# PERSUASIVE DISSENT

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ABSTRACT

Conventional wisdom about federal preemption holds that when a federal law or regulation clearly preempts state law, states that disagree with it must either 1) acquiesce while seeking opportunities to evade it or 2) dissent directly through litigation. States' limited institutional arrangements to express their dissent to federal preemption have led to calls to minimize preemption in favor of cooperative regulatory regimes, where overlapping state and federal responsibilities offer channels of communication, opportunities to address frictions, and ultimately engender deliberative democracy in national policymaking.

This Article rejects that false binary and excavates states' innovative laws to advance alternative approaches to federal preemption. Those laws directly conflict with preempting federal laws but do not go into effect until two conditions are satisfied: First, other states must adopt the same law, and second, Congress must amend its preempting law to permit those laws to enter force. This Article refers to those laws as "persuasive dissent." Drawing from economics, behavioral, and game theory literatures, it argues that states' innovative efforts may prove more effective in changing national policies than alternative evasion and litigation strategies. Persuasive dissent coordinates states by signaling preferences and assuring conformity around common sites of resistance. So amalgamated, states signal their collective preference to Congress, offering federal lawmakers information about states' self-organizing capacities during the lifetime of preemption.

Understanding states' persuasive dissent in preempting areas reaps descriptive and normative rewards. At the time of writing, the Supreme Court struggles to thread the needle between national and state policymaking, the

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federal government faces a regulatory crisis, and Congress remains frozen in political gridlock. Against that shaky terrain, this Article shows that states have various strategies to express their dissent to preemption, including creating their own regulatory scaffolding in areas traditionally reserved for the federal government.

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## 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 progressives "to the dark side" of federalism.[1] Those policies seem tepid compared to Donald Trump's promises to deport immigrants,[2] shrink the administrative state,[3] impose high tariffs in violation of trade agreements,[4] and eliminate social programs.[5] Progressives and conservatives have a renewed appreciation for states' interventions to check federal power.[6] Young was onto something. We're all federalists now.

Notwithstanding the growing enthusiasm for states' interventions in national policies, the federal government preempts states in numerous areas – from labor rights to immigration policy to trade agreements. Due to that preemption, states presumably lack the opportunity to resist the federal

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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 BROOKYLN L. REV. 1277, 1311 (2004) ("The War on Terror has made for strange bedfellows in any number of respects.").

[2] *See* German Lopez, *Donald Trump's Immigration Plans*, THE NEW YORK 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.

[3] *See* Daniel Wiessner & Brendan Pierson, *How Trump's Musk-led efficiency panel could slash federal agency rules*, REUTERS (Nov. 22, 2024) (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/; Ian Ward, *'A Very Large Earthquake': How Trump Could Decimate the Civil Service*, POLITICO (Dec. 20, 2023) (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.

[4] *See* Megan Cerullo, *Trump Tariffs Could Make These Items More Expensive*, CBS NEWS (Nov. 27, 2024) (noting that Donald Trump has pledged 25 percent 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/.

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

[6] *See, e.g.,* Adam Edelman, *Democratic Governors Vow to Protect Their States from Trump and his Policies*, NBC NEWS (Nov. 8, 2024), https://www.nbcnews.com/politics/2024-election/democratic-governors-vow-protect-states-trump-policies-rcna179295.

government, even when it undermines the values and civic responsibilities some states would gladly fight to uphold.

This Article intervenes in an unprecedented moment for state dissent. It describes an emerging state strategy it calls "persuasive dissent," which consists of laws that conflict with preempting federal laws and policies that contain two antecedent clauses: (1) sister states must transpose the same conflicting approach in their state laws ("conditional clauses"), and (2) Congress must amend its federal legislation to permit states to adopt the conflicting approach ("trigger clauses").[7] Those combined clauses, this Article argues, are persuasive because they signal sister states, facilitate interstate coordination, and communicate their self-organization and preferences to Congress. The bills that house them pass constitutional muster because states continue to abide by federal law while waiting for their preconditions to be satisfied.[8]

States' persuasive dissent defies the conventional wisdom that federal preemption silences states and demands acquiescence.[9] That wisdom assumes that disgruntled states can only resort to preemption evasion,[10] legislating preferences in the shadows, careful not to violate the letter of preempting laws,

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[7] *See infra*, Part II.B.

[8] This Article only considers legislative technologies as persuasive dissent, which it distinguishes from other areas of multistate coordination like governors' associations and model state legislation. While the latter initiatives similarly offer states platforms to dissent collectively to preempting approaches, as explained more fully in Part III, conditional and trigger clauses uniquely persuade states by offering focal sites of resistance *and* persuade Congress by publishing expressions of states' collective action and cooperation through trigger clauses. Those clauses engender changes to national agendas horizontally and vertically, rather than merely coordinate states, and consequently has a greater potential to advance a new national approach. Later, this Article notes that states will not always hope to advance a *national* approach and will therefore invoke different strategies.

[9] *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 (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….").

[10] *See* Michael S. Greve, *Federal Preemption: James Madison, Call Your Office*, 33 PEPP. L. REV. 77, 87-88 (2005) (advocating for expansive federal preemption given states' tendency to exploit loopholes in federal legislation "to evade it.") (quoting James Madison).

or antagonistic litigation that directly challenges federal authority.[11]

Because preemption evasion is, by design, intended to proceed unnoticed,[12] the literature centers mainly on highly visible state litigation against the federal government.[13] "State's rights" proponents explore ways to use litigation to minimize preemption to preserve state powers and voice in both ex ante and ex post contexts.[14] Progressive scholars have traditionally resisted those efforts in favor of a robust national government that uniformly protects liberties and rights.[15] Both sides often coalesce under the coterminous preference for alternative cooperative regimes,[16] where institutional arrangements for state voice and dissent are baked into federal legislation at inception.[17] Enjoying overlapping spheres of regulatory authority, state dissent becomes a feature rather than a threat to national policymaking, to the general satisfaction of both ideological camps.[18]

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[11] *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States*?, 101 CORNELL 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 COL. L. REV. 1998, 1998 (2001) ("[I]n pressing multistate cases, state attorneys general violate fundamental principles of federalism and separation of powers.").

[12] *See, e.g.,* Ryan M. Scoville, *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).

[13] *See infra*, Part II.

