs and benefits of states' various strategies. State governors, for instance, may prefer evasion as a tool to reap unique benefits for local citizens, such as securing foreign investments or exploiting loopholes in federal labor laws.<sup>29</sup> State attorneys general, by contrast, may prioritize restricting preemption through litigation, particularly in areas they consider to be matters of state regulation.<sup>30</sup> The argument is not that states should choose one strategy—direct resistance, evasion, or persuasive resistance—over another. Instead, it highlights those resistance strategies so that state actors (as well as advocates and scholars) will consider them when federal preemption affects state interests and citizens in undesirable ways.

This Article is organized in four parts. Part I describes conventional accounts of preemption according to nationalists, who have traditionally favored federal control over certain fundamental matters affecting life, liberty, and health, and federalists, who generally favor states' rights to participate and regulate those matters. It shows how support for federal preemption tends to

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27. See *infra* Part III.

28. For a detailed description of these assumptions at the Founding and throughout history, see NIEL S. SIEGEL, *THE COLLECTIVE-ACTION CONSTITUTION* 5–12 (2024) (arguing that “the primary structural purpose of the US Constitution is to empower the federal government to solve collective-action problems for the states and to prevent states from undercutting these solutions or generating collective-action problems”).

29. See, e.g., Courtnee Melton-Fant, *Corporate Influenced State Preemption and Health: A Legal Mapping Analysis of Workers' Rights Preemption Bills in the US South*, 336 SOC. SCI. & MED., Nov. 2023, at 1 (“Between 2009 and 2019, over 100 workers' rights preemption bills were introduced in southern state legislatures. . . . [t]extual analysis for the bills revealed the states prioritize perspectives of employers instead of workers.”); see also Scoville, *supra* note 18, at 317, 353 (noting that states have entered more than 600 commitments with foreign governments, many of which are related to trade and investment).

30. See Lynn Mather, *The Politics of Litigation by State Attorney General: Introduction to Mini-Symposium*, 25 L. & POL'Y 425, 425–26 (2003).

reflect assumptions of collective action problems<sup>31</sup> and “state cartels,”<sup>32</sup> while support for states’ rights reflects concerns about federal overreach and biases. Those debates stand starkly against the broad agreement that the discursive pathways between state and federal actors in cooperative regimes benefit the national agenda.

Part II advances the literature on federalism and preemption. It maps states’ evasion and direct resistance strategies and introduces persuasive resistance as a new tool that directly expresses state disharmony while respecting federal mandates. Part III explains why states’ conditional and trigger laws are persuasive. Part IV links states’ resistance strategies to their policy objectives and relevant state actors. Each strategy is associated with a set of trade-offs and risks to state and national agendas.

## I. THE VICES AND VIRTUES OF STATE RESISTANCE

The federalism literature is in a longstanding debate about the merits of preemption.<sup>33</sup> Still, it has been quick to dismiss the possibility that states have institutional arrangements to resist federal preemption cooperatively.<sup>34</sup> That may be because federal preemption, clearly laid out in the Constitution, offers no obvious inroads for state–federal dialects after preemption has been decided. The Supremacy Clause,<sup>35</sup> particularly in conjunction with the congressional powers enumerated in Article I of the Constitution, grants the federal

31. By “collective action problems,” I refer to the problem in which no single state can resolve national challenges absent action by other states. Collective action problems arise “when a group of individual [states] would benefit from cooperation, but lack the individual incentives to act collectively.” See Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241, 1241 (1997); see also Aziz Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 258–70 (2014) (challenging assumptions of collective action problems).

32. As Michael Greve explains, “By virtue of their resources, location, or history, some states will always be in a more advantageous position than others; that cannot be helped.” Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 325 (2003). By “state cartels,” I refer to the “anti-competitive and, in particular, the collusive exploitation of that advantage.” *Id.*

33. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232–35 (2000) (addressing the historical and modern debates over preemption); Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 309–10 (2012) (referencing debates over preemption stemming from the 2010 Supreme Court Term); Robert A. Mikos, *Making Preemption Less Palatable: State Poison Pill Legislation*, 85 GEO. WASH. L. REV. 1, 2 (2017) (“Congressional preemption constitutes perhaps the single greatest threat to state power and to the values served thereby.”); Patricia J. Zettler et al., *Mifepristone, Preemption, and Public Health Federalism*, 9 J.L. & BIOSCI. 1, 2 (2022) (arguing that the Supreme Court’s decision to overturn *Roe v. Wade* and eliminate preempting rights to abortion “has had immediate, harmful consequences, which are disproportionately falling on marginalized people.”).

34. So prevailing is this conventional wisdom that some scholars dismiss state interventions in preemption entirely, arguing that the Constitution’s Supremacy Clause is irrelevant to preemption because: “Where Congress has exclusive power, no issue of preemption can arise because there is no state legislative power to be preempted.” See Stephen A. Gardbaum, *Nature of Preemption*, 79 CORN. L. REV. 767, 770 (1993–1994) (arguing that scholars mistake the Supremacy Clause as the origins of federal preemption).

35. U.S. CONST. art. VI, cl. 2.

government a wide latitude to preempt state laws.<sup>36</sup> Although the Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,”<sup>37</sup> the Constitution makes no mention of residual powers left to the states when preempted.<sup>38</sup>

Federal preemption takes many forms. Sometimes, Congress preempts state laws expressly by restricting specific state powers (“express preemption”).<sup>39</sup> Congress may also legislate so extensively within a regulatory scheme (“field preemption”) that it leaves “no room for the States to supplement it.”<sup>40</sup> In other instances, state laws may obstruct or challenge the achievement of policies in a federal statute or agreement (“obstacle preemption”).<sup>41</sup> Even when Congress remains silent concerning treaties or preemption, the Supreme Court may decide that national laws preempt state laws or that preemption is inappropriate, ensuring that judges also play a role in preemption.<sup>42</sup>

These cases stand apart from lesser forms of federal preemption that leave open various opportunities for state input. Particularly in areas that enhance public welfare regarding environmental, occupational, and product risks, Congress opts to preempt minimum standards (“floor preemption”), thereby granting states autonomy over stricter standards.<sup>43</sup> Under these more cooperative regimes, the federal government controls national limits and objectives while states translate those objectives into legislation, leaving ample opportunity for cross-fertilization and resistance.

This Part’s key argument is that if we value expressive pathways that enable state input into national agendas, as the cooperative federalism literature discussed below suggests, we should appreciate and study those pathways in clear and express preemption cases. It begins by reviewing the debate between nationalists and federalists on whether state input fortifies or weakens preempting policies. It then juxtaposes those views against the relatively cohesive support for state input in cooperative regimes.

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36. See *infra* Part II.

37. U.S. CONST. amend. X.

38. See *id.*

39. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

40. *Id.*

41. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003).

42. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920) (upholding the Migratory Bird Treaty Act of 1918 because the Act fell under the federal government’s constitutional power to make treaties and enact laws pursuant to those treaties).

43. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1552 (2007) (explaining complete and floor preemption).

A. *The Nationalist View on State Resistance to Preemption*

Supporters of a robust centralized government value predictability and homogeneity in the national agenda,<sup>44</sup> not the state resistance that threatens to disrupt it.<sup>45</sup> They celebrate preemption for protecting matters impacting general welfare that “demand uniform solutions, either because of the national nature of the concern or because of collective action problems that might flow from the jurisdictional overlap.”<sup>46</sup>

While the term “collective action problems” is somewhat ubiquitous,<sup>47</sup> Jack Balkin defines it as instances in which “states may be unable or unwilling to act effectively in ways that promote the general welfare unless other states so do as well.”<sup>48</sup> When activities spill from one state into others, “the actions of individually rational states produce[] irrational results for the nation as a whole,” an acknowledgment that some argue led to congressional powers in Article I, Section 8 of the Constitution.<sup>49</sup> Federal intervention is thus deemed necessary in “cases in which states’ welfare functions are interdependent in the sense that one state’s choices interact with and influence those of another state,” creating “a gap between individual rationality and collective good . . . .”<sup>50</sup>

Imagine, for instance, that State A has strict protections for labor unions and, consequently, workers receive relatively higher wages than in states where

44. Huq, *supra* note 31, at 227 (describing concerns among the Founders that national legislation should encompass “all cases to which the separate States are incompetent . . .”).

45. *See id.*

46. Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 9 (2006); *see* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185, 1190 (2023) (cautioning that states’ ability to dissent in preempting areas “distorts the structural balance of power between the federal government and states, among states themselves, and vis-à-vis individual rights.”); Huq, *supra* note 31, at 226 (“Diagnosis of a breakdown in collective action justifies federal government intervention—and hence a shield against judicial invalidation of federal legislation.”); Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent*, 42 COLUM. J.L. & SOC. PROBS. 511, 515 (2009) (concerned that “a coalition of states can reverse the workings of [federal] legislative inertia that normally hinder the lawmaking process. In doing so, groups of states can alter the balance of power between states and the national government.”); Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 23 (2001) (arguing that federal preemption is more democratic than judicial interpretations); David A. Simon, *Off-Label Preemption*, 2024 WISC. L. REV. 1079, 1083–84 (2024) (advancing a theory of federal preemption to enhance ex ante risk evaluations of a particular use of drugs and devices).

47. *See* Huq, *supra* note 31, at 226 (arguing that “the term [‘collective action problems’] is often employed with some liberality, and even a touch of promiscuity”).

48. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 13 (2010).

49. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117–18 (2010) (arguing that the Framers’ intention was to prevent collective action problems and further “Article I, Section 8 of the new Constitution gave Congress additional powers to address collective action problems”); *but see* Huq, *supra* note 31, at 230 (arguing that Cooter and his co-author in other work “gloss the legislative powers enumerated in Article I, Section 8 of the Constitution as an enumeration of spillover-based collective action problems arising between the states”). The debate between Cooter and Huq turns on whether Art. I, sec. 8 *necessitates* nationalistic legislation. *Id.* at 230–33. In Part II, this Article shows how states overcome collective action problems voluntarily through interlinked legislation, in agreement with Huq that states have voluntaristic solutions at their avail.

50. *See* Huq, *supra* note 31, at 228.

unionizing is unprotected. Firms in State A produce goods that compete with goods produced by firms in State B, which has lax regulations and production costs reflective of its relatively lower labor costs.<sup>51</sup> Firms in State A may “threaten to relocate to unregulated states to take advantage of lower costs and a friendlier business environment,” which will, in turn, pressure state legislators in State A to lower their regulatory requirements in a race to the bottom.<sup>52</sup> Federal preemption is attractive for those who favor legal protections for workers seeking to earn a living wage and enhance their bargaining power.<sup>53</sup> A federal law could require uniform respect for labor rights, notwithstanding competitive reasons to ignore them.

Federal preemption also protects weak states from powerful groups of states.<sup>54</sup> Should states be given a voice in national policymaking, state cartels could conceal minority disagreements, thereby presenting a uniformity to Congress that belies the plurality of state interests.<sup>55</sup> And because behavior is inherently social and adaptive, otherwise compliant states may feel pressured to follow the crowd, even when doing so “sometimes leads to undesirable consequences” for both the state and society.<sup>56</sup>

Concerns over collective action problems, state cartels, and societal influence are more significant for those who consider “the state” an expression of interest group or political capture.<sup>57</sup> Miriam Seifter argues that positions offered by state interest groups are misleadingly considered “state views” when, in fact, they represent only a “subset of state officials” with an indirect consideration of the state’s general population.<sup>58</sup> Rather than view states’

51. See Balkin, *supra* note 48, at 32.

52. *Id.*

53. See *id.* at 32–33.

54. See Greve, *supra* note 32, at 327; Levy, *supra* note 31, at 1255 (arguing that states’ collective action “is essentially a species of cartel.”).

55. See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 968 (2014) (“While state interest groups emphasize their ability to speak for ‘state views,’ each group represents only a subset of state officials, and a group’s representation of the state’s general population is indirect at most.”); Greve, *supra* note 32, at 290–93 (disfavoring interstate agreements because “[w]hile states are capable of cooperating *with* one another, they are also capable of—and prone to—doing very bad things *to* one another”); Jessica Bulman-Pozen, *Preemption and Commandeering without Congress*, 70 STAN. L. REV. 2029, 2048 (2018) (“When the federal government seeks to regulate not by adopting a federal requirement but instead by making some states beholden to others . . .”).

56. See John Thøgersen, *Social Norm Nudging for Sustainable Consumption*, in RESEARCH HANDBOOK ON NUDGES AND SOCIETY 56–57 (Cass R. Sunstein & Lucia A. Reisch eds., 2023) (describing the benefits of top-down regulations).

57. See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176–77 (2006); Huq, *supra* note 31, at 278 (raising the argument that “each legislator will tend to overuse that shared resource as they pursue their interests in reelection and interest-group satisfaction.”); PAUL HIRST, *ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE* 29 (1996) (challenging ideals of democratic federalism by arguing that “there is [a] danger that highly exclusive and self-interested groups will lobby the state . . .”).

58. See Seifter, *supra* note 55, at 968 (“While state interest groups emphasize their ability to speak for ‘state views,’ each group represents only a subset of state officials, and a group’s representation of the state’s general population is indirect at most.” (footnote omitted)).

legislative strategies as democratic expressions of local interests, Seifter cautions, we should view them as “outright countermajoritarian institutions. . . controlled by either a clear or probable minority party.”<sup>59</sup> Wendy Wagner and her co-authors add that the processes by which federal actors decide to revise policies “may sometimes be driven by intensely interested regulated entities at the expense of more diffuse public interests, and that this may take place through mechanisms that lack transparency.”<sup>60</sup> Viewed accordingly, state influence on the federal government during the lifetime of preemption looms ominously.

### B. *The States’ Rights View on State Resistance to Preemption*

Given that Congress has legitimate authority and justifications for preempting areas that states also care about, what role should be left to the states? The lack of apparent institutional arrangements for state resistance has led to a robust body of scholarship objecting to federal preemption on the grounds of states’ rights.<sup>61</sup> Those objections presume that preemption strips states’ regulatory authority, leaving states vulnerable to federal abuse and overreach.<sup>62</sup>

Federalists have, consequently, argued that state sovereignty is necessary to allow states to “dissent from within rather than complain from without, and offer a real-life instantiation of their views.”<sup>63</sup> Federal preemption viewed through that lens is anti-democratic because it only permits deliberations before preempting legislation is adopted, not during its lifetime.<sup>64</sup> It lacks a platform for states’ ex-post interventions, even when preemption directly affects them.<sup>65</sup>

59. See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021).

60. See Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 261 (2017).

61. See, e.g., Peter Grossi & Daphne O’Connor, *FDA Preemption of Conflicting State Drug Regulation and the Looming Battle over Abortion Medications*, 10 J.L. & BIOSCIENCES 1, 2 (2023) (arguing that “those who oppose abortions entirely—or who would restrict them significantly—view such FDA preemption as a threat to the states’ rights victory they believe they achieved in *Dobbs*”).

62. See Nelson, *supra* note 33, at 229 (describing various “states’ rights” objections).

63. Heather K. Gerkin, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1626, 1895 (2014).

64. Under the APA notice-and-comment rulemaking process and other formal procedures, Congress is supposed to gather state input on the scope of federal legislation before it adopts it. See 5 U.S.C. § 553; Seifter, *supra* note 55, at 956; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1359 (2001) (“In order for political safeguards to be effective, we would want to make sure that the defenders of the states on Capitol Hill have adequate warning when pending legislation may affect the interests or authority of state governments.”); Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 367 (2010) (“States can—and do—monitor proposed legislation that might usurp their authority, contact their representatives to express their views, and rally other interest groups in support or opposition to a bill.”). The President also conducts ex ante consultations with states for strategic purposes, including attracting the support of allied states and mitigating congressional hostility. See Bulman-Pozen, *supra* note 55, at 2032–33 (“Faced with a hostile Congress after his first two years in office, President Obama worked with a subset of states to advance some of his central policy initiatives, including climate change regulation and expanded healthcare coverage.”).

65. See 5 U.S.C. § 553.

Even worse, the federal government does not always conduct ex-ante consultations.<sup>66</sup> When it does, its decisions to preempt states sometimes reflect internal biases and the presumed need for federal oversight.<sup>67</sup> Worse still, the political processes supposedly protecting states nationally—the House of Representatives, the electoral processes, and the legislative processes—have become obstructed by what Roderick Hills attributes to “the institutional failings that result from increasing the size of the population governed and the bureaucracy that performs the governing.”<sup>68</sup>

Circumstances may also evolve after Congress adopts preempting legislation, changing how that legislation is operationalized within states and giving greater cause for ex post dissent.<sup>69</sup> Consider the nuanced and unforeseen effects of the pandemic, which affected states differently,<sup>70</sup> how export-oriented states fare differently from import-oriented states in U.S. trade agreements,<sup>71</sup> or the disparate impact of President Trump’s fast-tracked immigrant deportations on agricultural states.<sup>72</sup> Crafting a one-size-fits-all approach to states through preemption prevents states from adopting the necessarily tailored laws and policies to adapt to global and local changes.<sup>73</sup>

66. See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 2010-1: AGENCY PROCEDURES FOR CONSIDERING PREEMPTION OF STATE LAW 3 (2010) (“An empirical evaluation of agency practices reveals that compliance with the preemption provisions of Executive Order 13132 has been inconsistent . . .”).

67. See generally Yoon-Ho Alex Lee, *Beyond APA Section 553: Hayek’s Two Problems and Rulemaking Innovations*, 91 GEO. WASH. L. REV. 1215, 1217 (2023) (“One category of limitations is institutional: the setup of the rulemaking process that tends to lead to imperfect or biased aggregation of information.”).

68. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 10 (2007) (describing his theory of “diseconomies of scale”).

69. See, e.g., Sandra Zellmer, *Preemption by Stealth*, 45 HOU. L. REV. 1659, 1660 (2009) (worrying that “federal regulatory regimes are not always perfect, and the preemption of state laws can leave dangerous regulatory gaps.”); Gilman, *supra* note 64, at 339 (2010) (“As a result of federal preemption, state laws could not be more protective than the federal standard . . .”). See also *id.* at 367 (“Even with the best of intentions, Congress legislates *ex ante* and cannot always foresee whether or how its laws may ultimately impact state-level initiatives as circumstances change.”); Merrill, *supra* note 10, at 754 (“Congress cannot anticipate when it legislates all the situations in which questions of displacement will arise.”).

70. But see Stephanie Cooper Blum, *Federalism: Fault or Feature – An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 WASHBURN L.J. 1, 44–45 (2020) (proposing a federal pandemic statute that would preempt states, arguing that the disproportionately high number of pandemic-related deaths in the United States “should at least call into question whether the status quo structure of the U.S. government is wise in the context of a global pandemic that respects no geographic boundaries”).

71. See MARY JANE BOLLE, CONG. RSCH. SERV., RL34688, U.S. FOREIGN-TRADE ZONES: TRADE AGREEMENT PARITY (TAP) PROPOSAL 18 (2010) (citing research showing that, on average, workers in export-oriented firms enjoyed higher earnings than workers in import-oriented firms).

72. See Nada Hassanein, *Trump Migrant Deportations Could Threaten States’ Agricultural Economies*, MO. INDEP. (Dec. 20, 2024, at 11:00 CT) (“If President-elect Donald Trump follows through on his pledge to deport millions of immigrants, it could upend the economies of states where farming and other food-related industries are crucial – and where labor shortages abound.”), <https://missouriindependent.com/2024/12/20/trump-migrant-deportations-could-threaten-states-agricultural-economies/> [<https://perma.cc/5Z4K-L79S>].

73. See Merrill, *supra* note 10, at 759 (arguing that “Congress cannot perform the role of resolving all or even most preemption questions because it cannot anticipate when it legislates what preemption controversies will arise in the future”).

Of course, Congress and federal actors are free to change their minds and revise national policies and rules if they feel motivated to do so. Under certain circumstances, the Administrative Procedure Act (APA) calls for ex-post notice and comment,<sup>74</sup> and federal actors can make informal adjustments.<sup>75</sup> Congress also revises legislation and policies owing to changes in circumstances.<sup>76</sup> However, it is unclear whether changed circumstances affecting *states*, not the nation, will engender that dynamism, particularly given the federal government's inertia over its existing regulations.<sup>77</sup>

Therefore, to many federalism scholars, the absence of predictable and guaranteed bottom-up contributions to deliberations weakens the national agenda.<sup>78</sup> By minimizing preemption,<sup>79</sup> federal courts would contribute to a system of federalism that values options, experimentation, regulatory competition,<sup>80</sup> innovation, and safeguards against tyranny and monopolization.<sup>81</sup>

### C. *Ideal State Resistance in Cooperative Regimes*

Rather than wholly preempting states, Congress often designs a cooperative regulatory regime that requires partnerships between the federal and state levels. It does so by enacting floor preemption statutes regulating minimum standards and frameworks for partnerships between state and federal governments.<sup>82</sup>

74. See Wagner et al., *supra* note 60, at 197 (arguing that when an agency is presented with new scientific or technical understandings or changed policymaking environments, it “must rescind the rule and promulgate a new one from scratch, revise the existing rule in one or more regards, or do nothing and deal with the consequences of an obsolete or irrelevant policy”).

75. *Id.* at 198 (“Under the APA’s ‘good cause’ exception, agencies may promulgate (or revise) rules without notice and comment if the changes are minor and noncontroversial or if delaying a rule to solicit comments would be contrary to the public interest.”).

76. *Id.* at 219 (finding that Congress and the President sometimes trigger revisions in federal rules and policies, albeit not as frequently as other stakeholders).

77. See Young, *supra* note 64, at 1361 (discussing the need for an institutional check in federalism owing to the federal government’s inertia).

78. See Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 821 (2008) (“The interaction of state and federal regulators may produce a regulatory scheme superior to what either government would produce in isolation.”); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Engel, *supra* note 57, at 161.

79. See Engel, *supra* note 57, at 186 (carving out a narrow exception for express field preemption).

80. Scholars are sharply divided on whether interstate competition results in more stringent standards in a “race-to-the-top” or more lax standards in a “race to the bottom.” See William Magnuson, *The Race to the Middle*, 95 NOTRE DAME L. REV. 1183, 1184–86 (2020) (explaining the divided scholarship).

81. See Engel, *supra* note 57, at 176–77; David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1823–33 (2008) (“The single most important means of fostering adaptive federalism is restricting federal regulatory preemption.”); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14 (2022).

82. See Joseph G. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS: J. FEDERALISM 15, 16 (2001) (describing the ways Congress “plays a leadership role” in establishing cooperative regimes through federal legislation).

Under this architecture, those governments share regulatory authorities within the framework established by federal law.<sup>83</sup> Philip Weiser notes that cooperative regimes “neither leave state authority unconstrained within its domain . . . nor displace such authority entirely with a unitary federal program, as would a preemptive federalism.”<sup>84</sup>

In his voluminous work on the evolution of federalism, Roderick Hills charts how cooperative federalism arose as an alternative to federal preemption and commandeering.<sup>85</sup> Working backward from the anti-commandeering cases *Printz v. United States*<sup>86</sup> and *New York v. United States*,<sup>87</sup> he describes how cooperative federalism preserved federal control while allowing states to participate voluntarily.<sup>88</sup> The relationship between Congress and the states gradually fell into a rhythm in which “the national government relied on state officials to carry out federal laws.”<sup>89</sup> Under this regime, states became “friendly servants carrying out federal mandates.”<sup>90</sup>

Scholars are fascinated with how Congress regulates national matters through federal–state cooperation.<sup>91</sup> Many applaud that integrative structure, which seeks to align state and federal authorities rather than isolate them in distinct spheres.<sup>92</sup> That alignment is preferable to top-down governance, which

83. See Weiser, *supra* note 11, at 665.

84. *Id.*

85. See Hills, *supra* note 13, at 831–39.

86. 521 U.S. 898 (1997) (applying the Tenth Amendment anticommandeering principle to hold that interim provisions in the Brady Handgun Violence Prevention Act were unconstitutional).

87. 505 U.S. 144 (1992) (holding that Congress’ effort to “take title” to low-level radioactive waste or order state legislatures to regulate in accordance with federal instructions constitutes unconstitutional compulsion).

88. See Hills, *supra* note 13, at 838.

89. *Id.* at 839.

90. Bulman-Pozen & Gerken, *supra* note 16, at 1263. See also *id.* at 1262 (arguing that, under cooperative federalism, “states should serve not as rivals or challengers to federal authority, but as faithful agents implementing federal programs.”); Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 169 (2014) (“Critics have pointed out that the idea of ‘cooperation’ here is decidedly one-sided.”).

91. See, e.g., Weiser, *supra* note 11, at 665 (comparing and contrasting dual federalism and cooperative federalism); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556–60 (2012) (framing state power under cooperative federalism regimes as the “power of the servant”); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (discussing cooperative federalism’s impact on regulatory programs); Zimmerman, *supra* note 82, at 16 (questioning “whether evidence supporting [cooperative federalism] has negated completely the theory of dual federalism”).

92. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (“Significantly, these programs neither leave state authority unconstrained within its domain, as would a dual federalism program, nor displace such authority entirely with a unitary federal program, as would a preemptive federalism.”); Bulman-Pozen & Gerken, *supra* note 16, at 1270–73 (crediting states’ frictions and dissent for convincing Congress to go “in a direction the federal government may not anticipate”); Gerken, *supra* note 91, at 1556 (arguing that states’ avenues to dissent in cooperative regulatory regimes grant states a role to “play in shaping identity, promoting democracy, and diffusing power”).

“risks . . . freezing policies in local maxima (dead ends) and decreases responsiveness” to changing conditions.<sup>93</sup>

Cooperative federalism is not without its critics. Some scholars lament that, despite its collaborative nature, cooperative programs grant the federal government “a directing or supervisory influence over the activities of the several states.”<sup>94</sup> Others note a lack of constitutional architecture that decides, for instance, whether state autonomy has been respected under the Tenth Amendment and whether the federal government can delegate oversight of federal law to state agencies.<sup>95</sup>

Studying the role of the presumed state servant in cooperative regimes, Jessica Bulman-Pozen and Heather K. Gerken assuage those concerns.<sup>96</sup> They show how states wield more power than assumed through their ability to dissent. States may simply refuse to implement programs or change the manner of implementation in unanticipated ways.<sup>97</sup> For example, the Clean Air Act preempted vehicle emissions standards and assigned states the responsibility for implementation.<sup>98</sup> California adopted more stringent standards and, in doing so, influenced other states, as well as the Environmental Protection Agency (EPA), to raise state and federal standards in kind.<sup>99</sup> In these cases, states’ resistance is not only powerful but also critical to the national agenda. If California had lacked the opportunity to vocalize its dissent to the EPA’s laxer standards, national policies would have remained stagnant.

Some scholars take the state power perspective even further by abandoning the servant model in favor of one that views states as functional alternatives to the federal government.<sup>100</sup> Overlapping federal and state spheres of authority enable necessary dialogue and frictions<sup>101</sup> through iterative processes capable of changing state and federal approaches.<sup>102</sup>

93. See Adelman & Engel, *supra* note 81, at 1799–1800.

94. Louis W. Koenig, *Federal and State Cooperation under the Constitution*, 36 MICH. L. REV. 752, 756 (1938); *id.* at 746; but see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 284 (2000) (“Obviously, the federal government is senior partner in this joint venture . . . Realistically, however, Congress can neither abandon politically popular programs nor ‘fire’ the states and have federal bureaucrats assume full responsibility for them.”).

95. See Weiser, *supra* note 11, at 665 (advancing a new constitutional architecture for cooperative federalism to reconcile these tensions).

96. See Bulman-Pozen & Gerken, *supra* note 16, at 1276–1277.

97. *Id.*

98. *Id.*

99. *Id.* at 1277.

100. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005); Engel, *supra* note 57, at 176.

101. See Engel, *supra* note 57, at 171 (“Interaction between the federal and state governments can lead either, or both, parties to adopt policy positions significantly different from the positions they would have adopted had they been regulating in a vacuum.”).

102. Adelman & Engel, *supra* note 81, at 1809.

One well-known example, offered by Ann Carlson, concerns climate change.<sup>103</sup> Although the Obama administration and Congress opted not to adopt a federal law on climate change, “a surprisingly large number of states” filled the policy void.<sup>104</sup> The innovative state strategies, Carlson argues, were neither the result of state regulation nor federal action.<sup>105</sup> On the contrary, those strategies and regulations resulted from “repeated, sustained and dynamic lawmaking efforts . . . involv[ing] both levels of government.”<sup>106</sup> Examining each actor’s—the federal government’s and states’—regulatory steps and achievements as feedback loops<sup>107</sup> rather than linear processes, she concludes that climate regulations have progressed through incremental and multi-dimensional steps.<sup>108</sup>

Nevertheless, Elizabeth Weeks has shown that states’ dissenting voices in cooperative federalism do not always spur changes in federal legislation.<sup>109</sup> She uses as an illustration the Affordable Healthcare Act (ACA), a cooperative regime in which Congress offers states incentives if they agree, inter alia, to implement Medicaid programs.<sup>110</sup> States had numerous reasons to resist the ACA’s onerous eligibility and administrative requirements.<sup>111</sup> Contrary to scholarly assumptions, state resistance proved ineffective.<sup>112</sup> Weeks concludes that when Congress can find alternative ways to operate (on its own, through sufficient numbers of state implementors or contractors), state resistance may have little persuasive value in shared regulatory regimes.<sup>113</sup> Weeks’s study suggests that Congress sometimes needs more than mere resistance to change course.<sup>114</sup> It must be *persuaded*.<sup>115</sup> In that case, it was necessary to ensure that states would not act chaotically, potentially depriving some residents of critical and affordable health insurance if given more regulatory options.<sup>116</sup>

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103. See Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1098–99 (2009).

104. *Id.* at 1098.

105. *Id.* at 1099.

106. *Id.*

107. *Id.* at 1100 (“The initial policy making then triggers a series of iterations adopted in turn by the higher/lower level of government and then back to the policy originator and so forth.”).

108. *Id.* at 1101 (“[I]n addition to identifying ‘iterative federalism’ as a significant dynamic within environmental law, I am also arguing that it is, from a normative perspective, quite useful as a regulatory tool in the arsenal.”).

109. See Leonard, *supra* note 11, at 139–40.

110. See 42 U.S.C. § 1396.

111. See Leonard, *supra* note 11, at 137 (citing a Florida complaint).

112. *Id.* at 139.

113. *Id.* at 143 (“But if the federal government can just as easily operate the high-risk pools on its own or through contracts with nonprofit organizations, states’ refusals may have little impact.”).

114. See *id.* at 165–66.

115. See *id.*

116. *Id.* at 165–67.

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Longstanding conventional wisdom bifurcates the role of states as dissenters into two broad categories. In the first category, field or otherwise complete preemption, states cannot resist the federal government cooperatively because they lack the institutional means to engage during the lifetime of preemption.<sup>117</sup> In the second category, floor preemption or cooperative federalism, Congress invites states to implement national policies, fostering a constructivist dialectic with national policymakers.<sup>118</sup>

This Article argues that both regulatory regimes offer ample opportunity for states to resist preempting approaches. The more persuasive the resistance, the more likely Congress will embrace it—in preemption and cooperative regimes alike. What’s more, resistance should be welcomed in both regimes, not on ideological grounds, but because ex-post feedback and input are valuable ways to promote democratic accountability and improve national policies.

## II. STATES’ RESISTANCE STRATEGIES

This Part describes states’ strategies to evade and litigate federal preemption that they disagree with and introduces an under-appreciated strategy it refers to as “persuasive resistance.” It does not mean to argue that any of these strategies, including persuasive resistance, is the *best* strategy. On the contrary, there may be instances in which states that disagree with preempting approaches should adopt a belligerent, rather than cooperative, stance toward the federal government. States that disagree with the federal government’s right to displace them in a given area might opt to sue the government or invite litigation by adopting conflicting laws. Others may hope to legislate under the radar by passively evading preempting laws. They may, for instance, exploit legal loopholes or sign agreements they never publish. In other cases, however, states may hope to cooperate with the federal government to change, rather than undermine, preempting approaches, in which persuasive resistance is likely most relevant. Before those strategic decisions may be assessed, however, this Part charts, using case studies where appropriate, states’ use of evasion, direct resistance, and persuasive resistance in preempting areas.

### A. States’ Traditional Resistance Strategies

States have long resisted preemption, just not always through the kinds of discursive channels one might expect or that the scholarship might appreciate. The two strategies described below, evasion and litigation, are common

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117. *Id.* at 119–25.

118. *Id.* at 125–32.

strategies states use to challenge the federal government's preemptive laws and policies. Much ink has been spilled, for instance, on the rise of state attorney generals to pursue multistate litigation against the federal government<sup>119</sup> and multistate marijuana laws that evade federal enforcement of marijuana prohibitions.<sup>120</sup> While recognizing each strategy in a vacuum, the scholarship has failed to consider them, together, as offering states *options* to resist preemption. Had it, the maxims presupposing state paralysis in preempting areas might have given way to a deeper recognition of states' expressive opportunities, examining the implications of those opportunities for more democratic participation within the federalism model.

### 1. *Preemption Evasion*

Although courts invalidate state laws that conflict with a preempting statute, this risk does not deprive states of “all concurrent powers to regulate in [a] given field,”<sup>121</sup> offering legislative space to violate the spirit of preempting laws without necessarily violating the letter.<sup>122</sup> For instance, states adopt laws that seemingly respect preemption while exploiting loopholes and exclusions.<sup>123</sup> They also evade preempting laws by not publishing their conflicting initiatives.<sup>124</sup> In both cases, states intend to violate the spirit of preempting laws and count on the federal government to either not notice or care enough to take punitive action.

Consider, for instance, how states exploit loopholes in the National Labor Relations Act (NLRA),<sup>125</sup> which preempts union organizing and collective

119. See, e.g., PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 20–21 (2015) (describing the rise in multistate attorneys general litigation); Lynch, *supra* note 18, at 2005–06 (arguing that the rise of multistate litigation against the federal government began in the 1990s and 2000s); Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 5 (2021) (“Beginning in the 1980s, state attorneys general started to join together to sue federal agencies for statutory noncompliance.”).

120. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

121. See JOSEPH F. ZIMMERMAN, *CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM* 2 (2005).

122. See *id.*

123. As noted, this spectrum offers points between direct litigation and deliberate evasion, noting that there may be cases that do not seem to fit comfortably within those labels. For instance, Ani Satz explains how it is sometimes unclear whether federal regulations preempt state laws, leaving states guessing as to whether, for instance, the federal privacy rights preempt “states’ historic role in both protecting privacy and administering their own workers’ compensation programs.” See Ani B. Satz, *The Federalism Challenges of Protecting Medical Privacy in Workers’ Compensation*, 94 IND. L.J. 1555, 1570 (2019). In these and undoubtedly other instances, states are not evading preemption, they are working within obscure federal laws that touch on matters they have historically regulated.