[14] *See, e.g.*, Michael Bare, Leslie Zellers, Patricia A. Sullivan, Jennifer L. Pomeranz & Mark Pertschuk, *Combatting and Preventing Preemption: A Strategic Choice*, 25 J. PUB. HEALTH MANAGEMENT & PRACTICE 101, 101 (2019) (advancing a four-part strategy to "combat preemption before it is enacted."); Ernest A Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1895 (2019) (advocating for state standing to sue the federal government in cooperative federalism regimes, where states have meaningful interests at stake).

[15] *See, e.g.,* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 Notre Dame L. Rev. 1185, 11890 (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-a-vis individual rights.").

[16] *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).

[17] *See infra*, Part I.

[18] *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J.

The debate on state dissent in national policymaking accounts for only two scenarios. Under the first scenario, states have no institutional arrangements to dissent during the lifetime of preemption and must rely on evasion or judges to escape its reach. Under the second, states depend on Congress to craft a cooperative regime offering states institutional arrangements to dissent when asked to implement their designated responsibilities.

A third scenario is missing from this conventional account: states may create *their own* institutional arrangements for interstitial dissent to preempting legislation.[19] Using as illustration states' bills dissenting to the biannual daylight saving time adjustments in the Uniform Time Act (UTA)[20] – a federal law that expressly preempts states' time zones[21] – this Article shows how states use persuasive dissent to signal their preferences for an alternative approach, assure one another of uniformity, and coordinate around focal sites of resistance. Those laws signal the fruits of states' coordinating labor to Congress. While states await interstate uniformity and Congress, they abide by the UTA's biannual clock adjustments.[22]

States' persuasive dissent is proving relatively successful. Drawing from legislative testimony, this Article shows how state legislators discuss each other's bills and express a sense of urgency to join state neighbors.[23] Members of Congress also discuss states' legislative efforts when deliberating over amending the UTA to incorporate states' sought changes.[24]

The federalism literature has overlooked states' persuasive dissent strategies. It may have done so because states only began adopting laws with conditional and trigger clauses around 2018.[25] More importantly, it may have overlooked persuasive dissent strategies because they don't *look* like expressive

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1256, 1270-73 (2009) (crediting states' frictions and dissent for convincing Congress to go "in a direction the federal government may not anticipate.").

[19] *See* Mallory E. SoRelle & Allegra H. Fullerton, *The Policy Feedback Effects of Preemption*, 2024 POL'Y STUD. 235, 236-240 (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).

[20] Pub. L. 89-387 [hereafter "UTA"].

[21] *See infra*, Part II.

[22] *See infra*, Part II.

[23] *See infra*, Part II.

[24] *See infra*, Part II.

[25] *See* NAT'L CONF. ST. LEG., REPORT: DAYLIGHT SAVING TIME, STATE LEGISLATION (Oct. 15, 2024) (noting that the first daylight saving time bill was enacted in 2018), https://www.ncsl.org/transportation/daylight-saving-time-state-legislation.

resistance, at least not in the traditional federalism sense. States are not adopting laws that affect their legal responsibilities. In the case of persuasive dissent, the dissent, itself, is not the main focus. Instead, it is the persuasive *means* through which that dissent is expressed that operates to build state power and influence federal lawmakers in preempted areas.[26] The payoff of considering persuasive dissent in this context is a recognition that opportunities for input and dialogue persist interstitially and that those opportunities may result in new approaches to national policies.

Scholars may also have overlooked states' persuasive dissent because daylight saving time seems relatively inconsequential for federalism, particularly when issues like basic health insurance and women's sovereignty over their reproductive choices have come to the fore. Nevertheless, the relationship between biannual clock adjustments and sleep patterns, heart attacks, strokes, and mood disturbances,[27] not to mention secondary effects on child safety at bus stops and confusion among animals, young persons, and the elderly, should not be understated.[28]

Beyond immutable matters like time zones, states' persuasive dissent may eventually be used in other policymaking areas such as health care, immigration, labor, and tax law.[29] For instance, early efforts to draft a National Popular Vote Commission (NPVC) – a plan to replace the current electoral college – proposed state legislation requiring a specific number of states to adopt the proposed text into their laws coupled with a trigger clause requiring a congressional "blessing" of the interstate agreement.[30] As the Trump

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[26] *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 exhibits those features, *see infra*, Part III.

[27] *See* Morgan Coulson, *7 Things to Know About Daylight Saving Time*, Johns Hopkins (March 09, 2023) (citing sleep studies), https://publichealth.jhu.edu/2023/7-things-to-know-about-daylight-saving-time.

[28] *See generally* Till Roenneberg, Eva C. Winnebeck, & Elizabeth B. Klerman, *Daylight Saving Time and Artificial Time Zones – A Battle Between Biological and Social Times*, 10 FRONT. PHYSIOL. 1 (2019) (describing scientific studies on the effects of daylight time zone adjustments on children, safety, animals, and other populations).

[29] *See infra*, Part IV.

[30] *See* 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, 252 (2011) (describing the proposed text).

administration's anti-immigrant, anti-worker, anti-trans, and anti-rights approach to preempting legislation manifests, states may employ this strategy to organize themselves and find federal allies, if not to catalyze immediate change, then to prime the regulatory landscape for a new administration.

This Article is organized in four parts. Part I describes conventional accounts of state dissent according to nationalists, who favor preemption, and federalists, who favor states' rights. It shows how nationalists often presuppose collective action problems[31] and state cartels[32] that justify federal preemption, while states' rights federalists assume the federal government needs a check on its inevitable overreach and biases. Those debates stand starkly against the broad agreement in cooperative regimes that discursive pathways between state and federal actors benefit the national agenda.

Part II advances the literature on federalism and preemption. It maps states' interstitial dissent to preemption, beginning with the traditional strategies of evasion and litigation. Using time zone legislation, it shows how states innovatively adopt legislation with antecedent conditional and trigger clauses.

Parts III and IV pivot to the theoretical and practical considerations. Part III explains why states' conditional and trigger laws are persuasive. The federalism literature has offered helpful insight into ways the national agenda benefits from state and federal dialectic but hasn't applied those benefits to preemption. Consequently, this Part cobbles together lessons from economics, behavioral theory, and game theory to fashion a clear and generalizable typology of dissent as regulatory persuasion in preempting regimes. This typology centers on public signaling, focal sites of resistance, and deference to decision-making autonomy.

Part IV links states' dissent strategies to their policy objectives. Each strategy is associated with a set of trade-offs and risks to states and national agendas. Persuasive dissent allows states to coordinate and advance an

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[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); Aziz Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 258-270 (2013) (challenging assumptions of collective action problems).