124. See, e.g., Richard Briffault, *The Challenge of New Preemption*, 70 STAN. L. REV. 1995, 2002–04 (2018) (describing punitive preemption laws that punish local governments for having conflicting laws on the books).

125. 29 U.S.C. §§ 151–169 (2006).

bargaining.<sup>126</sup> Because the NLRA makes it difficult for workers to join formal unions,<sup>127</sup> some blue states have adopted laws that offer robust protections to workers who wish to join informal unions, also known as “alt-labor” bodies.<sup>128</sup> Some red states, on the other hand, exploit the NLRA’s loopholes to make it easier for employers to maintain union-free facilities.<sup>129</sup> Influenced by powerful conservative interest groups,<sup>130</sup> those states have passed so-called “right-to-work” ordinances containing anti-union regulations (banning union shop agreements and prohibiting non-union workers from having to pay dues to a union).<sup>131</sup> They do so notwithstanding the NLRA’s preambular promise to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>132</sup>

What sets evasion apart from other forms of resistance is that these passive strategies do not necessarily intend to ignite new national approaches or enhance state power. On the contrary, states probably hope to proceed without directly abutting preempting law.<sup>133</sup> When they establish non-union worker organizations or make it easier to fire union organizers, states’ initiatives focus

126. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154 (2011) (“It would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act (NLRA).” (footnote omitted)).

127. See, e.g., Julius Getman, *The National Labor Relations Act: What Went Wrong; Can we Fix It?*, 45 B.C. L. REV. 125, 126 (2003) (noting that early NLRA optimism “has given way to cynicism and despair about the law’s ability to protect workers and enhance collective bargaining”); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1769–70 (1983) (arguing that the NLRA “must bear a major share of the blame for providing employers with the opportunity and the incentives to use [coercive and illegal] tactics, which have had such a chilling effect on worker interest in trade union representation”); David M. Rabban, *Has the NLRA Hurt Labor?*, 54 U. CHI. L. REV. 407, 409 (noting labor scholarship and advocacy agreeing that the NLRA “has produced a ‘counterfeit liberty’ for workers and unions”).

128. See, e.g., Sachs, *supra* note 126, at 1155 (describing state and local innovations to create “tripartite political exchanges” in areas like medical malpractice rules that tangentially entail bargained-for contractual commitments for organizing and bargaining); Michael M. Oswald, *Alt-Bargaining*, 82 L. & CONTEMP. PROBS. 89, 99 (2019) (“Perhaps the most telling exemplars of alt-labor’s willingness to organize in the absence of clear—or any—law come from worker centers, clinic-like organizations that use direct action and legal and policy advocacy to enforce and enhance workplace rights.”).

129. See, e.g., Melton-Fant, *supra* note 29, at 4 (finding that, between 2009 and 2019, “134 workers’ rights preemption bills were introduced in southern state[s]” that prioritized business perspectives over those of workers).

130. See Ariana R. Levinson, Alyssa Hare & Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEGIS. 457, 459 (2017) (naming the conservative interest groups, including the Heritage Foundation, that lobby states to pass right-to-work legislation).

131. See generally Ruben J. Garcia, *Right-to-Work Laws: Ideology and Impact*, 15 ANN. REV. OF L. & SOC. SCI. 509 (2019) (providing an excellent overview of right-to-work laws, including their racist origins).

132. 29 U.S.C. § 151.

133. See generally Kate Andrias, *Constitutional and Administrative Innovation Through State Labor Law*, 2024 WISC. L. REV. 1467, 1469 (2024) (describing California’s efforts to grant fast food workers greater collective power through a “worker standards board” but stopped short of granting those workers federally-controlled bargaining rights).

exclusively on protecting *their* workers or attracting corporations, not on charting new national approaches to federal labor law.<sup>134</sup>

An area of preemption evasion gaining attention among scholars<sup>135</sup> and Congress<sup>136</sup> concerns state-level memoranda of understanding (MOUs) with foreign actors on trade and investment, arguably contravening the preempting powers of the federal government.<sup>137</sup> Those initiatives had flown under the radar. In his efforts to map them, Ryan Scoville submitted countless Freedom of Information Act (FOIA) requests to states,<sup>138</sup> and in doing so, unearthed over 600 MOUs with foreign governments, “most of which have never been published, even online.”<sup>139</sup>

Nearly one hundred of those MOUs stipulate trade and investment opportunities.<sup>140</sup> Nevertheless, they do not directly conflict with federal tariffs or open new markets.<sup>141</sup> Instead, they commonly focus on cooperative trade exercises, business assistance, information sharing, and matching suppliers with customers and trade partners—thus abutting but not crossing the lines of federal preemption.<sup>142</sup> Those MOUs also offer states unique commercial advantages. On the heels of the North Carolina–UK MOU on trade and investment, for instance, the UK firm Marshall Aerospace announced a \$50 million, 240-job investment in Greensboro, citing “the MOU as a key lever.”<sup>143</sup>

134. *See id.* at 1489.

135. *See, e.g.,* Duncan Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 766–69 (2010) (discussing the China–Hawaii and Missouri–Manitoba MOUs); Scoville, *supra* note 18, at 312, 344 n. 168 (“[A] modern view suggests that it is possible for states independently to enter international commitments that neither qualify as ‘Treat[ies]’ or implicate the Compact Clause.” (alteration in original)).

136. *See Hearing on the Biden Admin.’s 2024 Trade Pol’y Agenda with United States Trade Representative Katherine Tai Before the H. Comm. on Ways and Means*, 118th Cong. (2024) (Statement of Rep. Feenstra) (referencing state-level MOUs with foreign actors on international trade).

137. U.S. CONST. art. I, § 10, cls. 1, 3. For arguments that those MOUs violate constitutional divisions of power and preemption doctrine, *see* Hollis, *supra* note 135, at 745 (“As a matter of constitutional text, history, and doctrine, the Constitution contemplates a federal negative over state agreements with foreign governments.”).

138. *See* Scoville, *supra* note 18, at 341–44 (describing methodology).

139. *Id.*; *see also* MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 35 (2016) (describing how states have “entered into compacts and agreements with foreign countries,” among other international activities).

140. *See* Scoville, *supra* note 18, at 341.

141. *See id.* A review of the state-level exports into signatory countries three years before and after the MOUs entered effect suggests that trade between the states and foreign actors has not been significantly impacted. Concededly, trade data are far from perfect. U.S. databases tracking imports merely tracks to the port-of-entry rather than destination state, rendering them unhelpful for present purposes. Furthermore, there are competing databases and views on export data. For present purposes, I used the export data compiled by the U.S. International Trade Administration. *See generally* *TradeStats Express - Trade by Partner by State*, INT’L TRADE ADMIN. (June 2025) (compiling data on exports), <https://www.trade.gov/data-visualization/tradestats-express-trade-partner-state>. [<https://perma.cc/CY2D-NBZH>].

142. *See* Scoville, *supra* note 18, at 353–54.

143. *See* Lauren Ohnesorge, *UK Official Says NC Trade Agreement Paying Off*, TRIANGLE BUS. J. (Nov. 9, 2023), <https://archive.is/FKjpB> [<https://perma.cc/85CS-ZS9M>].

## 2. (Multi)State Litigation

Since the 1980s, the number of multistate litigation challenges to federal laws has increased significantly.<sup>144</sup> Like-minded state attorneys general join forces to bolster resources when challenging the federal government.<sup>145</sup> The “increasing conservatism of the Supreme Court,” Lynn Mather argues, “signaled the states that the Court was likely to act favorably on their petitions to rein in congressional power and assert state sovereignty.”<sup>146</sup> The continued success of state attorneys general “encouraged even further activity from the states,”<sup>147</sup> garnering scholarly attention for its paradigm-shifting effects on the balance of power between states and the federal government.<sup>148</sup>

State attorneys general sometimes view litigation against the federal government as “components of a collective voice in national policymaking and eventually in federal constitutional interpretation.”<sup>149</sup> Relying on constitutional grounds rather than policy rhetoric, attorneys general from diverse states and interests challenge federal policies in courts when their challenges through legislative processes prove unsuccessful.<sup>150</sup>

144. See, e.g., Nolette, *supra* note 119, at 20–21 (describing multistate litigation efforts that shifted from defensive to offensive in the 1980s); Michael A. Dichio & Phillip Singer, *State Attorneys General and Their Challenges to Federal Policies: Insights from the Texas v. California Litigation Regarding the Affordable Care Act*, 53 PUBLIUS: J. FEDERALISM 566, 571 (2023) (“Since 1982, state [attorneys general] have filed 410 lawsuits, across all policy issues, against the federal government, with only twenty focused on healthcare policy issues.”); Miller, *supra* note 119, at 5 (“Beginning in the 1980s, state attorneys general started to join together to sue federal agencies for statutory noncompliance.”).

145. See Nolette, *supra* note 119, at 21 (“In addition to becoming more common, multistate cases have involved a greater number of [attorneys general] over time.”); Lynch, *supra* note 18, at 2005–06 (arguing that the rise of multistate litigation against the federal government in the 1990s and 2000s was an “inevitable” result of suits against powerful corporations).

146. Mather, *supra* note 30, at 426.

147. *Id.*

148. See, e.g., Ann O’Leary, *State Attorneys General are the Last Line of Defense Against Trump*, THE HILL (Nov. 12, 2024, at 11:00 ET), <https://thehill.com/opinion/judiciary/4984650-state-attorneys-general-challenge-trump-agenda/> [<https://perma.cc/2Q8H-2SAB>] (“Republican state attorneys general beat the Obama administration in court 64 percent of the time. And of the 155 lawsuits filed by Democratic state attorneys general against the Trump administration, an impressive 83 percent were successful.”); Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POL. & POL’Y Q. 1, 1 (2010) (arguing that “multi-state litigation has come to symbolize the increasingly visible and powerful role of state [attorneys general] in state, national, and even international, policymaking”); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45–46 (2018) (describing the numerous, high-profile public law litigation by state attorneys general).

149. See Miller, *supra* note 119, at 5; Lynch, *supra* note 18, at 2001 (“[W]hat is novel about multistate cases is the degree and quality of interstate cooperation being used to enforce the law.”); Dichio & Singer, *supra* note 144, at 570 (arguing that multistate lawsuits led by state attorneys general in pursuit of policy goals that oppose those adopted by the federal government have “risen dramatically since the Reagan administration across a multitude of policy areas” touching on state interests).

150. See Dichio & Singer, *supra* note 144, at 567–68 (describing the motives and tactics of state litigation).

State litigation is gaining momentum.<sup>151</sup> The Roberts Court's decisions seem, at least on average, sympathetic to states, requiring Congress to make a “super-strong statement” of its intent to override the balance of federal and state powers.<sup>152</sup> The Court has applied the clear statement doctrine to overturn preempting laws and programs that decide federal grant recipients, those that decide state immunity, and those considered to disrupt the “usual constitutional balance” between states and the federal government.<sup>153</sup> Its willingness to rule in favor of states motivates further state litigation,<sup>154</sup> leading scholars to conclude that we are witnessing a “revitalized” federalism revolution.<sup>155</sup>

Not all litigation over preempting laws aims to return power to states. Reviewing the long arc of multistate litigation, Paul Nolette observes that state attorneys general have used litigation as “policy-forcing litigation” with the ambition “to force the federal government to take a more active regulatory approach.”<sup>156</sup> From carbon emissions to acid rain to cap-and-trade programs, state attorneys general are pressuring Congress to adopt comprehensive regulatory regimes that address gaps concerning states.<sup>157</sup> Rather than restrict preemption, those litigation strategies seek “greater federal control over the states in the form of strengthened federal mandates.”<sup>158</sup>

States do not always take the federal government to court; sometimes, they invite the federal government to sue them.<sup>159</sup> The latter occurs when states knowingly adopt laws that contradict preempting federal laws. Doing so

151. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that where congressional actions “would upset the usual constitutional balance of federal and state powers,” it would be “incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance”).

152. See Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 *YALE L.J.* 839, 898 (2024) (quoting the Supreme Court majority’s rationale in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); Nicole Huberfeld, *High Stakes, Bad Odds: Health Laws and the Revived Federalism Revolution*, 57 *U.C. DAVIS L. REV.* 977, 982 (2023) (“A pattern is emerging in which the Court is recentering a formal, separate-spheres vision of federalism that favors states’ rights, regardless of state capacity to wield that power or evidence that they do not.”).

153. See Eyer & Tani, *supra* note 152, at 916; see also Young, *supra* note 64, at 1349 (showing how, even before the Roberts Court, the Rehnquist Court had “reasserted outer limits to Congress’ commerce power, developed new doctrinal rules against the ‘commandeering’ of state governmental institutions, and vastly expanded the scope of state sovereign immunity” (footnote omitted)).

154. See Mather, *supra* note 30, at 426 (arguing that state attorneys general “continued success before the Court encouraged even further activity from the states”).

155. See Eyer & Tani, *supra* note 152, at 916–18 (describing the litigation in the disability context). Like the theory of dynamic federalism, the theory of state-litigation federalism also goes by many names. See, e.g., Dylan L. Yingling & Daniel J. Mallinson, *Courts-First Federalism: How Model Legislation Becomes Impact Litigation*, 22 *PERSPS. POL.* 1031, 1033 (2024) (“Gridlock in Congress, Republican success in winning majorities in state legislatures, and the conservative composition of the Supreme Court have prompted some states and policy advocates . . . to pursue this courts-first strategy.”).

156. See Nolette, *supra* note 119, at 30.

157. *Id.* at 167.

158. *Id.* at 30.

159. See, e.g., JENNIFER SHERER & NINA MAST, *CHILD LABOR LAWS ARE UNDER ATTACK IN STATES ACROSS THE COUNTRY*, *ECON. POL’Y INST.* 5–7 (2023) (detailing state laws that roll back child labor protections) <https://www.epi.org/publication/child-labor-laws-under-attack/> [<https://perma.cc/E6VQ-8MM3>].

requires the federal government to either permit states to violate preemption or defend preemption through financial sanctions or litigation in federal courts.

For example, some states have enacted laws expressly defying federal labor laws that prohibit various forms of child labor.<sup>160</sup> The Fair Labor Standards Act prohibits children and teenagers under the age of eighteen from being employed in hazardous work.<sup>161</sup> The Act presumes that employers are protected from legal liability only when they have on file “an unexpired certificate . . . certifying that such person is above the oppressive child labor age.”<sup>162</sup> In 2023, ten states introduced or passed laws reducing the age at which children are permitted to work, including in hazardous occupations. Minnesota introduced legislation that reduces the minimum age for construction—a hazardous work site—to sixteen to seventeen years of age.<sup>163</sup> Iowa introduced a bill that permits fourteen year olds to work in hazardous occupations such as mining, meatpacking, and logging as part of an approved training program.<sup>164</sup> Arkansas enacted a law that eliminates age verification and parent/guardian requirements.<sup>165</sup> Meanwhile, the documented incidents of children hurt and killed when working below federal standards continue to rise.<sup>166</sup> State lawmakers know they are directly contravening federal labor laws, with at least one conceding that “such conflict is part of the point.”<sup>167</sup>

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Without an institutional arrangement to express their resistance to federal preemption, states have employed strategies that advance their interests but not necessarily the national agenda.<sup>168</sup> Evasion is often conducted under the guise of implementation to secure regulatory benefits that elide other, more

160. *See id.*; *see also* 29 U.S.C. § 203 (setting a minimum age for child labor).

161. Eighteen-Year Minimum, 29 C.F.R. § 570.120 (2010) (“To protect young workers from hazardous employment, the FLSA provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to the health or well-being for minors 16 and 17 years of age.”).

162. *Id.* at § 570.121.

163. *See* S.B. 375., 2023 S., 93rd Sess. (Minn. 2023).

164. *See* S.B. 167, 2023 S., Reg. Sess. (Iowa 2023).

165. *See* H.B. 1410, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

166. *See* Michael Sainato, *US Labor Department Condemns Surge in Child Labor After Teen Dies on the Job*, THE GUARDIAN (July 27, 2023, at 09:46 ET), <https://www.theguardian.com/us-news/2023/jul/27/child-deaths-labor-department> [https://perma.cc/7DHK-SMZD] (describing the “700 open cases” of illegal child labor and deaths of teenagers owing to workplace accidents); Laura Romero, *Despite Hazardous Working Conditions, Many States are Rolling Back Child Labor Laws*, ABC NEWS (Feb. 21, 2024, at 11:59 CST), <https://abcnews.go.com/US/despite-hazardous-working-conditions-states-rolling-back-child/story?id=107209273> [https://perma.cc/SKL3-PER6] (“[L]ast year 5,800 children were employed in violation of child labor laws, representing an 88% increase since 2019. And of the 955 child labor cases . . . , more than half involved minors employed in violation of hazardous occupation laws.”).

167. Sherer & Mast, *supra* note 159.

168. *See* Miller, *supra* note 119, at 28.

compliant states.<sup>169</sup> Those laws and MOUs take a passive approach to resistance by either remaining unpublished or exploiting legal loopholes.<sup>170</sup> Consequently, they offer Congress no additional information about states' policy preferences. Litigation, by contrast, aggressively challenges preemptive laws and coalesces sympathetic states but seeks to disrupt rather than modify the national agenda.<sup>171</sup> These payoffs influence strategic decisions regarding forms of state resistance, which are explored in greater detail in Part IV.

### B. *Persuasive Resistance*

Mere days before their execution, death row inmates William Bell and Jacob Rosenwasser realized that the state had advanced the prison's clocks by an hour under the federally mandated bi-annual daylight saving time adjustment, thus depriving them of one hour of their lives.<sup>172</sup> Their appeals for lenience failed to convince the state to ignore the federally mandated clock adjustments, and both inmates were executed on time.<sup>173</sup> Since then, many states have become more sympathetic to their inmates, parents, caregivers, pet owners, and businesses that urge them to abandon the mandatory clock adjustments.<sup>174</sup>

Notwithstanding states' sympathy, Congress has limited their options under the preempting UTA.<sup>175</sup> Congress adopted the UTA, at least in part, to organize time zones across U.S. regions and ensure standardized time for interstate commerce, travel, and various other logistical purposes.<sup>176</sup> Imagine if states could adopt different time zones, perhaps to optimize their immutable proximity to the sun. Competing states, perhaps close enough to share businesses and transportation lines but far enough geographically to experience daylight differently, would struggle to align their hours with those of the companies and transportation systems next door. Interstate travel would be disrupted, harming shipments, travelers, airlines, and buses. Children attending school across borders (a common feature in areas like Maryland, Virginia, and Washington, D.C.) would have to observe multiple time zones throughout the day. In sum, each state may decide, based on its rational interests, to the

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169. See Sherer & Mast, *supra* note 159.

170. See Scoville, *supra* note 18, at 312–13.

171. See *id.* at 316–17.

172. See DAVID PRERAU, SEIZE THE DAYLIGHT: THE CURIOUS AND CONTENTIOUS STORY OF DAYLIGHT SAVING TIME 123–24 (2005) (describing various legal challenges to daylight saving time in the 1920s).

173. *Id.* at 124.

174. See *infra* Part I.B.

175. Uniform Time Act of 1966 § 3(b), 15 U.S.C. § 260a (“It is hereby declared that it is the express intent of Congress by this section to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for advances in time or changeover dates different from those specified in this section.”).

176. See PRERAU, *supra* note 172, at 111–12 (describing efforts before the UTA to organize major commercial centers, railroads, and long-distance trains on standard times).

detriment of national uniformity and the general welfare. Consequently, the UTA offers states only two options: accept the default biannual clock adjustments<sup>177</sup> or opt out of daylight saving time entirely.<sup>178</sup>

In recent years, states introduced at least 750 bills and resolutions relating to daylight saving time.<sup>179</sup> Many of those bills would reject both options under the UTA and advance a third option, permanent daylight saving time.<sup>180</sup> While those bills presumably violate federal preemption, they contain two clauses, which this Article refers to as “trigger” and “conditional” clauses, ensuring compliance with UTA while signaling the states’ preferred alternative.<sup>181</sup>

Scholars have overlooked these burgeoning bills, and their implications for federalism should they prove successful. They may have done so because states only began adopting laws with conditional and trigger clauses around 2018.<sup>182</sup> More importantly, they may have overlooked persuasive resistance strategies because they don’t *look* like traditional resistance in the context of federalism.<sup>183</sup> States are not adopting laws that affect their legal responsibilities. In the case of persuasive resistance, it is the persuasive *means* through which states express that resistance that operates to influence the national agenda.<sup>184</sup>

### 1. Trigger Clauses

Eighteen states have adopted laws or resolutions that would automatically observe daylight saving time permanently should Congress amend the UTA to allow it.<sup>185</sup> Florida was the first to adopt such legislation in 2018.<sup>186</sup> Its bill states, “If the United States Congress amends 15 U.S.C. s. 260a to authorize states to observe daylight saving time year-round, it is the intent of the Legislature that

177. Uniform Time Act of 1966 § 3(a).

178. *Id.* Congress amended the Act in 1972 to allow states that were split between time zones to opt out of daylight saving time only the portion of the state lying within the different time zone. *See* Uniform Time Act, Pub. L. No. 92-267, § 3(a), 86 Stat. 116, 116 (1972). At the time of drafting, two states—Arizona and Hawaii—and five U.S. territories opted out of observing daylight saving time. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, DAYLIGHT SAVING TIME / STATE LEGISLATION, NCSL (2025), <https://www.ncsl.org/transportation/daylight-saving-time-state-legislation> [<https://perma.cc/4U6Z-SVL4>].

179. *See* STATE LEGISLATION, *supra* note 178.

180. Permanent daylight saving time would mean that states would not require clock changes. It would alter states’ time zones by permanently advancing clocks forward by one hour.

181. *See* STATE LEGISLATION, *supra* note 178.

182. *See id.* (noting that the first daylight saving time bill was enacted in 2018).

183. For a discussion of traditional resistance strategies, *see supra* Part II.A.

184. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: THE FINAL EDITION* (2021) (describing regulatory efforts in the United States and the United Kingdom to enhance compliance through deliberate persuasive techniques that turn on offering citizens information that overcome biases and human error, socialize compliance as norms, and respect decision-making autonomy). For a discussion of how persuasive dissent advances those features, *see infra* Part III.

185. *See* STATE LEGISLATION, *supra* note 178.

186. *Id.*

daylight saving time shall be the year-round standard time of the entire state and all of its political subdivisions.”<sup>187</sup>

Since then, seventeen additional states have adopted laws with similar trigger clauses: five in 2019,<sup>188</sup> five in 2020,<sup>189</sup> five in 2021,<sup>190</sup> one in 2022,<sup>191</sup> and the most recent in 2024.<sup>192</sup> Between 2024 and 2025, seventeen additional states introduced similar laws.<sup>193</sup>

Trigger clauses are not new. They came to the fore in the wake of *Dobbs*, when states sought to signal their displeasure with *Roe v. Wade*<sup>194</sup> by adopting laws that placed restrictions on abortion access. Despite facially conflicting with the federally protected right to access an abortion, those clauses had no legal effect until *Roe* was overturned.<sup>195</sup> Trigger clauses have since become known as strategic technologies that allow states to express their displeasure with federal legislation without crossing constitutional lines.<sup>196</sup>

In expressing their alternative preference for permanent daylight saving time, states hope to create a “pressure point”<sup>197</sup> for Congress to pass the Sunshine Protection Act, which amends the UTA to allow permanent daylight saving time.<sup>198</sup> Those signals are reaching some members of Congress.<sup>199</sup>

187. FLA. STAT. § 1.025(2) (2018).

188. Those states are Delaware, Maine, Oregon, Tennessee, and Washington. *See* STATE LEGISLATION, *supra* note 178.

189. Those states are Idaho, Louisiana, South Carolina, Utah, and Wyoming. *See id.*

190. Those states are Georgia, Minnesota, Alabama, Mississippi, and Montana. *See id.*

191. That state is Colorado. *See id.*

192. Oklahoma passed SB1200 in the spring of 2024. *See id.*

193. Those states are Alaska, Maine, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, and Virginia. *See id.*

194. 410 U.S. 113 (1973).

195. *See* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1641 (2008) (“Because the substantive provisions have no immediate effect and will not be enforced, their constitutionality cannot be challenged in court until they are triggered.”).

196. *Id.* at 1640 (noting that the number of trigger laws is increasing).

197. *See, e.g.*, ALA. CODE § 1-1-4.1 (2021) (“If the United States Congress amends 15 U.S.C. § 260a to authorize states to observe Daylight Saving Time year-round, the State of Alabama shall adopt Daylight Saving Time as the year-round standard of time for the entire state and all of its political subdivisions.”).

198. *See* Miles Blumhardt, *Colorado Bill Makes Daylight Saving Time Permanent, but Hurdles Remain*, COLORADOAN (June 3, 2022, at 15:21 MT), <https://www.coloradoan.com/story/news/2022/06/03/colorado-daylight-saving-time-permanent-what-comes-next/7498198001/> [<https://perma.cc/E389-8JPC>]; Howard Koplowitz, *Daylight Saving Time a ‘Nuisance,’ Tuberville Says Time to Abolish ‘Outdated Practice’*, AL.COM (Mar. 07, 2022, at 19:03 CT), <https://www.al.com/politics/2022/03/daylight-saving-time-a-nuisance-tuberville-says-time-to-abolish-outdated-practice.html> [<https://perma.cc/F7TC-9FWY>] (Sen. Tommy Tuberville, R-AL, referring to DST clock changes as “a nuisance and not smart policy.”); Kate Lisa, *Bipartisan New York Bill Would Make Daylight Saving Time Permanent with Neighboring States*, SPECTRUM NEWS 1 (Mar. 10, 2023, at 19:43 ET), <https://spectrumlocalnews.com/nys/centralny/politics/2023/03/11/bipartisan-bill-would-make-daylight-saving-time-permanent-with-neighboring-states> [<https://perma.cc/5UCB-P89P>] (“Griffo says passing the measure in New York would put pressure on Congress to end the time change . . .”).

199. *See* Corrie E. Clark & Lynn J. Cunningham, CONG. RSCH. SERV., R45208, DAYLIGHT SAVING TIME (DST) 12 (2020) (discussing several bills introduced in Congress to permit states to observe permanent daylight saving time).

Senator Patty Murray, who co-sponsored the Sunshine Protection Act with Senator Marco Rubio, was partly motivated when the governor of her home state, Washington, signed a law that would make daylight saving time permanent.<sup>200</sup>

Nevertheless, trigger clauses alone are insufficient to contradict Congress's initial motivations to preempt states in matters requiring coordination and organization. Consider what would happen, for instance, if Vermont and Connecticut adopted permanent daylight saving time while New York and Rhode Island observed the biannual clock adjustments. What would happen to those who live in Connecticut but work in New York? Or the bus and train schedules that frequently cross state borders?

## 2. *Conditional Clauses*

Given the legitimate concerns of regional disorganization and chaos, states that prefer permanent daylight saving time need a way to assure Congress that they can coordinate among themselves. Otherwise, by giving states the additional option of permanent daylight saving time, Congress increases the risk that neighboring states will observe different time zones, at least during portions of the year.

The problem states face is that they cannot take for granted that other states will join them in preferring permanent daylight saving time. Not all states share the same preferences for adjusting the clock.<sup>201</sup> For instance, those in the northeast corridor face unique daylight challenges. Easternmost states have much to gain from permanent daylight saving time. Much of New England, Rhode Island, Maine, and Massachusetts would benefit from later sunsets—around 5 pm instead of 4 pm.<sup>202</sup> By contrast, states on the western border of the Eastern Standard Time zone—western Indiana, Michigan, and North Dakota—would experience darker days.<sup>203</sup> The sun would not set until after 6 pm, but the latest sunrise would occur after 9 am from mid-November to mid-February.<sup>204</sup>

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200. See U.S. Sen. Patty Murray, *Senator Murray Calls for Permanent Daylight Saving Time Ahead of Clocks Falling Backward This Weekend* (Nov. 4, 2021), <https://www.murray.senate.gov/senator-murray-calls-for-permanent-daylight-saving-time-ahead-of-clocks-falling-backward-this-weekend/> [<https://perma.cc/QY5D-EDTB>] (“Senator Murray has been a strong proponent of making DST permanent, expressing her support after Governor Inslee signed legislation into law to make DST permanent in Washington state.”); see also WASH. REV. CODE § 1.20.052 (2024) (conditioning Washington’s adoption of year-round daylight saving time to the passage of federal law allowing the states to do so).

201. See STATE LEGISLATION, *supra* note 178 (collecting various state approaches).

202. See Justin Grieser, Joe Fox & Tim Meko, *How Permanent Daylight Saving Time Would Change Sunrise and Sunset Times*, WASH. POST (March 4, 2024), <https://www.washingtonpost.com/weather/2022/03/17/daylight-saving-time-sunrise-sunset/> [<https://perma.cc/FKD7-5CT5>].

203. *Id.*

204. *Id.*

States needed a way to signal their preferences and persuade others to adopt permanent standard time as the new norm. Consequently, twenty-one states adopted or otherwise proposed legislation containing conditional clauses *recruiting their neighbors to join them*.<sup>205</sup> For instance, Connecticut's bill states, "That section 1-6 of the general statutes be amended to delete the provision concerning advancing the standard of time one hour in March of each year until November, upon the adoption of the elimination of daylight saving time in Massachusetts, New York and Rhode Island."<sup>206</sup>

Conditional clauses, by themselves, are not new.<sup>207</sup> States have long conditioned their bills on similar bills enacted in other states to "compete with, or to repel the expansion of, federal administration."<sup>208</sup> In the early twentieth century, Felix Frankfurter and James Landis observed that states were exploring ways to engender "a fruitful interchange of views on State policies essential to an understanding of common interests."<sup>209</sup> Since then, states have combined their legislative initiatives across multiple policy fronts, from immutable areas like daylight saving time and state boundaries<sup>210</sup> to complex health care regulations, law enforcement,<sup>211</sup> transportation,<sup>212</sup> genetically modified foods,<sup>213</sup> and copyright.<sup>214</sup>

205. Those states are Connecticut, Delaware, Maryland, Massachusetts, Michigan, New Hampshire, New York, Pennsylvania, Rhode Island, Vermont, Colorado, Montana, New Mexico, North Dakota, Utah, Wyoming, Iowa, Missouri, Nebraska, Nevada, and Tennessee. None of these states have adopted legislation with a conditional clause that does not also have a trigger clause. See STATE LEGISLATION, *supra* note 178.

206. H.B. 06071, 2023 Gen. Assemb., Jan. Sess. (Conn. 2023). Other bills refer to "bordering" or "neighboring" states. Colorado's law, for instance, notes "[e]ighteen states, including Colorado's neighboring states of Utah and Wyoming, have already enacted laws to permanently stay on daylight saving time year-round when federal law changes to allow states to move to permanent daylight saving time." H.B. 22-1297 § 1(f), 73rd Gen. Assemb., Reg. Sess. (Colo. 2022). Enacted in 2020, the law does not enter effect until "[a]t least four states in the Mountain Standard Time Zone, in addition to Colorado, enact legislation that becomes law making coordinated" daylight saving time their standard time throughout the year. *Id.* at § 2(2.5)(B).

207. See, e.g., PHILIP SCRANTON, PROPRIETARY CAPITALISM: THE TEXTILE MANUFACTURE AT PHILADELPHIA, 1800–1885, at 38 (1983) (describing how powerful state interest groups lobbied state lawmakers during 1837 hearings on child labor, urging the state to offer schooling for millworker children and reduced hours of work, "but only if other states acted in like manner").

208. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 381 (2018).

209. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 688–89 (1925) (describing reciprocal legislation, uniform state laws, and other interstate initiatives).

210. See, e.g., Samuel McCune Lindsay, *Reciprocal Legislation*, 25 POL. SCI. Q. 435, 454 (1910) (describing a New Jersey act for the protection of sturgeon on the Delaware River that provided it "shall take effect when similar acts shall have been passed by the legislatures of Delaware and Pennsylvania" and ensuing similar acts by Pennsylvania and Delaware).

211. See Bulman-Pozen, *supra* note 208, at 387.

212. *Id.*

213. *Id.* at 388 n. 41 (describing Connecticut's conditional legislation seeking to impose a requirement to label genetically modified goods in the Northeast).

214. See, e.g., Patrick Cronin, *The Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 COLUM. J.L. & ARTS 221, 234 (2012) (noting that some states passed "copyright laws which would only take effect when every other State passed similar laws").

The National Popular Vote Compact (NPVC) may be the most well-known initiative to interlink state legislation.<sup>215</sup> Many critics dislike the Electoral College, or rather, what has *become* of it (a “winner-take-all rule”),<sup>216</sup> and propose state-level conditional legislation.<sup>217</sup> Under that proposal, the compact would come into effect “if and only if other states, whose electors taken together with this state’s electors total at least 270, also enact [the same laws].”<sup>218</sup>

States’ efforts remain a work in progress. Many continue to vacillate on adopting permanent standard time or permanent daylight saving time, waiting for neighboring states to take a decisive position before adopting their own.<sup>219</sup> Of the nine states with conditional legislation in the northeastern region, for instance, five passed or are considering legislation to observe permanent standard time,<sup>220</sup> and six passed or are considering legislation to observe permanent daylight saving time.<sup>221</sup>

Some states have modified their legislative initiatives in response to their neighbors’ legislation. Vermont’s original bill, for instance, proposed adopting permanent standard time and was conditioned on Connecticut, Maine, Massachusetts, New Hampshire, and Rhode Island doing the same.<sup>222</sup> However, its bill never made it out of committee, perhaps reflecting that the

215. See Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 375 (2007) (discussing states’ interest in a popular-vote system following the outcome of the 2000 election, in which Governor Bush received a majority of the electoral vote even though Vice President Gore received a plurality of the popular vote).

216. *Id.* at 225; see also JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 2–42 (1975) (describing a host of “indictments” against the Electoral College based on how it has evolved over time).

217. See Robert W. Bennett, *Popular Election of the President without a Constitutional Amendment*, 4 GREEN BAG 241, 243–46 (2001); Muller, *supra* note 215, at 372 (noting that “attempts to abolish the Electoral College at the federal level have failed”).

218. See Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html> [<https://perma.cc/4MSE-BH44>]; see also Muller, *supra* note 215, at 375; Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 239 (2011) (explaining that states were considering the National Popular Vote Compact despite scholarly opposition). Under their proposal, as more states joined the compact, Congress would become involved to approve the compact and “supplement it with a system of uniform rules for tallying sentiment in all fifty states.” *Id.* at 252. Nevertheless, while their proposal was largely adopted, the drafters of the NPVC plan dropped the reference to Congress and left authority with the states. *Id.*

219. See, e.g., H.3405, 194th Gen. Ct., Reg. Sess. (Mass. 2025) (proposing that Massachusetts will adopt permanent standard time should Connecticut, New Hampshire, Rhode Island, and Vermont do the same); H.B. 584, 67th Leg., 2nd Reg. Sess. (Idaho 2024) (stating that Idaho will discontinue daylight saving time as soon as any two of the states of Montana, Utah, Wyoming, Washington, or California do so).