[32] Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 290-93 (2003) (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.").

alternative vision of national policies, but its success requires sister state and federal agreement. Evasion, like persuasive dissent, respects preempting authority, but its discrete and atomized nature weakens its influence on the national agenda. For litigation to be successful, states often persuade judges to restrain or undo the federal government's preempting authority altogether, leaving matters once organized under the national umbrella to the oft-competing interests of the states.

## I. THE VICES AND VIRTUES OF STATE DISSENT

The federalism literature is in a longstanding debate about the merits of federal preemption. Still, it has been quick to dismiss the possibility that states have institutional arrangements to express their dissent in preempting regimes.[33] That may be because federal preemption is clearly laid out in the Constitution. The Supremacy Clause,[34] particularly in conjunction with the congressional powers enumerated in Article I of the Constitution, grants the federal government a wide latitude to preempt state laws.[35] Although, under the Tenth Amendment, "The 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,"[36] the Constitution makes no mention of residual powers left to the states when preempted.

Federal preemption takes many forms. Sometimes, Congress preempts state laws expressly by restricting specific state powers ("express preemption"). Congress may also legislate so extensively within a regulatory scheme ("field preemption") that it leaves "no room for the states to occupy it."[37] In other instances, state laws may obstruct or challenge the achievement of policies in a federal statute or agreement ("obstacle preemption").[38] Even when Congress

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[33] 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 CORNELL L. REV. 767, 770 (1993-1994) (arguing that scholars mistake the Supremacy Cause as the origins of federal preemption)/

[34] U.S. CONST., art. VI, cl. 2.

[35] *See infra*, Part II.

[36] U.S. CONST. Tenth Amend.

[37] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[38] *See* Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000); American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

is 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 have a role to play in preemption.[39]

These cases stand apart from lesser forms of federal preemption that arguably leave open various opportunities for state input. Particularly in areas enhancing public welfare regarding environmental, occupational, and product risks, Congress has opted to adopt preempting minimum standards ("floor preemption"), granting states autonomy over stricter standards.[40] Under these cooperative regimes, the federal government controls national limits and objectives while states translate those objectives into state legislation, leaving ample opportunity for cross-fertilization.

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

### A. *The Nationalist View on State Dissent in Preemption*

Supporters of a robust national government value predictability and homogeneity in federal programs,[41] not the state dissent that threatens to disrupt it. 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."[42]

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[39] *See, e.g.,* Missouri v. Holland, 252 U.S. 416 (1920).

[40] *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).

[41] Huq, *supra* note 31, at 11-13 (describing concerns among the Founders that national legislation should encompass "all cases to which the separate States are incompetent….") (internal citations omitted).

[42] *See* Crocker, *supra* note 15, at 11890 (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-a-vis individual rights."); Huq, *supra* note 31, at 9 ("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

While the term "collective action problems" is somewhat ubiquitous,[43] 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 do as well."[44] 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.[45] 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 in another state," creating a "gap between individual rationality and collective good…."[46]

Imagine, for instance, that State A has strict protections for labor unions and, consequently, workers receive relatively higher wages than in states where 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.[47] Firms in State A may "threaten to relocate to unregulated states to take advantage of lower costs and friendlier business environment," which will, in turn, pressure state legislators

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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).

[43] *Id.* at 10 (arguing that "the term ["collective action problems"] is often employed with some liberality, and even a touch of promiscuity.").

[44] *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010).

[45] *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) ("Article I, Section 8 of the new Constitution gave Congress additional powers to address collective action problems."); Robert D. Cooter, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STANF. L. REV. 115, 117-18 (2010) (arguing that the Framer's intention was to prevent 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 231. 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.

[46] *See* Huq, *supra* note 31, at 12.

[47] *See* Balkin, *supra* note 44, at 32.

in State A to lower their regulatory requirements in a race to the bottom.[48] Federal preemption is attractive for those who favor legal protections for workers seeking to earn a living wage and enhance their bargaining power vis-à-vis capital because it could require uniform respect for labor rights.

Federal preemption also protects weak states from powerful groups of states.[49] Should states have a dissenting voice in preempting, those groups could hide minority disagreements, thus presenting uniformity to Congress that belies the plurality of state interests and cartels.[50] 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" both for the state and society.[51]

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.[52] Miriam Seifter argues that state interest groups represent their views as "state views" when, in fact, they represent only a "subset of state officials" with an indirect consideration of the state's general

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[48] *Id.*

[49] *See* Greve, *supra* note 32, at 327; Levy, *supra* note 31, at 1255 (arguing that states' collective action "is essentially a species of cartel.")

[50] *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.") (internal citations omitted); Greve, *supra* note 32, at 290-93 (disfavoring interstate agreements because "While 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 by [not] adopting a federal requirement it instead [makes] some states beholden to others….").

[51] *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).

[52] *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, and either impose extremely partisan and unpopular views on others or secure advantages for

population.[53] Rather than view states' legislative strategies as democratic expressions of local interests, Seifter cautions, we should view them as "outright countermajoritarian institutions…controlled by either a clear or probably minority party."[54] 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."[55] Viewed accordingly, state influence on the federal government on preempting laws looms ominously.

### B. *The States' Rights View on State Dissent in 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 obvious institutional arrangements for state dissent has led to a robust body of states' rights scholarship objecting to preemption.[56] Those objections presume that preemption strips states' regulatory authority, leaving states vulnerable to federal abuse and overreach.[57]

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."[58] Federal preemption through that lens is anti-democratic because it only permits deliberations *before* preempting legislation is adopted and not during its lifetime.[59] It lacks a platform for states'

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[53] *See* Seifter, *supra* note 50, 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.") (internal citations omitted).

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

[55] *See* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 261 (2017).

[56] *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*.").

[57] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229 (2000) (describing various "states' rights" objections).

[58] *Id.* at 1895.

[59] Under the APA notice-and-comment rulemaking process and other formal procedures

interstitial interventions even when preemption directly affects them.