220. Those states are Connecticut, Massachusetts, New Hampshire, and Rhode Island. See STATE LEGISLATION, *supra* note 178.

221. Those states are Delaware, Maryland, Michigan, New York, Pennsylvania, and Vermont (the latter originally proposed permanent standard time). *Id.* Note that this list only includes states seeking permanent daylight saving time conditional on interstate agreement. It leaves off states like New Jersey that seek permanent daylight saving time but whose proposed bills do not have conditional clauses.

222. See H.168, 2021 Gen. Assemb., Reg. Sess. (Vt. 2021).

named states were adopting or considering *permanent daylight saving time*, instead.<sup>223</sup> A second draft bill, submitted in 2023, seeks permanent daylight saving time in line with Vermont’s influential neighbors.<sup>224</sup>

Some Congress members, too, have been affected by states’ collective efforts. In her remarks on the Senate floor,<sup>225</sup> Senator Murray emphasized that states across the country, from Florida and California to Maine and many more, have now passed legislation or resolutions to make Daylight Saving Time year-round.<sup>226</sup> The Senate was convinced and adopted the Sunshine Protection Act on March 15, 2022.<sup>227</sup> However, the bill languishes before the House,<sup>228</sup> reportedly over concerns that other matters should take priority, that the research concerning the effects of daylight saving time is incomplete, and that changing the clock could disparately impact areas that rely on tourism.<sup>229</sup>

\* \* \*

Is persuasive resistance limited to matters of interstate coordination? For instance, states that believe strongly in supporting the right to an abortion may not *want* to coordinate with neighboring states, which may believe just as strongly in restricting, if not eliminating, those rights. There may be other instances in which states care less about persuading each other and Congress than publicly attacking federal mandates in court. Or they may be perfectly content addressing their resistance through the obscurity of evasion.

This Article does not argue nor propose that states adopt the strategy of conditional and trigger legislation in all instances of resistance to preemption. However, there are areas in which states would benefit by signaling their resistance and identifying state and federal allies. Take immigration. On January 20, 2025, President Trump signed an executive order, “Protecting the American People Against Invasion,” demanding sweeping action against undocumented

223. See, e.g., The Sunshine Protection Act of 2021, H.R. 69, 117th Cong. (2021) (“This bill makes daylight savings time the new, permanent standard time.”); The Sunshine Protection Act of 2023, H.R. 1279, 118th Cong. (2023) (“This bill makes daylight savings time the new, permanent standard time.”).

224. See H.329, 2023 Gen. Assemb., Reg. Sess. (Vt. 2023).

225. U.S. SENATE, *Senators on Daylight Saving Time Legislation* (C-SPAN, Mar. 15, 2022), <https://www.c-span.org/program/us-senate/senators-on-daylight-saving-time-legislation/609751> [<https://perma.cc/747R-NPQC>] [hereinafter *Senators on Daylight Saving Time*] (in which Sen. Patty Murray names states that had adopted trigger laws to support her recommendation to adopt the Sunshine Protection Act).

226. *Id.*

227. Sunshine Protection Act of 2021, S. 623, 117th Cong. (as passed by Senate, Mar. 15, 2022).

228. *Id.*

229. See Addy Bink, *Bill to Make Daylight Saving Time Permanent Reintroduced in Congress*, THE HILL (March 2, 2023, at 08:58 ET), [https://thehill.com/homenews/nexstar\\_media\\_wire/3880009-bill-to-make-daylight-saving-time-permanent-reintroduced-in-congress](https://thehill.com/homenews/nexstar_media_wire/3880009-bill-to-make-daylight-saving-time-permanent-reintroduced-in-congress) [<https://perma.cc/MBL6-RNZ3>].

immigrants and their children.<sup>230</sup> It is conceivable that conservative states like Texas and Florida, while initially receptive, might change their position on the order once their influential agricultural and farming communities lack capable staffing. States unhappy with the federal agenda have good reason to signal their resistance and recruit others to the cause. Congress may feel more emboldened to join the resistance if it unifies across political borders.

But wait, don't these bills violate the Constitution? While an interesting question for academic debate<sup>231</sup> (what is a compact? at what point is there a conflict?), the bills' trigger clauses likely save them from constitutional scrutiny.

Those bills do not offend the Supremacy Clause<sup>232</sup> because they are not legally enacted until Congress amends its legislation to remove the conflict. Conditional clauses *alone* arguably could violate the Interstate Compact Clause, which prohibits states from entering into "compacts" with each other without the consent of Congress.<sup>233</sup> Some constitutional scholars argue that these types of interstate strategies are unconstitutional because of their potential impact on the national agenda.<sup>234</sup> Conditional clauses *coupled with trigger clauses*, however, address those concerns by ensuring that Congress considers the legislative initiatives and supports them.

Still, even with trigger clauses, aggregate state persuasion may strike some as worrisome given the potential for states to increase their political power. However, as the Supreme Court majority held in *U.S. Steel Corp. v. Multistate Tax Commission*, even where there is "some incremental increase in the bargaining power of the member States,"<sup>235</sup> that increase "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."<sup>236</sup> In the case of states' conditional and trigger clause bills, states'

230. See *Protecting the American People Against Invasion*, WHITE HOUSE: PRESIDENTIAL ACTIONS (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/> [<https://perma.cc/BAM3-ZVPA>].

231. See, e.g., Muller, *supra* note 215, at 388 (arguing that constitutional doctrine requires states to obtain congressional approval before passing conditional clauses); Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 214 (2007) (arguing that a relevant test is whether the compact would enhance state power relative to that of the federal government); Daniel P. Rathbun, *Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008) (arguing that any agreement between states disrupts the vertical balance between the states and the federal government); Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the Federal Structure*, 44 N.M. L. REV. 383, 384 (2014) (describing the National Popular Vote effort that asks states to "sign an interstate compact binding them" to give their electoral college votes to the winner of the popular vote); Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1500 n. 5 (2009) (citing constitutional doctrine to argue that certain compacts likely do not require congressional consent).

232. U.S. CONST. art. VI, cl. 2.

233. *Id.* art. I, § 10, cl. 3.

234. See Pincus, *supra* note 46, at 513–14 (urging new doctrine prohibiting coalitions of states from entering into agreements that might "effect change on a national level" in the absence of congressional consent).

235. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472–73 (1978).

236. *Id.* at 473.

efforts to recruit other states to adopt similar legislation without binding states to commitments, while deferring to Congress, arguably fit within states' expressive powers.<sup>237</sup>

### III. UNDERSTANDING PERSUASIVE RESISTANCE

Our system of federalism permits regulatory decisions to be made at either the state or national level.<sup>238</sup> Robert Glicksman and Richard Levy note that, all things being equal, state governments are “more directly accountable and more familiar with regional conditions . . . [and are therefore] in a better position than the federal government to make policy judgments for their constituencies.”<sup>239</sup> On the other hand, the federal government is better positioned to regulate and, therefore, preempt matters “when the cost-benefit analysis of state policymakers is distorted by collective action problems.”<sup>240</sup> Accordingly, decisions on the federal level often turn on whether states will suffer collective action problems in a given area.<sup>241</sup>

Congress's decision to displace states' regulatory powers based on its assumptions of hypothetical collective action problems raises worrisome questions. What happens when Congress preempts matters that states are capable of self-coordinating? How can states intervene in federal decision-making to correct faulty or outdated assumptions? This Article has mapped the various strategies of state resistance to preempting federal laws. Only one of those strategies, persuasive resistance, works symbiotically with federal decision-makers to reconsider assumptions of collective action problems. Left aside until now is an explanation of how it operates persuasively to engender that reconsideration.

A significant body of psychological and behavioral scholarship suggests that states can influence and persuade state and federal actors through instrumental design.<sup>242</sup> Decision-makers make choices based on available

237. See *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 472 U.S. 159, 175 (1985) (identifying four criteria for distinguishing permissible from impermissible interstate compacts: (i) the establishment of a joint organization or body; (ii) the conditions linking a state's action to the actions of other participating states; (iii) the restrictions on the ability of member states to modify or repeal their laws unilaterally; and (iv) the constraints on each state's regulations); cf. *U.S. Steel*, 434 U.S. at 491–93 (White, J., dissenting) (arguing that the low-cost and voluntary nature of conditional clauses rendered them influential and thus relatively more powerful in relation to the federal government).

238. See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 592 (2008).

239. *Id.*

240. *Id.*

241. On that point, as Thomas Merrill argues, “The federal government was created only later and was to engage in functions that the states were regarded as collectively or individually incompetent to perform.” See Merrill, *supra* note 10, at 745.

242. See, e.g., THALER & SUNSTEIN, *supra* note 184, at 19 (describing efforts by the Obama Administration and in the United Kingdom to create regulatory units that apply behavioral science to regulations capable of influencing compliance); see also Carlson, *supra* note 103, at 1099 (“The most innovative

information, which may be flawed, biased, or erroneous.<sup>243</sup> Instruments like laws can offer decision-makers better information, assisting in coordination by signaling preferences and offering assurances.<sup>244</sup> This Part establishes a typology to show how laws can affect decision-making through (1) signaling; (2) building sites of resistance; and (3) assuring decision-making autonomy.

### A. Signaling

The most important feature of states' persuasive resistance is its public signaling.<sup>245</sup> Those signals are directed horizontally to sister states and vertically to the federal government. The greater the level of coordination (such as the number of states), the more visible the signal to state and federal actors. This section briefly reviews the behavioral and game theories to explain that link. It argues that state signals help sister states overcome collective action problems and risk avoidance, and help the federal government identify social preferences and state capacities.

#### 1. Signaling Sister States

A central feature of states' persuasive resistance is its ability to signal preferences and commitments to other states.<sup>246</sup> Doing so offers information to other states, facilitating self-organizing and coordination.<sup>247</sup> By coordinating their efforts, states may persuade Congress to reconsider its decision to preempt or, as in the case of daylight saving time, amend its preemptive approach to reflect the widespread interests of large coalitions of states.<sup>248</sup> A state's success, therefore, rests on whether it can combine its actions in a certain way—through legislation—recognizing that more than one possible solution could suffice.

On their own, however, states have a coordination problem. They are not necessarily aware of the initiatives and priorities of other state legislators. Legal

state responses to climate change are neither the product of state regulation alone nor are they exclusively the result of federal action. Instead, such regulations are the results of repeated, sustained, and dynamic lawmaking efforts . . . .”).

243. See THALER & SUNSTEIN, *supra* note 184, at 137–38 (describing how regulators can improve decision-making by making better information available than might otherwise have been shared).

244. See Stephen Morris & Hyun Song Shin, *Global Games: Theory and Applications*, in 1 ADVANCES IN ECON. AND ECONOMETRICS: THEORY AND APPLICATIONS 56, 57 (Mathias Dewatripont, Lars Peter Hansen, & Stephen J. Turnovsky eds., 2010) (noting that while it is impossible to have an “adequate account of the subtle reasoning undertaken” by decision-makers, game theories offer a heuristic device that enables researchers to identify outcomes of the games and analyze potential results).

245. For an excellent explanation of public signaling as a coordinating device, see Nicholas Almendares & Dimitri Landa, *Incitement as Coordination* (forthcoming). I thank Nick Almendares for helpful discussions on this section.

246. See *id.* at 33–35 (discussing the impact of individual preference in group coordination).

247. *Id.*

248. See Huq, *supra* note 31, at 263–64.

scholars often depict coordination problems as a prisoners' dilemma.<sup>249</sup> This dilemma stems from a lack of information. Under this scenario, two prisoners are detained separately and offered a choice between remaining silent or incriminating the other.<sup>250</sup> If both remain silent, they each receive a relatively light sentence (five years).<sup>251</sup> If they both incriminate each other, they receive heavier sentences (seven years). If only one incriminates the other and the other remains silent, the silent prisoner receives a relatively harsh sentence (say, ten years), and the other goes free.<sup>252</sup> The relative payoffs are often represented in a two-by-two matrix reflecting the possible sentences.

		Prisoner 1	
		Remain Silent	Incriminate the Other
Prisoner 2	Remain Silent	5 years, 5 years	Go free, 10 years
	Incriminate the Other	10 years, Go free	7 years, 7 years

**Fig. 1 Prisoners' Dilemma**<sup>253</sup>

According to this theory, now part of legal lore, without information about the other's actions, both prisoners are enticed to incriminate each other, resulting in the worst sentence for each.<sup>254</sup> The prisoners' dilemma shows the undesirable yet inevitable effects of individually rational actions. States worried about going it alone have little incentive to resist preemption, just as prisoners have little incentive to refrain from incriminating one another.<sup>255</sup>

In addition to the prisoners' dilemma, game theory proposes coordination games to elucidate the importance of signaling in deciding among multiple solutions.<sup>256</sup> One of the games that is helpful in the present context is the

249. See, e.g., *id.* at 240–42 (“[T]he prisoners’ dilemma illustrates how individually rational actions can yield collectively undesirable outcomes.”).

250. See generally *id.* at 240 (explaining the prisoners’ dilemma scenario).

251. See *supra* Fig. 1 Prisoner’s Dilemma.

252. See *id.*

253. See *id.*; see also Huq, *supra* note 31, at 241 (illustrating “how individually rational actions can yield collectively undesirable outcomes”).

254. See Huq, *supra* note 31, at 241.

255. See generally *id.* at 242 (applying the prisoners’ dilemma to state collective action issues).

256. See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CALIF. L. REV. 209, 218–25 (2009) (explaining three games of coordination).

assurance (otherwise known as the stag hunt) game.<sup>257</sup> Assume that there are two players and two possible strategies. If Player 1 selects Strategy A, then Player 2 is better off selecting Strategy A and receiving 4 points than selecting Strategy B and receiving 3 points.<sup>258</sup> If, on the other hand, Player 1 selects Strategy B, then Player 2 is better off selecting Strategy B and receiving 3 points instead of Strategy A and receiving 0 points.<sup>259</sup> Because the payoffs are equivalent, Player 1 has the same preferences.<sup>260</sup> Consequently, the players want to match strategies.<sup>261</sup> The game has two strategy equilibria: A/A and B/B:

		Player 2	
		Strategy A	Strategy B
Player 1	Strategy A	4, 4	0, 3
	Strategy B	3, 0	3, 3

**Fig. 2 Assurance Game**<sup>262</sup>

In this scenario, the players are better off selecting Strategy A/A (which affords each 4 points) than B/B (which affords each 3 points).<sup>263</sup> This common preference should make it easy to reach the optimal outcome. The problem here is the risk of selecting Strategy A without complete information. Strategy B is safer for Player 2 because it guarantees 3 points, while Strategy A could afford 4 or 0 points.<sup>264</sup> The lack of information signaling the players' preferences causes a coordination problem, where coordination offers the best solution.

The assurance game helps illustrate the importance of states' conditional clauses. It captures the idea that state legislators may be influenced into taking a specific action if they believe, or are assured, others are taking the same

257. *Id.* at 220–21.

258. *Id.* at 220.

259. *See id.*

260. *See id.*

261. *See generally id.* at 221 (“[E]ach [player] needs to assure the other that he or she is going to play the riskier strategy . . . so the other should as well.” (footnote omitted)).

262. *See id.* at 220 (modeling the Assurance Game).

263. *See id.* at 220.

264. *See id.*

action.<sup>265</sup> Studies have found that information announced publicly, such as through legislation, is more reassuring than bilateral dialogues with the same information.<sup>266</sup> A state's willingness to commit to its preference through law reflects a public investment. Their conditional clauses elevate the publicity of choice, which "might be expected to have an apparently disproportionate effect on the probability of ending in the good equilibrium."<sup>267</sup>

Take, for instance, the legislative hearings in Vermont, where advocates and legislators hotly debated whether "all of the New England states" would adopt the same policy regarding daylight saving time.<sup>268</sup> Legislative discussions turned to the need to inform New York, New Hampshire, and Massachusetts because "we're a small state" and "we need to team up on this."<sup>269</sup> Vermont's deliberations, along with those in Connecticut and New York, were later raised in New Hampshire debates around whether to adopt permanent daylight saving time or standard time.<sup>270</sup>

As the assurance game suggests, states' conditional clauses are extremely risky.<sup>271</sup> Interstate cooperation is not a foregone conclusion. Some states have not decided whether to join the pack of states favoring permanent daylight saving time.<sup>272</sup> Having these initiatives unfold publicly may generate signals of interstate chaos rather than organization, which could lead to the conclusion that federal interventions are necessary to maintain coherence. For these reasons, federalism scholars dismiss the utility of interstate initiatives, "citing the putative difficulty of securing unanimity among any numerically large number of participants."<sup>273</sup> Drawing on Coasean theory, Robert Cooter and Neil Siegel argue that the number of participants is critical in determining transaction costs.<sup>274</sup> These studies conclude that "[t]he more states there are

265. See Morris & Shin, *supra* note 244, at 58 (explaining "the importance of public information in contexts where there is an element of coordination between the players" by creating instances of equilibrium selection).

266. *Id.* at 82 ("Such public briefings have a larger impact on the market than bilateral briefings . . . because they automatically convey to participants not only information about market conditions, but also valuable information about the beliefs of the other participants.").