Even worse, the federal government does not always conduct ex-ante consultations.[60] When it does, its decisions to preempt states sometimes reflect internal biases and the presumed need for federal oversight.[61] Furthermore, the political processes supposedly protecting states nationally – the House of Representatives, the electoral and 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."[62]

Circumstances may also evolve after the federal government adopts preempting legislation, changing how that legislation is operationalized within states and giving greater cause for interstitial dissent.[63] Consider the nuanced

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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 50, at 956; Young, *supra* note 46, at 1359 ("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."); Gilman, *supra* note 63, at 367 ("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 carries out ex ante consultations with states for strategic purposes, including attracting the support of allied states and warding off congressional hostility. *See* Bulman-Pozen, *supra* note 50, 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.").

[60] *See, e.g.,* Administrative Conference of the United States, 1 Administrative Conference Recommendation 2010-1: Agency Procedures for Considering Preemption of State Law 3 (Dec. 9, 2010) ("An empirical evaluation of agency practices reveals that compliance with the preemption provisions of Executive Order 13132 has been inconsistent….").

[61] *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.").

[62] *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).

[63] *See, e.g.*, Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. 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."); Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 367 (2010) ("As a result of federal preemption, state laws could not be more protective than the federal standard….") ("Even with the best

and unforeseen effects of the pandemic, which affected states differently, or how export-oriented states fare differently from import-oriented states in U.S. trade agreements.[64] Crafting a one-size-fits-all approach to states through preemption prevents them from adopting the necessarily tailored laws and policies to adapt to those changes.

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 APA calls for ex-post notice-and-comment,[65] and federal actors can make informal adjustments.[66] Congress also revises legislation and policies owing to changes in circumstances.[67] However, it is unclear whether changed circumstances affecting *states*, not national matters, will engender that dynamism, particularly given the federal government's inertia over its existing regulations.[68]

To many federalism scholars, therefore, the absence of predictable and guaranteed bottom-up problem-solving and contributions to deliberations

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of intentions, Congress legislates *ex ante* and cannot always foresee whether or how its laws may ultimately impact state-level initiatives as circumstances change."); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 754 (2008) ("Congress cannot anticipate when it legislates all the situations in which questions of displacement will arise.").

[64] *See* Mary Jane Bolle, *U.S. Foreign-Trade Zones: Trade Agreement Parity (TAP) Proposal*, CONG. RES. OFF. 18 (Jan. 20, 2010) (citing research showing that, on average, workers in export-oriented firms enjoyed higher earnings than workers in import-oriented firms), https://www.everycrsreport.com/files/20100120_RL34688_e8cd771464b56b9504a8a743bc1a09aa414f9ea4.pdf.

[65] *See* Wagner, et al., *supra* note 55, 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.").

[66] *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.").

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

[68] *See* Young, *supra* note 46, at 1361 (discussing the need for an institutional check in federalism owing to the federal government's inertia).

threatens to weaken the national agenda.[69] By minimizing preemption,[70] federal courts would contribute to a system of federalism that values options, experimentation, regulatory competition,[71] innovation, and safeguards against tyranny and monopolization.[72]

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

Rather than preempt state action, Congress often designs a cooperative regulatory regime requiring federal-state partnerships. It does so by enacting floor preemption statutes regulating minimum standards and frameworks for partnerships between state and federal governments.[73] Under this architecture, those governments share regulatory authorities within the framework established by federal law.[74] Philip Weiser notes that cooperative regimes "neither leave state authority unconstrained within its domain…nor displace such authority entirely with a unitary program, as would a preemptive federalism."[75]

In his voluminous work on the evolution of federalism, Roderick Hills charts how cooperative federalism arose as an alternative to federal preemption and commandeering.[76] Working backward from the anti-

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[69] *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 52, at 159.

[70] *See* Engel, *supra* note 52, at 186 (carving out a narrow exception for express field preemption).

[71] 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, 1184-186 (2020) (explaining the divided scholarship).

[72] *See* Engel, *supra* note 52, 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).

[73] *See* Joseph G. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS: J. OF FED. 15, 16 (2001) (describing the ways Congress "plays a leadership role" in establishing cooperative regimes through federal legislation).

[74] *See* Weiser, *supra* note 9, at 665.

[75] *Id.*

[76] *See* Hills Jr., *supra* note 16, at 831-839.

commandeering cases *Printz v. United States*[77] and *New York v. United States*,[78] Hills describes how cooperative federalism preserved federal control while allowing states to participate voluntarily.[79] The relationship between Congress and the states gradually fell into a rhythm in which "the national government relied on state officials to carry out laws."[80] Under this regime, states became "friendly servants carrying out federal programs."[81]

Since then, scholars have become fascinated with how Congress regulates national matters by carving out participatory roles for states.[82] Many applaud its integrative structure, which seeks to align state and federal authorities rather than isolate them in distinct spheres.[83] That alignment is preferable to top-down governance, which "risks freezing policies in local maxima (dead ends) and decreases responsiveness" to changing conditions.[84]

Cooperative federalism is not without its critics. Some scholars argue that, despite its collaborative nature, cooperative programs grant the federal

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[77] 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).

[78] 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).

[79] *See* Hills, *supra* note 16, at 838.

[80] *Id.* at 839.

[81] *See, e.g.,* Federal Water Pollution Control Act of 1972 (Clean Water Act), Pub. L. No. 92500, 86 Stat. 816904 (codified as amended at 33 U.S.C. §§ 1251-1387 (2012)) (quoting 33 U.S.C. § 1251(a)). *See also* Bulman-Pozen & Gerken, *supra* note 18, at 1262-63 (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.").

[82] *See, e.g.* Weiser, *supra* note 9, at 665; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556–60 (2012); Philip J. Weiser, F*ederal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15 (2001).

[83] *See* Bednar, *supra* at 506 ("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 18, 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 130, at 1566 (arguing that states' avenues to dissent in cooperative regulatory regimes grant states "a role to play in shaping identity, prompting democracy, and diffusing power.").

[84] *See* Adelman & Engel, *supra* note 72, at 1979-1800.

government "a directing or supervisory influence over the activities of the several states."[85] 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.[86]

Studying the role of the presumed state servant in cooperative regimes, Jessica Bulman-Pozen & Heather K. Gerken assuage those concerns. 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.[87] For example, the Clean Air Act preempted vehicle emissions standards and assigned states implementing responsibilities. 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.[88] In these cases, states' dissent is not only powerful but also critical to the national agenda. Had states lacked the opportunity to vocalize it constructively, national policies would have remained stagnant.

Some take the state power perspective even further by abandoning the state servant model in favor of one that views states as functional alternatives to the federal government.[89] Overlapping federal and state spheres of authority enables necessary dialogue and frictions[90] through iterative processes capable of changing state and federal approaches.[91]

One well-known example, offered by Ann Carlson, concerns climate change.[92] Although the Obama administration and Congress opted not to adopt a federal law on climate change, "a surprisingly large number of states

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[85] *Id.* at 746. *But see* Kramer, *supra* at 284 ("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.").

[86] *See* Weiser, *supra* note 9, at 665 (advancing a new constitutional architecture for cooperative federalism to reconcile these tensions).

[87] *See* Bulman-Pozen & Gerken, *supra* note 18, at 1277.

[88] *Id.*

[89] *See* Schapiro, *Interactive Federalism*, *supra* note X, at 285; Engel, *supra* note 52, at 176.

[90] *See* Engel, *supra* note 52, 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.").

[91] Adelman & Engel, *supra* note 72, at 1809.

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

have stepped in to fill the policy void."[93] The innovative state strategies, Carlson argues, were neither the result of state regulation nor federal action.[94] On the contrary, those strategies and regulations resulted from "repeated, sustained, and dynamic lawmaking efforts involving both levels of government…."[95] Examining each actor's – the federal government's and states' – regulatory steps and achievements as feedback loops[96] rather than linear processes, she concludes that climate regulations have progressed through incremental and multi-dimensional steps.[97]

Nevertheless, Elizabeth Weeks has shown that states' dissenting voices in cooperative federalism do not always spur changes in federal legislation. She uses as an illustration the Affordable Healthcare Act (ACA), a cooperative regime in which Congress offers states federal dollars if they agree to implement Medicaid programs.[98] States had numerous reasons to resist the ACA's onerous eligibility and administrative requirements.[99] Contrary to scholarly assumptions, state resistance proved ineffective.[100] Weeks concludes that when the federal government can find alternative ways to operate (on its own, through sufficient numbers of state implementors or contractors), state dissent may have little persuasive value in cooperative regulatory regimes.[101] Weeks' study suggests that Congress sometimes needs more than mere dissent to change course. It must be persuaded that states will not act chaotically, depriving some residents of critical and affordable health insurance if given more regulatory options.

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[93] *Id.* at 1098.
[94] *Id.* at 1099.
[95] *Id.*
[96] *Id.* at 1100 ("The initial policymaking then triggers a series of iterations adopted in turn by the higher or lower level of government. The process then extends back to the policy originator, and so forth.").
[97] *Id.* at 1101 ("in addition to identifying iterative federalism as a significant dynamic within environmental law, I am also arguing that, from a normative perspective, iterative federalism is quite useful as a regulatory tool.").
[98] 42 U.S.C. § 1396.
[99] *See* Weeks, *supra* note X, at 137 (citing a Florida complaint).
[100] *Id.* at 139.
[101] *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.").

The conventional wisdom of preemption and federalism bifurcates the role of states as dissenters into two broad categories. In the first category, preemption, state dissenters are silenced or must directly challenge preempting laws in the courts. In the second category, cooperative federalism, Congress invites states to implement national policies, fostering a constructivist dialectic with national policymakers.

Rather than narrowly view institutional arrangements in preemption and cooperation, this Article argues that both regulatory regimes offer ample opportunity for states to dissent. Dissent should be welcomed in both regimes, not on ideological grounds but by recognizing that interstitial feedback and input are valuable features. The more persuasive the dissent, the more likely Congress will embrace it – in preemption and cooperative regimes, alike.

## II. STATES' DISSENT STRATEGIES

The purpose of this Article is to describe a new state strategy to dissent to federal preemption. It does not argue that this strategy is the only strategy states have at their avail in preempting regimes. On the contrary, states have long used public and private technologies to resist preemption. The following sections describe those strategies, which consist of acquiescence and evasion to avoid the letter of the preempting law and litigation to command different laws.[102] After mapping those relatively familiar strategies, it unearths states' persuasive dissent in the form of conditional and trigger laws.

### A. *States' Traditional Dissent Strategies*

States have long resisted preemption, just not always through the kinds of discursive channels one might expect. Instead of engaging in a dialectic, states sometimes evade preemption by acting in ways that contradict the spirit of preemption but not the letter of the law. In other instances, states litigate or invite litigation, directly challenging the federal government through appeals to judges instead of directly to the federal government.

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[102] *See* Weiser, *supra* note 9, at 665 ("Preemptive federalism, like dual federalism, views the federal government and the states as two separate spheres, but instead of leaving room for state regulation, it preempts all state authority and supplants it with a unitary federal regime.").

1. Acquiescence and Evasion

Although courts invalidate state laws for conflicting with a preempting statute, that risk does not deprive states of "all concurrent powers to regulate in a given field,"[103] offering legislative space to violate the spirit of preempting laws without necessarily violating the letter. For instance, states evade preempting laws through unpublished initiatives. They also adopt laws that seemingly respect preemption while exploiting loopholes and exclusions.[104] Ultimately, they count on the underenforcement of preempting laws. What sets acquiescence and evasion apart from other forms of dissent and resistance is that these strategies do not necessarily intend to ignite new national approaches or greater state power. On the contrary, states often hope to proceed unnoticed, securing unique privileges and benefits for their constituents, which are unavailable to states strictly complying with preempting laws.

Consider, for instance, how states evade the National Labor Relations Act (NLRA),[105] which preempts union organizing and collective bargaining[106] to benefit their local workers. Labor scholars and practitioners have long criticized the NLRA for making it too difficult for workers to form and join unions and too easy for employers to violate labor rights.[107] Rather than contest

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[103] *See* JOSEPH ZIMMERMAN, CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM 2 (2005).

[104] 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.

[105] 29 U.S.C. §§ 151-169 (2006).

[106] *See* Benjamin I. Sachs, Des*pite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) ("It would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act (NLRA).").

[107] *See, e.g.*, Julius Getman, *The National Labor Relations Act: What Went Wrong; Can we Fix It?*, 45 BOS. COLL. L. REV. 125, 126 (2003) (noting that early optimism concerning the 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

the NLRA's weak protections in court, some progressive states have adopted laws that offer robust protections to workers, albeit in the context of "alt-labor" (i.e., non-union) bodies.[108] Doing so allows those states to facilitate greater worker power without violating the letter of the NLRA's union-specific provisions.

Other state laws evading the NLRA seek to protect local employers.[109] Influenced by powerful conservative interest groups[110] and supported by large corporations, red 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).[111] 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."[112] Because the NLRA's provisions enshrine the right to

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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….").