267. *Id.* at 83 (describing the benefits of a "well-publicized investment" in a specific option).

268. VERMONT HOUSE COMMITTEE ON GENERAL & HOUSING, *House General 03-21-23 2:40PM*, at 13:08 (YouTube Mar. 21, 2023), <https://www.youtube.com/watch?v=JlbasM0UbhY&t=776s> [<https://perma.cc/ZND5-WUMT>].

269. *Id.*

270. See SAVE STANDARD TIME, *New Hampshire House Hearing on Permanent Standard Time & DST (2024 January 24)*, at 28:22 (YouTube Jan. 27, 2024), [https://www.youtube.com/watch?v=QHehGL\\_hVf4&t=1s](https://www.youtube.com/watch?v=QHehGL_hVf4&t=1s) [<https://perma.cc/UB8Q-SPT2>].

271. See Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS: J. FEDERALISM 1, 10 (1993) (noting that states sometimes lobby Congress to express their dissent to preempting legislation, but "[i]f few or no states make their opposition to a preemption statute known to the Congress, it will not enact a relief statute.>").

272. See CONG. RSCH. SERV., R45208, DAYLIGHT SAVING TIME (DST) 8 (2020).

273. See Huq, *supra* note 31, at 261 (citing Cooter & Siegel, *supra* note 49, at 140–41).

274. See Cooter & Siegel, *supra* note 49, at 143.

that must work together . . . the larger the costs of cooperation, and the greater the chance of failure.”<sup>275</sup>

States’ conditional clauses mitigate the possibility of unruly numbers. They are designed to limit the number of state participants by naming a select few neighbors rather than regions and beyond.<sup>276</sup> Doing so avoids the unruly collective action problem, where states situated differently (in this case, due to their proximity to the sun) would feel compelled to make different decisions based on their rational interests. By coordinating piecemeal, state laws demonstrate the social desirability of an option that would otherwise be unavailable under preempting legislation. They also demonstrate that they can sufficiently self-coordinate despite having more options than Congress envisioned.

Furthermore, even if states’ conditional clauses fail to elicit immediate follow-up action among their named participants, the costs of enacting legislation are relatively low. Historically, due to potential costs, states have been reluctant to adopt innovative policies.<sup>277</sup> They often freeride on the innovations modeled by other states.<sup>278</sup> In this instance, states may freeride on the legislative efforts of different states, which have drafted the trigger and conditional clauses that states can reproduce in their laws. Moreover, states’ trigger clauses buy states time to persuade one another and lobby domestically. Their bills only take effect once federal decision-makers are convinced of state preferences and organizing capacities. Effectively, those bills could remain in effect for as long as it takes to self-organize because there is no law on the books for judges to strike down.

## 2. *Signaling Congress*

When Congress legislates cooperative programs or preempts legislation, it does so based on a series of assumptions or biases regarding state behavior.<sup>279</sup> It may assume that states suffer regulatory gaps and market failures or will compete with and undermine one another to the detriment of national

275. See Huq, *supra* note 31, at 232.

276. H.267, 2023 Gen. Assemb., Reg. Sess. (Vt. 2023).

277. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEG. STUD. 593, 614–16 (1980) (finding that political cost and risk aversion results in a lack of innovation).

278. See Huq, *supra* note 31, at 262 (“Rational states have an incentive to refrain from innovation because they will not be able to capture all its benefits. Instead, they prefer to free ride on the innovation of others.”).

279. See Martin Hilbert, *Toward a Synthesis of Cognitive Biases: How Noisy Information Processing Can Bias Human Decision Making*, 138 PSYCH. BULL. 211, 211 (2012) (noting that psychological research on human judgement over several decades has produced “an impressive list of ‘heuristics and biases’” impacting decision-making).

welfare.<sup>280</sup> Or it may assume that states lack coordinating capacities, demanding a centralized authority to coordinate decisions on their behalf.<sup>281</sup>

Recall that those kinds of assumptions contributed to the UTA, which confines states' options to biannual clock adjustments and an opt-out.<sup>282</sup> States' conditional clauses, which publicly signal their ability to coordinate without federal control, offer Congress better information about whether they can align themselves across additional daylight options, potentially motivating Congress to revisit its initial approach.

In her article *Dissenting by Deciding*, Gerken argues that when minority actors such as states outwardly resist the majority approach, they present a "real-life instantiation of what successful" counterapproaches would look like.<sup>283</sup> Because minority resistance "takes the form of an outlier decision, not an argument, it is inherently visible to the polity."<sup>284</sup> Even if states' efforts prove unsuccessful, Gerken's work suggests that their bills still push "the marketplace of ideas" by encouraging Congress to evaluate its views and make corrections where necessary.<sup>285</sup> Although Congress's initial decisions may prove sticky, states' efforts make it more difficult to proceed without at least considering and offering justifications.<sup>286</sup>

"Acting radically," such as by passing legislation, is more visible than traditional dissent through oration.<sup>287</sup> More than mere words, state bills bind the resisting state. Reversing the decision would take a legal act.<sup>288</sup> In that sense, resistance expressed through trigger and conditional legislation can serve as an "equalizer of sorts" by paving expressive pathways to congressional decision-making.<sup>289</sup>

Although Gerken avoids the question of preemption, she uses "hard federalism" as an example of how action-based resistance is often misunderstood as a battle between competing sovereigns rather than a decision made by a minority of the polity.<sup>290</sup> Referring to *U.S. Term Limits, Inc. v. Thornton*,<sup>291</sup> in which the Supreme Court invalidated a term limit rule passed by

280. See Huq, *supra* note 31, at 278 ("Rather than preserving the 'commons' of state regulatory and fiscal autonomy this argument suggests, each legislator will tend to overuse that shared resource as they pursue their interests in reelection and interest-group satisfaction.").

281. See *id.* at 227–28.

282. See CONG. RSCH. SERV., *supra* note 272, at 2.

283. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1766–68 (2005).

284. *Id.* at 1760.

285. *Id.* at 1759 (emphasis removed).

286. *Id.* at 1762 (arguing that the binding nature of legislated resistance "is harder to ignore" and "thereby allows electoral minorities to engage in the type of agenda setting that is otherwise difficult for those whose" input is not automatically solicited and incorporated).

287. *Id.* at 1761.

288. *Id.* at 1762–63.

289. *Id.* at 1762.

290. *Id.* at 1790.

291. 514 U.S. 779 (1995).

voters in Arkansas, she muses whether the opinion would have been different had congressional districts throughout the country “signed a pledge or contract” to impose term limits.<sup>292</sup>

While state legislators lack a formal enclave into preempting decision-making within the federal government, their overlapping responsibilities, for instance, in the House, and as local advocates, place their resistance in a broader context of participatory governance rather than as an outside intrusion. The debates in Congress, like those on the Sunshine Protection Act, are carried out in public, forcing explanations—if not defenses—of preempting approaches that may have otherwise been taken for granted.<sup>293</sup> Even if it takes no action, Congress is more likely to revisit its preempting approach, as sticky as such an approach may be, if states use conditional and trigger clauses in their legislation, publicly signaling coordinated resistance.

### B. *Creating Focal Sites of Resistance*

Game theorists argue that coordination problems can be resolved when there is “some focal point for each person’s expectation of what the other expects him [or her] to expect to be expected to do.”<sup>294</sup> By adopting bills with trigger clauses expressing the desire for Congress to amend the UTA to allow permanent daylight saving time, states create focal sites of resistance to preemption.<sup>295</sup> State participants organize around focal points by coordinating their efforts to achieve an expected outcome, in this case, UTA amendments. Coordination isn’t a given, but states are more likely to coordinate if they are aware of coordinating efforts and prospects and can witness momentum among states.<sup>296</sup>

By building focal sites of resistance, such as through conditional clauses that interlink states’ alternative policy preferences, states’ strategies serve as necessary feedback loops, correcting Congress’s incomplete information during implementation.<sup>297</sup> They signal and engender multidirectional frictions:

292. See Gerken, *supra* note 283, at 1790.

293. *Id.* at 1762–63.

294. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 57 (1960).

295. See Bulman-Pozen, *supra* note 208, at 395 (describing the historical role of states’ regional organizing); SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 144 (3rd ed. 2011); David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 133, 136 (Aldon D. Morris & Carol McClurg Mueller eds., 1992); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 22 (2015) (“Some of the earliest and most informal game theory shows that, if individuals share an interest in *coordinating* their behavior, they tend to engage in the behavior they find mutually salient—the *focal point*.”).

296. See MCADAMS, *supra* note 295, at 101 (referring to movements that aim to destabilize an existing legal convention, arguing that “*uncoordinated individual confrontations are less likely to succeed than coordinated individual confrontations*”).

297. Compare *id.*, with Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Nonpreempting Regimes*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION*

vertically from the federal government to states, horizontally between states, and vertically from states up to the federal government.

As state numbers grow, so might the persuasive effect of their signals on Congress to amend its preempting legislation, at least when its initial preempting decisions were based on assumptions of state collective action problems.<sup>298</sup> Notably, during the congressional hearings on the Sunshine Protection Act, legislators focused on the *number* of states opting for permanent daylight saving time to drive amendment efforts.<sup>299</sup>

### C. *Respecting Decision-Making Autonomy*

States' persuasive resistance leaves sister state and federal decision-making autonomy unfettered.<sup>300</sup> That is, sister states and Congress can completely ignore it or decide its persuasive value.<sup>301</sup> Indeed, the voluntary nature of states' bills and recruitment efforts helps protect their constitutionality.<sup>302</sup> As alluded to above, if those bills seek to bind sister states, they would appear less like state-level expressions of resistance and more like the types of interstate compacts that concern scholars and federal judges.<sup>303</sup>

Michael Greve and others worry that, even when voluntary, interstate initiatives can operate as if they are mandatory.<sup>304</sup> Like cartels, strong states will unduly pressure weaker states into regulatory decisions that benefit the more powerful. One can imagine how that pressure might manifest in a regulatory environment where one state could dismantle collective organizing—consider Vermont's efforts to adopt permanent standard time against the tide in the Northeast, in contrast to the Northeast's adoption of permanent daylight saving time.<sup>305</sup> States may feel compelled to follow suit to avoid political ostracism, even when doing so is ultimately unsatisfactory to local constituents. In those instances, nothing stops small states from succumbing to pressure and, years later, amending their legislation to protect local interests.

236 (William W. Buzbee, ed. 2009) (“One important, but often-overlooked consequence of allowing federal regulatory law to preempt state common law is the destruction of this feedback loop.”).

298. See, e.g., TARROW, *supra* note 295, at 88 (“As movements learned to use the apparatuses of national communications and consolidated states, governments had to grudgingly accept forms of collective action whose legitimacy they had earlier resisted . . .”).

299. See Senators on Daylight Saving Time Legislation, *supra* note 225 (focusing on how many states oppose the UTA).

300. See Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REGUL. 413, 414 (2015) (“The last decade has seen a remarkably rapid growth of interest in choice-preserving, low-cost regulatory tools.”).

301. *Id.* at 417.

302. See *Ne. Bancorp.*, 472 U.S. at 175.

303. See *id.* (including among the “classic indicia of a compact” for interstate compact clause purposes the conditioning on action by another state and limiting each state’s right to modify or repeal its law unilaterally).

304. See Grove, *supra* note 18, at 86–87.

305. See H. 168, 2021–2022 Gen. Assemb., Reg. Sess. (Vt. 2021).

The autonomy feature is, therefore, important. The more decision-makers feel empowered over their choices, the more likely they are to comply with their decisions in the long term.<sup>306</sup> Compliance is critical in a state-driven regulatory scheme that centers on front-end commitments (such as permanent daylight saving time) without monitoring mechanisms or repercussions for adopting different approaches down the line. For instance, it offers state legislatures the policy space to explore their own “preferences through reasoning,” resulting in greater motivation to examine their own decisions.<sup>307</sup> In the context of daylight saving time, state legislators balance the invitation to enact similar legislation against the available information concerning the health and safety of their unique populations.<sup>308</sup> Some bills, for instance, “cite[] findings that the annual change from standard time to daylight saving time can have negative impacts, such as disrupting sleep, increasing health issues, and reducing work productivity.”<sup>309</sup> States’ concerns about protecting residents may or may not align with those of their sister states. Decision-making autonomy enables states to situate their local interests within broader interstate movements, resulting in long-term commitments rather than short-term promises.

States’ trigger clauses also preserve Congress’s decision-making autonomy. Part I explained how states often turn to litigation to enlist judges to minimize or overturn federal preemption aggressively.<sup>310</sup> In those instances, judges may require Congress to abandon its preempting approach.<sup>311</sup> By contrast, states’ trigger clauses enlist Congress’s assistance by persuading it of states’ social norms and conventions.<sup>312</sup> By coming to their own decisions autonomously, members of Congress, like state actors, may feel compelled to honor those decisions in the long term, at least more so than a decision imposed upon them by a federal judge.

Even though Congress remains autonomous, shouldn’t it seek to dissuade rather than respond positively to state aggregation? If states build their political

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306. See generally THALER & SUNSTEIN, *supra* note 184, at 20 (“Better governance often requires less in the way of government coercion and more in the way of freedom to choose.”); see also Cass R. Sunstein & Lucia A. Reisch, *Introduction to the Research Handbook on Nudges and Society*, in RESEARCH HANDBOOK ON NUDGES AND SOCIETY 2 (Cass R. Sunstein & Lucia A. Reisch eds., 2023) (arguing that permitting decision-makers to make their own decisions after providing them better information may “have a larger impact than more expensive and more coercive tools”).

307. See Sanchayan Banerjee et al., *It’s Time We Put Agency into Behavioural Public Policy*, 8 BEHAV. PUB. POL’Y 789, 797 (2024) (arguing that deliberations result in “building cognitive capability and motivation through the regular activation of reflective processes”).

308. See Trey Delida, *Is Daylight Saving Time Worth Saving?*, THE COUNCIL OF STATE GOVERNMENTS (March 11, 2024), [www.csg.org/2024/03/11/is-daylight-saving-time-worth-saving/](http://www.csg.org/2024/03/11/is-daylight-saving-time-worth-saving/) [<https://perma.cc/6L33-986U>] (outlining the various considerations states are giving to their approaches to daylight saving time).

309. *VT H0168*, BILL TRACK 50 (last visited Sept. 12, 2025) (summary generated by AI). <https://www.billtrack50.com/BillDetail/1296498> [<https://perma.cc/B2RY-HG92>].

310. See *infra* Part I.

311. See Eyer, *supra* note 152, at 898.

312. See Murray, *supra* note 200.

and persuasive power, aren't they doing so at the expense of the federal government's power?

The response here turns on whether political power is a zero-sum game. While some scholars view political power as exclusive and competitive, Stephen Gardbaum argues persuasively that state and federal power can grow in tandem.<sup>313</sup> He observes that after the New Deal era, “*both* federal and state governments were constitutionally enabled to regulate a large number of areas of social and economic life that previously they had both been prohibited from regulating.”<sup>314</sup> Cooperative regimes, after all, are celebrated for enabling federal and state governments to realize parallel regulatory power.<sup>315</sup> In preemption, states' collective power enhances oppositional voice but does nothing to undermine the overarching power of the federal government, which remains separate and intact.

Watching states self-organize, for instance, Congress remains free to decide whether states' conditional clauses sufficiently persuade it to invoke their trigger clauses. Again, senators referenced states' pending laws and used those laws to support the argument that Congress should revise its preempting approach.<sup>316</sup> Those senators hail from states that have passed permanent daylight saving time legislation.<sup>317</sup> Yet, the Sunshine Protect Act languishes before the House. The reluctance among House representatives to pass the Act may reflect that *only* 21 states currently have such legislation on the books.<sup>318</sup> It may well be the case that as more states become persuaded, so too may the House. Ultimately, if Congress perceives the information expressed in state bills as beneficial to the national agenda, it alone decides whether to change course. If it perceives that information as inchoate, hostile to the national agenda, or vulnerable to state cost exportation,<sup>319</sup> it remains free to disregard it.

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This Part has explained why states' conditional and trigger clauses are persuasive in the short and long terms. Those clauses assure sister states that they will maintain their decision-making autonomy and invite their coordination. They signal collective action to Congress, asking it to reconsider its priors about state competition and collective action problems. They create

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313. See Stephen Gardbaum, *New Deal Constitutionalism and the Unbacking of the States*, 64 U. CHI. L. REV. 483, 486–87 (1997).

314. *Id.*

315. *Id.*

316. See *Senators on Daylight Saving Time*, *supra* note 225.

317. See *Murray*, *supra* note 200.

318. See states listed, *supra* note 205.

319. See Hills, *supra* note 68, at 27 (“Instead of assuming away the costs of the excessive federalization of the law, one might look for some mechanism to force Congress itself to focus its attention on making the necessary comparison.”).

focal sites of resistance through legislation while preserving the decision-making autonomy of both groups of actors, encouraging participation and ownership. That participation and ownership may increase the likelihood that state and federal decisions will continue long after laws have been adopted and amended.

Persuasive resistance through conditional and trigger clauses could significantly change the relationship between states and national policies. That state strategy seems to support what Gerken and Abbe Gluck call the “nationalist school of federalism”<sup>320</sup> or “national federalism.”<sup>321</sup> Both consider how policymakers and lawmakers devolve regulatory authorities to entrench state pluralism and sovereignty in the national agenda, arguing that the line between federalists and nationalists has intrinsically blurred. Persuasive resistance strategies demonstrate how states have further blurred the line by crafting their own dialectics in areas previously insulated from states’ interstitial interventions.