[108] *See, e.g.*. Sachs, *supra* note 108, 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. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 98-99 (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.").

[109] *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. 1, (2023) (finding that, between 2009 and 2019, 134 workers' rights bills were introduced in southern states prioritizing business perspectives over those of workers).

[110] *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).

[111] For an excellent overview of right-to-work laws, including their racist origins, *see generally* Ruben J. Garcia, *Right-to-Work Laws: Ideology and Impact*, 15 ANNUAL REV. OF L & SOC. SCI. 509 (2019).

[112] 29 U.S. Code § 151.

"refrain" from unionizing,[113] states claim they have the leeway to make it more difficult for unions to prove their worth to workers and finance their advocacy activities.

States also evade the federal government's plenary preemption of international law.[114] An area of state evasion gaining attention among scholars[115] and Congress[116] concerns state-level memoranda of understanding (MOUs) with foreign actors on trade and investment. After submitting countless Freedom of Information Act (FOIA) requests, Ryan Scoville found that states have entered over 600 MOUs with foreign governments, "most of which have never been published, even online."[117]

Nearly one hundred of those MOUs stipulate trade and investment opportunities.[118] Nevertheless, they do not directly conflict with federal tariffs or open new markets.[119] Instead, they commonly focus on cooperative trade exercises, business assistance, information sharing, and matching suppliers

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[113] 29 U.S.C. § 157 ("Employees shall…have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.").

[114] For a description of that plenary power, *see* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002) (tracing plenary power doctrine to the 1880s).

[115] *See, e.g.*, Duncan Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 766 (2010); Scoville, *supra* note 12, at 312 & n. 168.

[116] *See* House Ways & Means Hearing on the Biden Administration's 2024 Trade Policy Agenda with United States Trade Representative Katherine Tai (April 16, 2024), https://gop-waysandmeans.house.gov/event/hearing-on-the-biden-administrations-2024-trade-policy-agenda-with-united-states-trade-representative-katherine-tai/ (testimony of Representative Feenstra referencing state-level MOUs with foreign actors on international trade).

[117] *See* Scoville, *supra* note 12, at 317 (describing methodology). *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).

[118] *See* Scoville, *supra* note 12, at Appendix.

[119] 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, rending 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, https://www.trade.gov/data-visualization/tradestats-express-trade-partner-state.

with customers and trade partners – thus abutting but not crossing the lines of federal preemption.[120] Important for present purposes, those MOUs also offer states unique commercial advantages. On the heels of the North Carolina-UK MOU on trade and investment, for instance, the U.K. firm Marshall Aerospace announced a $50 million, 240-job investment in Greensboro, citing "the MOU as a key lever."[121]

2. (Multi)State Litigation

Since the 1980s, multistate litigation challenging federal laws has increased significantly.[122] Like-minded state attorneys general join forces to bolster resources when challenging the federal government.[123] The "increasing conservativism of the Supreme Court," Lynn Mather argues, "signaled that the Court was likely to act favorably on their petitions to reign in congressional power and assert state sovereignty."[124] The continued success of state attorneys general "encouraged further activity from the states,"[125] garnering scholarly attention for its paradigm-shifting effects on the balance of state and federal powers.[126]

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[120] *See* Scoville, *supra* note 12, at 353-54.

[121] *See* Lauren Ohnesorge, *UK official says NC trade agreement paying off*, TRIANGLE BUSINESS JOURNAL (Nov. 9, 2023).

[122] See, e.g., PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 20-21 (2015) (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: THE JOURNAL OF FEDERALISM 571 (2023) ("Since 1982, state [attorney generals] have filed 410 lawsuits, across all policy issues, against the federal government, with only twenty focused on healthcare policy issues."); 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.").

[123] *See* NOLETTE, *supra* note X, at 21 ("In addition to becoming more common, multistate cases have involved a greater number of [attorneys general] over time."); Lynch, *supra* note X, 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).

[124] Lynn Mather, *The Politics of Litigation by State Attorneys General: Introduction to Mini-Symposium*, 25 LAW & POL'Y 425, 426 (2003).

[125] *Id.*

[126] *See, e.g.*, Colin Provost*, An Integrated Model of U.S. State Attorney General Behavior in Multi-*

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."[127] 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.[128]

States' litigation is gaining momentum.[129] 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.[130] The Court has applied the clear statement doctrine to overturn preempting laws and programs that decide federal grant recipients, state immunity, and those considered to disrupt the "usual constitutional balance" between states and the federal government.[131] Its willingness to rule in favor

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*State Litigation*, 10 St. POL. & POL'Y QUART. 1, 1 (2010) (arguing that "multi-state litigation has come to symbolize the increasingly visible and powerful role of the state [attorney 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 (2018) (describing the numerous, high profile public law litigation by state attorneys general).

[127] *See* Miller, *supra* note 36, at 5. *See also* Lynch, *supra* note 2, at 2001 ("what is novel about multistate cases is the degree and quality of interstate cooperation being used to enforce the law."); Dichio & Singer, *supra* note 124, 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).

[128] *See* Dichio & Singer, *supra* note 124, at 567-68 (describing the motives and tactics of state litigation).

[129] *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.").

[130] *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. Ashcroff*, 501 U.S. 452, 460 (1991)); Huberfeld, *supra* note 27, at 982 ("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.").

[131] *See* Eyer & Tani, *supra* note 45, at 916; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1349 (2001) (showing how, even before the Roberts Court, the Rehnquist 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.").

of states motivates further state litigation,[132] leading scholars to conclude that we are witnessing a "revitalized" federalism revolution.[133]

On the other hand, 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."[134] Those state strategies seek "greater federal control over the states in the form of strengthened federal mandates."[135]

3. Conflicting Laws

States do not always take the federal government to court; sometimes, they invite the federal government to sue them. The latter takes place when states knowingly adopt laws contradicting preempting federal laws. Doing so 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 protections for children under the age of 18.[136] In 2023, ten states introduced or passed laws *reducing* the age of children permitted to work, including in hazardous work. Arkansas enacted a law that eliminates age verification and parent/guardian requirements.[137] Minnesota introduced legislation that reduces the minimum age in construction, a hazardous worksite, to 16-17.[138] Iowa introduced a bill that permits 14-year-olds to work in hazardous

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[132] *See* Mather, *supra* note 38, at 426 (arguing that states attorney generals' "continued success before the Court encouraged even further activity from the states.").