#### IV. STATES’ STRATEGIC CONSIDERATIONS

At the time of writing, the fate of national regulations is uncertain. The Trump administration (and many in Congress) promises to decentralize regulatory governance and terminate federal programs, policies, and laws<sup>322</sup>—many of which traditionally justified progressive support for federal preemption.<sup>323</sup> State actors that may have been content with evading the reach of federal preemption may find themselves exploring greater protective action. State attorneys general who sought to use progressive litigation to convince Congress to overcome its inertia may sense that litigation will merely provide fodder for Congress to eliminate federal protections and programs. Whether states change their approach to preemption will likely depend on the policy in question and the specific objectives of each state. Yet, as mentioned, states have no formal mechanisms to intervene in preempting areas *ex post*, even when circumstances such as changes in administrations and federal approaches to rights and liberties occur.<sup>324</sup>

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320. See Heather K. Gerken, *Federalism and Nationalism: Time for a Detente*, 59 ST. LOUIS U. L.J. 997, 999–1002 (2015) (arguing that the new nationalists favor devolution as a means to achieve nationalist aims).

321. See Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1999 (“Congress today reaches for the states to restrain the breadth of federal law and to bring the states’ expertise, variety, traditional authority, and sovereign lawmaking apparatus into federal statutes.”).

322. See *President Trump’s America First Priorities*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/briefings-statements/2025/01/president-trumps-america-first-priorities/> [<https://perma.cc/8S2A-Q5VW>] (“The President will . . . freeze bureaucrat hiring except in essential areas to end the onslaught of useless and overpaid DEI activists buried into the federal workforce. He will pause burdensome and radical regulations not yet in effect that Biden announced.”).

323. See Rashmi Dyal-Chand, *Progressive Law, Activism, and Lawyering in an Age of Preemption*, 46 LAW & SOC. INQUIRY 252, 252 (2021).

324. See Abrams, *supra* note 11, at 606 (arguing that preempted states “simply have no power to act”).

This Part considers states' strategies to resist preemption after Congress has adopted them. It avoids assessing whether a given state strategy is "better" or "worse" for society, or even democracy, given that such an assessment would inevitably turn on subjective opinions on the policy. Instead, it considers strategies in light of their objectives, costs, and benefits, recognizing that states face competing demands and circumstances.

Up to now, this Article has treated states as monoliths. Doing so has permitted a singular focus on an emerging persuasive resistance strategy and a recognition of other forms of state-level resistance to federal preemption. Nevertheless, it is impossible, or at best incomplete, to unmoor strategy from its purpose and actors. Those factors reveal the range of options and considerations underlying state resistance.

To illustrate, state attorneys general often adopt strategies to achieve political objectives. Those actors may be less concerned about persuading *all* states than persuading the *right* states (and judges). State governors may focus purely on local issues with an eye to reelection. State legislators may balance local and regional interests with political opportunism. And as Miriam Seifter and others note, state actions must be interpreted as an expression of the heavy influence of private interest groups, advocates, and other third-party organizations.<sup>325</sup>

Rather than charting every possible scenario for all actors and objectives, this Part aims to spark a broader conversation on state strategies. It outlines three possible state objectives, focusing on the relevant actors and recommending the appropriate resistance strategy. It leaves aside the broader normative argument concerning which state actor *should* drive state approaches to regulatory areas that the federal government preempts.<sup>326</sup>

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325. See Seifter, *supra* note 55, at 957–58 (arguing that the homogeneous "state view" is actually constructed by heterogeneous state officials settling for the "lowest-common-denominator"); see also Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2191 (2022) (arguing that the so-called "laboratories of democracy" reflect aggressive advocacy by "interest groups, activists, constituency-mobilization organizations, advocacy coalitions, donor consortia, and other third-party organizations").

Recall that the states' time zone bills described in Part II reflect local advocacy by schools, parents, farmers, chambers of commerce, and sleep experts. See *About*, COALITION FOR PERMANENT DAYLIGHT SAVING TIME (last visited Nov. 22, 2024) (describing advocacy efforts), <https://ditchdst.com> [<https://perma.cc/EBP8-F5Q3>].

326. A discussion concerning which actors are best positioned to advance the needs and interests of states is too important and nuanced to fit into this largely descriptive Article. Scholars have assessed which federal actors are best positioned to preempt state laws. See Merrill, *supra* note 10, at 727 (reconsidering the law on preemption by evaluating and comparing "[o]ther possible agents of norm articulation—the constitutional amendment process, Congress, the President, administrative agencies, state governments, world organizations, markets"). It is only fitting, then, to assess which state actors are best positioned to resist preemption.

### A. Objective #1: Amend the National Agenda

While federalism often depicts state and federal powers at inexorable odds, there are instances in which at least some state legislators may favor federal preemption, even when they hope for different options under preempting laws. They may, for example, hope that federal preemption allows them to deflect blame for various policies. Social and welfare policies may be too expensive in isolation, but they are made possible through preempting laws and attendant federal funding. In the context of daylight saving time, state legislators appeared to recognize the need for overarching federal control, focusing their efforts on adding a preferred option rather than challenging preemption on the grounds of overreach.<sup>327</sup> One can imagine various circumstances in which maintaining federal responsibility, resources, and accountability might be appealing.

Consider, for instance, the case of right-to-work states, where state-elected officials cater to powerful corporate interests while needing the votes of their worker constituents.<sup>328</sup> Rather than claiming accountability for laws that render workers and working conditions vulnerable by overemphasizing the relative power of capital, those officials can cite the NLRA and its preempting provisions, thereby cementing the right of workers to *refrain* from building their power through unions.<sup>329</sup>

If state actors hope to preserve federal authority while influencing preempting approaches, they need a strategy that promotes a dialectic. In such instances, neither evasion nor litigation is sufficient. Evasion lacks the public signaling effects necessary to assure, coordinate, and ignite a dialogue. State-elected officials may particularly hope to avoid openly challenging the Trump administration, which is known for punishing those who do not comply with its policies.<sup>330</sup>

Sometimes, state attorneys general turn to multistate litigation to preserve preemption while advocating for Congress to advance progressive federal policies on issues such as climate change and environmental protection.<sup>331</sup> However, when successful, those efforts may have pleased participant states but did not exactly advance the *national* agenda. When the Supreme Court voted in favor of the plaintiff attorneys general in *Massachusetts v. EPA*, it inadvertently

327. STATE LEGISLATION, *supra* note 178.

328. Melton-Fant, *supra* note 129, at 4–5.

329. 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities . . .”).

330. See Jeff Amy, *Georgia Official: Trump Call to “Find” Votes was a Threat*, ASSOCIATED PRESS (Nov. 2, 2021, at 23:26 CT), <https://apnews.com/article/donald-trump-joe-biden-arts-and-entertainment-elections-georgia-2b27f4c92919556bf6548117648693b7> [<https://perma.cc/3ANK-XX7H>] (“Raffensperger—known as a conservative Republican before Trump targeted him—writes that he perceived Trump as threatening him multiple times during the phone call.”).

331. See Nolette, *supra* note 119, at 151 (“During periods in which congressional conflict combined with a deregulatory-minded executive branch to make action on emerging environmental issues unlikely, state attorneys general emerged as an alternative venue for national policymaking.”).

triggered a “wider range of sources that were never meant to be subject to the [federal] regulatory regime.”<sup>332</sup> By removing legislative control over preempting approaches, state attorneys general failed to engender a comprehensive regulatory agenda, as Congress might have better conceptualized.<sup>333</sup>

Even if litigation were an effective national agenda-shaping tool during some administrations, it would likely become unattractive during the Trump administration. Imagine what would happen under the Trump administration if state attorneys general sought to litigate the NLRA to have right-to-work provisions expressly prohibited. Those efforts would just as likely give the administration cause to scrutinize the NLRA’s administrative agency, the National Labor Relations Board, to decide whether to eliminate it on efficiency grounds.<sup>334</sup> Similarly, litigation to bolster federal enforcement of protections for young children engaged in hazardous work could entice the administration to reduce the size of the Department of Labor under the assumption that this is an area best left to the states and their business interests.

Instead of those strategies, this Article argues, state actors hoping to engender new approaches to the national agenda should explore persuasive resistance. State legislators should adopt bills that signal their resistance to the current approach, coordinate state resistance, and signal their coordinating capacities to Congress. The time zone case is the first instance of this kind, but its context is misleadingly narrow. While persuasive resistance is an obvious choice for coordination matters like daylight, its potential extends to issues of political importance. State actors—sympathetic attorneys general, legislators, and elected officials—should support persuasive resistance in cases where national control is favored.

For example, and notwithstanding the Trump administration’s shrinking policy space, states could adopt trigger and conditional clauses on matters like workers’ rights. Indeed, those efforts have begun, albeit inefficiently.<sup>335</sup> On January 27, 2025, the Trump administration removed NLRB Member Gwynne Wilcox, ensuring the Board lacked the necessary three-member quorum to issue various labor decisions.<sup>336</sup> Predicting the demise of federal labor law, the states

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332. *Id.* at 166.

333. *Id.* at 164.

334. See *Trump Announces Musk, Ramaswamy Will Lead Newly-Created Department of Government Efficiency*, CBS NEWS (Dec. 5 2024, at 16:54 ET), <https://www.cbsnews.com/news/trump-elon-musk-vivek-ramaswamy-new-department-of-government-efficiency/> [<https://perma.cc/2HC3-YTRW>] (quoting Trump’s promise “to dismantle Government Bureaucracy, slash excess regulations, cut wasteful expenditures, and restructure Federal Agencies - Essential to the ‘Save America’ Movement”).

335. See A08590, 248th Leg. Sess. (N.Y. 2025); AB 288, 2025-2026 Reg. Sess. (CA. 2025).

336. Andrea Hsu, *Trump Fires EEOC and Labor Board Officials, Setting up Legal Fight*, NPR (Jan. 28, 2025, at 18:07 ET), <https://www.npr.org/2025/01/28/nx-s1-5277103/nlr-trump-wilcox-abruzzo-democrats-labor> [<https://perma.cc/YCJ9-MGGA>].

of New York,<sup>337</sup> California,<sup>338</sup> and Massachusetts<sup>339</sup> introduced trigger legislation that would permit state-level governance of private labor relations matters when the NLRB is incapacitated. However, their efforts remain siloed. Without linking their legislative efforts through a conditional clause, those states communicate that they wish for labor law to function, but miss the opportunity to seriously threaten the President and Congress with an alternative governance model at the national level.

Progressive states may assume that coordinated action will be impossible, given the traditional stance across red states that federal control over matters such as private labor relations should be left to the states. That assumption is not only a strategic error but also a grave miscalculation. Beyond divisive matters like right-to-work policies<sup>340</sup> (which, ironically, harm the blue-collar workers the red states and Trump administration claim to support<sup>341</sup>), states have begun to coalesce around their resistance to the Trump administration's anti-labor policies. In *Wilcox v. Trump*,<sup>342</sup> twenty states—including red and blue states—filed a joint amici brief opposing the administration's firing of Wilcox, expressing their uniform “depend[ence] on a well-functioning labor relations system.”<sup>343</sup> While running parallel strategies (here, trigger legislation and litigation) reinforces state efforts and may prove a successful signaling device, states should interpret the joint action of the attorneys general as an invitation to include conditional clauses in their trigger legislation.

On the other hand, persuasive resistance is not without its risks. Critics may worry that, if Congress offers states more options, the relative decentralization of state decision-making will result in reduced economic gains and increased

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337. See A08590A, 248th Leg. Sess. (N.Y. 2025).

338. See AB 288, 2025-2026 Reg. Sess. (Cal. 2025).

339. S.B. 1327 (Mass. 2025).

340. See *Right-To-Work Resources*, NATIONAL CONFERENCE OF STATE LAWS, (Dec. 19, 2023), at <https://www.ncsl.org/labor-and-employment/right-to-work-resources> [<https://perma.cc/V9V9-UHVP>]. But even in this divisive area, states are demonstrating their willingness to reconsider traditional positions. See John Nichols, *Michigan Just Became the First State in 6 Decades to Scrap an Infamous Anti-Union Law*, THE NATION (Feb. 16, 2024), <https://www.thenation.com/article/politics/michigan-right-to-work-law/> [<https://perma.cc/4WGV-DZMS>] (noting that Michigan repealed its right-to-work legislation when Democrats took power).

341. See Paul Kiernan, *Trump Made Big Gains Among Blue-Collar Workers. Is He Really on Their Side?*, WALL ST. J. (Nov. 18, 2024, at 00:03 ET), <https://www.wsj.com/politics/elections/trump-labor-policy-working-class-voters-923e8861> [<https://perma.cc/33RM-UUPV>] (“While campaigning, Trump aggressively courted rank-and-file union members and invited Teamsters President Sean O’Brien to speak at the Republican National Convention in July.”).

342. 145 S. Ct. 1415 (2025).

343. Brief of the States of Arizona et al. in support of Plaintiff Appellee at 2, *Wilcox v. Trump*, 145 S. Ct. (2025) No. 1:25-cv-0034-BAH.

negative externalities<sup>344</sup> and transaction costs.<sup>345</sup> By maintaining its position at the helm in preempting areas, the federal government reduces transaction costs by centralizing and coordinating those solutions.<sup>346</sup>

Also, consider that states' conditional clauses invoke "a future fact, and the statutes designed no authority to determine the fact."<sup>347</sup> Many states named sister states in a relatively ad hoc fashion. They do not identify, for instance, one common state whose legislation would trigger cascading implementing laws across partnering states. Furthermore, none of the clauses mention the consequences if named states later change their minds and amend their time zone legislation to opt out or change daylight saving time options.<sup>348</sup> Nor did they designate monitoring mechanisms to review the implementation of agreed-upon standards across neighboring states.<sup>349</sup>

Of course, those deficiencies are a matter of instrumental design and could be avoided in future persuasive resistance efforts. Should the uncertainty of persuasive resistance prove troublesome, states could create centralized bodies to track and communicate ex post changes, triggered by Congressional blessing. States could also employ alternative strategies to signal their preferences and persuade sister states to harmonize their approaches. State governors, for example, have created official alliances to foster cross-state collaboration, including "the sharing of essential tools, knowledge, and resources."<sup>350</sup> Lawyers around the United States participate in the Uniform Law Commission, which "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."<sup>351</sup>

344. Negative externalities arise when states incidentally convey costs to other states, such as pollution as a byproduct of burning fuel. See Cooter & Siegel, *supra* note 49, at 136–37 (describing negative externalities).

345. See Levy, *supra* note 31, at 1243 ("But in the real world, transaction costs such as those arising from imperfect information, strategic behavior, or simple numerosity, may prevent agreement on collective action, even when it is desirable.")

346. *Id.* at 1260 (arguing that transaction costs are reduced when policies do not require state consent).

347. See Lindsay, *supra* note 210, at 456 (noting prior state efforts); see also Klaus Heine, *A Quick Guide to Behavioural Federalism*, in DON'T TAKE IT SERIOUSLY: ESSAYS IN LAW AND ECONOMICS IN HONOUR OF ROGER VAN DEN BERGH 230, 230 (Michael Faure, Wicher Schreuders & Louis Visccher eds., 2018) ("[T]he effectiveness of behavioural economics instruments depends not only on the availability of reliable empirical data but also strongly on the jurisdictional capacity to obtain the data, process it and to interpret it correctly in a given situational context.")

348. STATE LEGISLATION, *supra* note 178.

349. *Id.*

350. See *About Us*, GOVERNORS SAFEGUARDING DEMOCRACY, <https://govsfordemocracy.org/about-us/> [https://perma.cc/C4NP-TQVG] (last visited Nov. 22, 2024).

351. See *About Us*, UNIFORM LAW COMMISSION (last visited Sept. 12, 2025) <https://www.uniformlaws.org/aboutulc/overview> [https://perma.cc/9D25-APV4].

Nonprofit organizations<sup>352</sup> and regulators<sup>353</sup> also promulgate model state laws to create interstate policies. State attorneys general convene under the umbrella of the National Association of Attorneys General to discuss litigation and amici briefing strategies.<sup>354</sup>

Those public and private strategies undoubtedly signal various preferences and approaches across states and have the potential to persuade interstate initiatives. Nevertheless, while those strategies may result in multistate litigation challenging preemption or model laws evading preemption, they have no equivalent of the trigger clauses described above, which leave federal decision-making intact.<sup>355</sup> Consequently, they tend to affect national agendas indirectly.<sup>356</sup> That's not to suggest that they are a worse strategy, but merely that their signals to Congress are weaker than persuasive resistance because they lack the concrete investment of trigger clauses.

It is plausible that evasion and litigation could also signal state preferences and indirectly persuade Congress. States' bills, for instance, evade federal prohibitions on marijuana usage by legalizing it.<sup>357</sup> The sheer volume of states' evading laws had salient effects on conversations around marijuana usage on the federal level.<sup>358</sup> In 2013, the Department of Justice (DOJ) announced it would "not prioritize the enforcement of federal marijuana laws in states."<sup>359</sup> Yet, lacking a conditional clause, neighboring states did not necessarily match or welcome these state initiatives. On the contrary, when states like Colorado legalized marijuana, they motivated neighboring states to *strengthen* law enforcement to combat marijuana trafficking and restrict access within their borders.<sup>360</sup>

352. See, e.g., *Model State Legislation*, NAT'L EMP. L. PROJECT <https://www.nelp.org/explore-the-issues/unemployment-insurance/ui-policy-hub/model-state-legislation/> [https://perma.cc/C9N8-ZA53] (last visited Nov. 22, 2024) ("Use these state legislative models to draft bill language to introduce in the legislature.").