[133] *See* Eyer & Tani, *supra* note 45, 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,* PERSPECTIVES IN POLITICS (First View: April 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.").

[134] *See* NOLETTE, *supra* note X, at 30.

[135] *Id.*

[136] 29 U.S.C. 203 (setting a minimum age for child labor). *See* Jennifer Sherer & Nina Mast, *Child labor law are under attack in states across the country*, ECON. POL'Y INST. 5-7 (March 14, 2023), at https://www.epi.org/publication/child-labor-laws-under-attack/.

[137] *See* H.B. 1410.

[138] *See* H.B. 375.

occupations such as mining, meatpacking, and logging as part of an approved training program.[139]

Meanwhile, the documented incidents of children hurt and killed when working below federal standards continue to rise.[140] Child labor is not an area where states count on evasion through under-enforcement. State lawmakers are aware they are directly contravening federal labor laws, with at least one conceding that "such conflict is part of the point."[141] States' laws intend to eventually legalize forms of child labor considered to be hazardous or exploitative under federal law, benefitting powerful industries "from restaurants and retail to construction, logistics, and manufacturing."[142]

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Without an institutional arrangement to express their dissent to federal preemption, states have executed strategies advancing their interests but not necessarily the national agenda. Evasion is often conducted under the guise of implementation to secure regulatory benefits that elide other, more compliant states. They fail to signal dissent publicly, offering Congress no better information about states' heterogenous policy preferences than it had before. Litigation, by contrast, effectively coalesces sympathetic states (via attorneys general), but much of it disrupts the uniform national agenda, leaving matters of national importance vulnerable to fragmentation and regression.

Those limited options stand starkly against the institutional arrangements for state input, including dissent, in cooperative regimes. States do not seem to be content with this status quo. They are innovatively creating their own institutional arrangements in preempting regimes, leaning on persuasive devices where direct federal channels are seemingly foreclosed. The next

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[139] *See* SF-167.

[140] *See* Michael Sainato, *US Labor Department Condemns Surge in Child Labor After Teen Dies on the Job*, THE GUARDIAN (July 27, 2023), https://www.theguardian.com/us-news/2023/jul/27/child-deaths-labor-department (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), https://abcnews.go.com/US/despite-hazardous-working-conditions-states-rolling-back-child/story?id=107209273 ("last 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.").

[141] Sherer & Mast, *supra* note 139.

[142] *Id.*

section describes those innovations, which include conditional clauses to motivate and coalesce dissenting states and trigger clauses to persuade Congress of state uniformity and preferences.

### B. *States' Persuasive Dissent*

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 one hour of their lives.[143] Their appeals for lenience failed to convince the state to ignore the federally mandated clock adjustments, and both inmates were executed on time.[144] 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.[145]

Notwithstanding states' sympathy, Congress has limited their options under the preempting UTA.[146] Congress adopted it, at least in part, to organize time zones across U.S. regions and ensure standardized time for interstate commerce, travel, and a host of other logistics.[147] 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 might decide based on its rational interests to the

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143 *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).

144 *Id.* at 124.

145 *See infra*, Part I.B.

146 UTA, *supra* note X at §3(b) ("It is hereby declared that it is the express intent of Congress by this section to supersede any and all laws of the State or political divisions thereof insofar as they may now or hereafter provide for advances in time or changeover dates different from those specified in this section.").

147 *See* PRERAU, *supra* note 11, 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[148] or opt out of daylight saving time entirely.[149]

Between 2015 and 2024, states introduced at least 450 bills and resolutions relating to daylight saving time.[150] Many of those bills would reject both options under the UTA and advance a third option, permanent daylight saving time.[151] While those bills presumably violate federal preemption, they contain two clauses, trigger and conditional clauses, ensuring compliance with UTA while signaling states' preferred alternative.

1. Trigger Clauses

Twenty states have adopted laws or resolutions that would automatically observe daylight saving time permanently should Congress amend the UTA to allow it. Florida was the first to adopt such legislation in 2018. Its bill states:

> If the United States Congress amends 15 U.S.C. s. 260a 18 to authorize states to observe daylight saving time year-round, it is the intent of the Legislature that daylight saving time shall be the year-round standard time of the entire state and all of its political subdivisions.[152]

Since then, 19 additional states have adopted laws with similar trigger clauses: five in 2019,[153] six in 2020,[154] five in 2021,[155] two in 2022,[156] and the most recent in 2024.[157] Between 2022 and 2023, 11 additional states introduced

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[148] UTA, *supra* note X at §3(a).
[149] *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* Pub. L. 92-267. 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 Legislature, *Daylight Saving Time / State Legislation* (March 06, 2024) [hereafter, *State Legislation*], https://www.ncsl.org/transportation/daylight-saving-time-state-legislation.
[150] *See* National Conference of State Legislature, *Daylight Saving Time / State Legislation* (March 06, 2024), https://www.ncsl.org/transportation/daylight-saving-time-state-legislation.
[151] 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.
[152] H.B. 1013, §1(2) (2018).
[153] Those states are Delaware, Maine, Oregon, Tennessee, and Washington.
[154] Those states are Idaho, Louisiana, South Carolina, Ohio, Utah, and Wyoming.
[155] Those states are Georgia, Minnesota, Alabama, Mississippi, and Montana.
[156] Those states are Colorado and Kentucky.
[157] Oklahoma passed SB1200 in the Fall of 2024.

similar laws.[158]

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*[159] 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.[160] Trigger clauses have since become known as strategic technologies that allow states to express their displeasure with federal legislation without crossing constitutional lines.[161]

In signaling their alternative preference for permanent daylight saving time, states hope to create a "pressure point for"[162] for Congress to pass the Sunshine Protection Act, which amends the UTA to allow permanent daylight saving time.[163] Those signals are reaching Congress.[164] Senator Patty Murray, who co-sponsored the Sunshine Protection Act with Senator Marco Rubio, was motivated in part when the governor of her home state, Washington, signed into legislation a law that would make daylight saving time permanent.[165]

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158 Those states are Alaska, Iowa, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, and Texas.

159 410 U.S. 113 (1973).

160 *See* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1639 (2009) ("Because the substantive provisions have no immediate effect and will not be enforced, their constitutionality cannot be challenged in court until they are triggered.").

161 *Id.* (noting that the number of trigger laws is increasing).

162 *See, e.g.,* AL SB388, §1 ("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.").