353. See, e.g., *NASAA Model Acts*, N. AM. SEC. ADM'RS ASS'N (NASAA) <https://www.nasaa.org/policy/legislative-policy/model-state-legislation/> [https://perma.cc/4XCS-HYKP] (last visited Sept. 12, 2025) ("NASAA Model Acts are state-level legislative proposals developed by committees of NASAA members.").

354. See Miller, *supra* note 119, at 5 (describing the role of the National Association of Attorneys General in multistate litigation).

355. Berns, *supra* note 195, at 1640–41.

356. Nolette, *supra* note 119, at 205–06.

357. For a review of those state laws and their relationship to preempting federal law, see Erwin Chemerinsky et al., *supra* note 120, at 77 ("The ongoing clash over marijuana laws raises questions of tension and cooperation between state and federal governments and forces policymakers and courts to address the preemptive power of federal drug laws.").

358. See *id.*

359. *Id.*

360. See Kyle C. Ward, Paul A. Lucas & Alexandra Murphy, *The Impact of Marijuana Legalization on Law Enforcement in States Surrounding Colorado*, 22 POLICE Q. 217, 232–34 (2019) (describing the results of a qualitative study of the effects of Colorado's legalizing marijuana on neighboring state law enforcement, noting concerns expressed in those states of the effects within their borders).

Unintended spillover effects aside, it is unlikely that the same evasion strategies which compelled the DOJ to announce soft permission for state marijuana laws would work for, say, state efforts to protect local immigrants under a Trump administration deportation policy. The federal government was not highly motivated to enforce marijuana laws because, *inter alia*, the scope of its preempting authority was somewhat murky.<sup>361</sup> Federal judges hadn't weighed in on the preemption argument, and the U.S. Supreme Court had denied certiorari.<sup>362</sup> Federal officials would undoubtedly enforce a Trump administration's federal policy imposing obligatory deportation actions.

### B. *Objective #2: Restrict Federal Preemption*

There are numerous instances where state actors seek to limit federal preemption. Governors may wish to govern differently, avoid costly and prescriptive regulations, or respond with more nuance to the demands and interests of their local constituents. State attorneys general may undertake a broader initiative to limit centralized regulatory authority, particularly over matters they consider beyond the federal government's purview or approaches that contravene the Constitution.<sup>363</sup> Legislators may hope to invite legislation by enacting laws—recall the child labor laws—that directly contradict preempting existing legislation.

In those instances, all those actors should use direct forms of resistance, such as litigation. As mentioned earlier, the strategy (both offensively and defensively) is proving influential with federal judges, some of whom declare preempting federal laws unconstitutional or ambiguous, amplifying state power and decentralizing regulations.<sup>364</sup> Moreover, the Supreme Court recently suggested that state litigation may now be the *only* avenue to secure a nationwide injunction against a preempting executive order or law.<sup>365</sup>

That is not to suggest that litigation is foolproof. Although subject to debate in recent years, Erwin Chemerinsky argued that, at least as of 2005, the conservative Supreme Court was inconsistent, if not blatantly hypocritical, in

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361. See Chemerinsky et al., *supra* note 120, at 100–02.

362. See *id.* at 101 & n. 97 (citing a series of federal cases, including cases in which the Supreme Court had denied certiorari).

363. See Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 2 (2021) (arguing that “state attorneys general are asserting their collective voice in the institutional conversation over the meaning of the federal constitution and federal policymaking more generally”).

364. See, e.g., Nolette, *supra* note 119, at 31–32 (“Rather than seeking an expansion of the national regulatory state, this activity typically seeks to push back on federal power in order to preserve alleged state prerogatives.”); see also Allison M. Whelan, *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 HARV. J.L. & GENDER 131, 138 (2023) (“Today, the fragmentation caused by state restrictions on pharmaceuticals and health care harms, rather than protects and promotes, public and individual health.”).

365. *Trump v. CASA, Inc.*, 145 S. Ct. 2450, 2591 (2025) (Sotomayor, J., dissenting).

its preemption cases.<sup>366</sup> He recounts that while the Supreme Court fairly consistently narrowed the scope of Congress's power to regulate in cases like *United States v. Lopez*<sup>367</sup> and *City of Boerne v. Flores*,<sup>368</sup> "in case after case, the . . . Court has gone out of its way to broadly construe preemption to strike down state laws."<sup>369</sup> Recent court decisions have proven equally problematic, with one commentator observing that Trump-appointed federal judges were expected to "respect the autonomy of state governments by consistently deferring to the policy decisions made by those governments," but concluding that "this has not been the case."<sup>370</sup> Ultimately, placing one's hope for change in the hands of judges is a gamble that often hinges on the specific regulatory matter and the judge's ideological position.<sup>371</sup>

Not only are judges unreliable champions of states' rights, but litigation costs are also high and tend to be borne by local taxpayers. Studies show that states devote significant time and resources to litigation.<sup>372</sup> Nolette points out that attorneys general office budgets increased by 500% between 1970 and 1989.<sup>373</sup> Examining litigation to protect right-to-work ordinances from federal preemption across twelve Kentucky counties, Ariana Levinson, Alyssa Hare, and Travis Fiechter show that litigation costs were ultimately funded through taxpayer dollars.<sup>374</sup> These costs may not justify the results if, in the long term, Congress merely revives preemption through redrafted legislation.

### C. Objective #3: Seize Unique Opportunities

There are instances in which state actors will continue to seek unique opportunities despite federal preemption. In the trade and investment context, for example, state governors will likely continue searching for opportunities that

366. See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 69 (2005) ("Conservatives are hypocrites when it comes to federalism.").

367. 514 U.S. 549, 567–68 (1995) (holding that a federal gun law restricting possession of a gun within a thousand feet of a school exceeded Congress's commerce law authority).

368. 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress's power under Section 5 of the Fourteenth Amendment).

369. See Chemerinsky, *supra* note 366, at 72.

370. See Earl M. Maltz, *Faint-Hearted Federalism: The Role of State Autonomy in Conservative Constitutional Jurisprudence*, 72 S. CAL. L. REV. 55, 68 & nn. 91–92 (2020).

371. Numerous scholars have written about the Court's inconsistent approach to preemption. See, e.g., Lawrence O. Gostin, *Regulating the Safety of Pharmaceuticals: The FDA, Preemption, and the Public's Health*, 301 J. AM. MEDICAL ASS'N 2036 (2009) (comparing the Roberts Court's upholding federal preemption over state common law claims challenging FDA-approved devices in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) to *Wyeth v. Levine*, 555 U.S. 555 (2009), rejecting preemption as a bar to pharmaceutical lawsuits).

372. See, e.g., Levinson, Hare & Fiechter, *supra* note 130, at 499 ("Moreover, even if litigation resulting from right-to-work ordinances is funded by out-of-state conservative interests, passage of such ordinances takes away time from county officials.").

373. See Nolette, *supra* note 119, at 33.

374. See Levinson, Hare & Fiechter, *supra* note 130, at 499 ("This means that in addition to the taxpayer dollars that fund Hardin County's insurance premium payments, taxpayer dollars that fund premiums for counties across the state are being used to pay to defend these preempted ordinances.").

uniquely benefit their local businesses. The Trump administration has an acrimonious relationship with formal trade agreements.<sup>375</sup> President Trump withdrew the United States from the Trans-Pacific Partnership Agreement during his first administration,<sup>376</sup> and is threatening to violate the terms of the United States–Mexico–Canada Agreement by hiking tariffs to 25 percent on goods from Canada and Mexico.<sup>377</sup> With formal trade opportunities with countries appearing dim, entering into ubiquitous MOUs with foreign actors is relatively easy.<sup>378</sup>

Persuasive resistance could be a viable alternative to MOUs. State legislators could link their legislative initiatives to demonstrate the opportunity costs of preemption. For instance, interstate MOUs with foreign actors stipulating trade and investment opportunities could highlight the areas where U.S. export and import markets could benefit from formal trade agreements. Nevertheless, state governors may have too much to gain from discovering unique opportunities to evade preempting laws in commercial contexts, such as trade, to support public-signaling legislation.<sup>379</sup> Had North Carolina focused its efforts on coordinating with states rather than going it alone with the United Kingdom, Marshall Aerospace might have invested its \$50 million project elsewhere.<sup>380</sup>

Even when states are not competing, evasion strategies offer state legislators immediate opportunities to circumvent oppressive preempting laws. For example, in 2017, Congress enacted the Tax Cuts and Jobs Act (TCJA) to spur economic growth by lowering individual and corporate income tax rates for tax years 2018 through 2025.<sup>381</sup> The TCJA includes a highly disputed

375. See Sam Fleming, Owen Walker, & Andry Bounds, *The End of an Era: What Next for Global Trade?*, FIN. TIMES (Apr. 11, 2025), <https://archive.is/JTn8b> [<https://perma.cc/EWB7-SWXX>].

376. See Press Release, Off. U.S. Trade Rep., The U.S. Officially Withdraws from the Trans-Pacific Partnership (Jan. 30, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> [<https://perma.cc/AM9V-9DN8>].

377. See Ari Hawkins, *Trump Says He Will Quickly Impose Tariffs of 25% on Goods from Canada and Mexico*, POLITICO (Nov. 25, 2024, at 20:24 ET) <https://www.politico.com/live-updates/2024/11/25/congress/trumps-tariff-threat-00191615> [<https://perma.cc/34P2-YTBR>] (“On January 20th, as one of my many first Executive Orders, I will sign all necessary documents to charge Mexico and Canada a 25% Tariff on ALL products coming into the United States, and its ridiculous Open Borders.”) (quoting President Trump).

378. See, e.g., *Vietnam Firms to Sign MOUs to Buy \$2 Billion of U.S. Farm Produce*, REUTERS (June 3, 2025, at 01:36 CT) (“The new deals . . . include 5 MoUs to buy \$800 million of products from Iowa . . .”), [https://www.reuters.com/world/asia-pacific/vietnam-firms-sign-mous-buy-2-bln-us-farm-produce-2025-06-03/#:~:text=HANOI%2C%20June%203%20\(Reuters\),deal%20between%20the%20two%20countries](https://www.reuters.com/world/asia-pacific/vietnam-firms-sign-mous-buy-2-bln-us-farm-produce-2025-06-03/#:~:text=HANOI%2C%20June%203%20(Reuters),deal%20between%20the%20two%20countries) [<https://perma.cc/Z3E9-THZC>].

379. State governors are not the only state actors entering into state–foreign actor MOUs. Scoville’s research shows that, along with governors, a significant number of agreements were “signed exclusively by lower-ranking officials who acted on behalf of an executive department or agency over which they presided, rather than on behalf of the governor or the state as a whole.” See Scoville, *supra* note 18, at 348.

380. See Ohnesorge, *supra* note 143, at 2 (noting the investment project following the North Carolina–UK MOU).

381. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

provision that limits the deductibility of individual state and local income taxes (SALT).<sup>382</sup> Various efforts driven by high-income (mainly Democratic) states to repeal the SALT cap (which Republican states tend to favor) have proven unsuccessful.<sup>383</sup> A handful of states have responded by enacting workarounds that permit pass-through entity (PTE) owner-taxpayers to pay (and deduct) SALT liabilities on behalf of the PTE's owners.<sup>384</sup> Those initiatives went into effect immediately, rather than states' conditional and trigger laws, which take time to percolate and trigger antecedent action.<sup>385</sup> Given the immediacy of President Trump's executive orders affecting the rights of immigrants, schoolchildren, and workers, states may not have the luxury of time to react.

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This Part has reviewed various state objectives in preemption to show how states' strategies will differ depending on short- and long-term goals and state actors. State objectives that call for cooperation, such as working with Congress to amend preempting laws, will benefit from state legislators' initiatives to adopt conditional and trigger clauses for the reasons described in Part III.<sup>386</sup> Objectives to challenge the constitutionality of preemption, redistribute power to the states, or forestall executive orders within states, lend themselves to litigation by state attorneys general,<sup>387</sup> while objectives to gain a competitive edge over other states or otherwise enjoy unique advantages under preemption may call for evasion, often promoted by governors. None of those strategies will have predictable outcomes. State and federal lawmakers are, after all, irrational.<sup>388</sup> They do not always respond to signals and influence in the same way.<sup>389</sup> Nor will they always weigh competing interests between their constituents and state movements in favor of the collective. The Trump administration introduces an additional variable.<sup>390</sup> It may intervene in state strategies to advance a broader, deregulatory agenda that is divorced from the states' objectives. It may also foster alliances between red and blue states in

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382. See Richard Stephenson McEwan, *State Workarounds the IRC's SALT Cap: The Past, the Present, and Building for the Future*, 98 IND. L.J. 668, 678 (2023) (describing the SALT cap, arguing that "far fewer taxpayers receive a benefit from paying their SALT now, resulting in an effectively higher federal tax bill at the end of the year").

383. *Id.* at 669–70.

384. *Id.*

385. See *id.* at 680–81.

386. See *supra* Part III.

387. See, e.g., Tyson & Mendonca, *supra* note 7 (calling on state attorneys general to "play a very important role in protecting progressive values over the coming years").

388. Aneil Kovvali, *Who Are You Calling Irrational?*, 110 NW. L. REV. 707, 717 (2016).

389. See *id.* at 709, 711–13.

390. See Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2031 (2018).

unanticipated ways. The takeaway is that states have options and strategies for preemption, and some of those strategies may succeed.

## CONCLUSION

Until now, scholars have largely assumed that states unhappy with federal preemption must choose between direct litigation or evasion. That assumption fails to reconcile state-level resistance strategies with general maxims of state paralysis in preempting regimes.<sup>391</sup> It also overlooks an alternative strategy to cooperate with state and federal decision-makers to change preempting approaches.<sup>392</sup> That oversight suggests that scholars and state actors are missing critical opportunities to experiment with resistance in an unprecedented moment of federal control.

Consider the Trump administration's immigration orders, which preempt states while reaching deeply into their boundaries.<sup>393</sup> State attorneys general could sue, calling on judges to demand the restoration of rights for immigrants within their borders. However, there is no guarantee that those judges, many of whom are Trump appointees, will champion that cause. State governors and legislators could quietly refuse to implement those orders; however, the Trump administration has sworn diligence in oversight and enforcement.<sup>394</sup>

State resistance to the Trump administration's approaches to national agendas so far has been atomized, disorganized, and ad hoc.<sup>395</sup> Blue states may assume that red states align with Trump's approach to preempting areas, underestimating the latter's preference for state-level decision-making. Faced with a President (enabled by Congress) who plans to control numerous policies within states, including policies on immigration and education that directly affect local residents, blue and red states may prove intuitive, if short-lived, bedfellows.<sup>396</sup> By adopting state bills that advance better approaches to the

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391. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1997–98 (2018).

392. See *id.* at 2012–13.

393. See, e.g., Exec. Order No. 2025-02006, 90 Fed. Reg. 8443 (Jan. 20, 2025) (“Further, the Attorney General and the Secretary of Homeland Security shall evaluate and undertake any other lawful actions, criminal or civil, that they deem warranted based on any such jurisdiction’s practices that interfere with the enforcement of Federal law.”).

394. See Sarah N. Lynch, Andrew Goudsward & Gabriella Borter, *Trump Steps Up Immigration Crackdown, Warns City, State Officials Against Interference*, REUTERS (Jan. 23, 2025, at 01:06 CT) (reporting a memo in which “Trump’s acting deputy attorney general, Emil Bove, told Justice Department staff that state and local authorities must cooperate with the immigration crackdown and federal prosecutors ‘shall investigate incidents involving any such misconduct for potential prosecution’”), <https://www.reuters.com/world/americas/trump-administration-criminally-probe-officials-who-resist-immigration-actions-2025-01-22/> [<https://perma.cc/3KJY-AXBV>].

395. See, e.g., Tyson & Mendonca, *supra* note 7 (relying on “states like California” to champion and lead the resistance against President Trump’s policies through individual state actions).

396. See generally Plaintiffs’ Motion for an Emergency Temporary Restraining Order Under Federal Rule of Civil Procedure 65(b), *New York v. Trump*, 133 F. 4th 51(1st Cir. Jan. 28, 2025) (No. 25-1236) (motion contesting the Trump administration’s OMB Directive to pause agency grant, loan, and other financial

national agenda, states could build and signal focal sites of resistance, assure one another of solidarity, and capture Congress's attention. If not for today, then for the regulatory environment of tomorrow.

The emergence of states' strategies to resist preemption does not, however, suggest that states' alternative strategies cease to be helpful. States have different objectives, depending on the policy, local political pressures, and the actions of state actors. There may be instances in which state governors hope to evade but not change national laws, such as when they enter into MOUs with countries stipulating trade opportunities not addressed in bilateral trade agreements with the United States or protections for immigrants. That strategy may become more popular as states grow weary of the Trump administration's retaliation and penchant for eliminating federal programs and agencies. Alternatively, state attorneys general may litigate, either because the federal government is preempting regulatory areas they consider to be state matters or because they otherwise deem preemption unconstitutional. State lawmakers may adopt legislation that directly conflicts with preempting laws to invite litigation.

This Article has highlighted those strategies and objectives to unsettle the existing assumptions about state resistance to federal preemption. Whether states and Congress respond to that resistance and whether states, on the aggregate, hope to advance national or state-centric agendas remain open questions.

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assistance programs, brought by the states of New York, California, Illinois, Arizona, Colorado, Nevada, and North Carolina, among others).