163 *See* Miles Blumhardt, *Colorado Bill makes daylight saving time permanent, but hurdles remain*, COLORADOAN (June 3, 2022) (Sen. Tommy Tuberville, R-AL, referring to DST clock changes as "a nuisance and not smart policy"), https://rb.gy/872d7; Kate Lisa, *Bipartisan New York bill would make daylight saving time permanent with neighboring states*, SPECTRUM NEWS 1 (May 22, 2023) ("Griffo says passing the measure in New York would put pressure on Congress to end the time change…"), https://rb.gy/8cbhd [hereinafter, *New York bill*].

164 *See* Corrie E. Clark & Lynn J. Cunningham, *Daylight Saving Time*, CONG. RES. SERV. 12 (Sept. 30, 2020) (discussing several bills introduced in Congress to permit states to observe permanent daylight saving time).

165 *See* U.S. Sen. Patty Murray, *Senator Murray Calls for Permanent Daylight Saving Time Ahead of Clocks Falling Backward This Weekend* (Nov. 4, 2021) ("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."), https://www.murray.senate.gov/senator-murray-calls-for-permanent-daylight-saving-time-ahead-of-clocks-falling-backward-this-weekend/. *See also* WASH. REV. CODE §1.20.052 (2024).

Nevertheless, trigger clauses, alone, are insufficient to contradict Congress' 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 signal to 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 states will join them in preferring permanent daylight saving time. Not all states share the same preferences for clock adjustments. For instance, states in the northeast corridor face unique daylight challenges. Those situated at the easternmost point 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. By contrast, states on the western border of the Eastern Standard Time zone – western Indiana, Michigan, and North Dakota – would experience darker days. The sun would not set until after 6 pm, but the latest sunrise would occur after 9 am from mid-November to mid-February.

States needed a way to signal their preferences and persuade others to adopt permanent standard time as the new norm. Consequently, 21 states adopted or otherwise proposed legislation containing conditional clauses *inviting their neighbors to join them.*[166] 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

[166] 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.

> November, upon the adoption of the elimination of daylight saving time in Massachusetts, New York and Rhode Island.[167]

Conditional clauses, by themselves, are not new.[168] States have long conditioned their bills on similar bills enacted in other states to "compete with, or to repel the expansion of, federal administration…."[169] In the early twentieth century, Felix Frankfurter and James Landis observed that states were exploring ways to engender "a fruitful exchange of views on State policies essential to an understanding of common interests."[170] Since then, states have combined their legislative initiatives across multiple policy fronts, from immutable areas like daylight saving time and state boundaries[171] to complex health care regulations, law enforcement,[172] transportation,[173] genetically modified foods,[174] and copyright.[175]

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[167] CT HB06071 (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(l). Enacted in 2020, the law does not enter effect until "at least four states in the United States 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).

[168] *See, e.g.*, PHILIP SCRANTON, PROPRIETARY CAPITALISM: THE TEXTILE MANUFACTURE AT PHILADELPHIA, 1800-1885, 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.").

[169] *Id.*

[170] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution. A Study in Interstate Adjustments*, 34 YALE L. J. 685, 688-689 (1925) (describing reciprocal legislation, uniform state laws, and other interstate initiatives).

[171] *See, e.g.,* Lindsay, *supra* note 25, at 454 (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)

[172] *See* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 387 (2018)

[173] *Id.*

[174] *Id.* at 388 & n 41 (describing Connecticut's conditional legislation seeking to impose a requirement to label genetically modified goods in the northeast).

[175] *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. Many critics dislike the Electoral College, or rather, what has *become* of it (a "winner-take-all rule"),[176] and proposed state-level conditional legislation.[177] Under that proposal, the compact would come into effect "if and only if other states, whose electors taken together with this state's electors totally at least 270, also enact [to do the same]."[178]

The daylight saving time bills containing conditional clauses could have given rise to academic debate[179] (what is a compact? at what point is there a conflict?), but they all contain the trigger clauses discussed above.

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[176] *Id.* at 225; JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 21-42 (1975) (describing a host of "indictments" against the electoral college based on how it has evolved over time).

[177] See Robert W. Bennett, *Popular Election of the President With-out a Constitutional Amendment*, 4 GREEN BAG 241, 243-46 (2001); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 372 (2007) (noting that "attempts to abolish the Electoral College at the federal level have failed."). In the 2000 election, Governor Bush received a majority of the electoral vote even though Vice President Gore received a plurality of the popular vote.

[178] *See* Akhil R. Amar & Vikram D. Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW, Dec. 28, 2001, http://writ.news.findlaw.com/amar/20011228.html; 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); Muller, *supra* note 96, at 375. 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.* 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.*

[179] *See, e.g.,* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 Election L.J. 372, 388 (2007) (arguing that constitutional doctrine requires states to obtain congressional approval before passing conditional clauses); Stanley Chang, *Recent Development: 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); 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).

Consequently, they avoid constitutional scrutiny. They do not offend the Supremacy Clause[180] because they are not legally enacted until Congress amends its legislation to remove the conflict. And they do not offend the Interstate Compact Clause,[181] which merely prohibits compacts "without the Consent of Congress…."[182]

States' persuasive efforts remain a work in progress. Many states 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. Of the nine states with conditional legislation in the northeastern region, for instance, five passed or are considering legislation to observe permanent standard time,[183] and six passed or are considering legislation to observe permanent daylight saving time.[184]

Some states have changed their legislative initiatives in light of 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.[185] However, its bill never made it out of committee, perhaps reflecting that the named states were adopting or considering *permanent daylight saving time*, instead. A second draft bill, submitted in 2023, seeks permanent daylight saving time in line with Vermont's influential neighbors.[186]

Congress, too, has been affected by states' aggregate efforts. In her remarks on the Senate floor,[187] Senator Murray emphasized that "states across the country from Florida and California to Maine and many more have now

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[180] U.S. Const. art. VI, cl. 2.

[181] U.S. Const. art. I. § 10(3).

[182] U.S. Const. art. I. § 10(3); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 456-57 (1978); Northeast Bancorp. v. Bd. of Gov. of Fed. Res. Sys., 472 U.S. 159 (1985).

[183] Those states are Connecticut, Massachusetts, New Hampshire, and Rhode Island.

[184] Those states are Delaware, Maryland, Michigan, New York, Pennsylvania, and Vermont (the latter originally proposed permanent Standard time). 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 whose proposed bills do not have conditional clauses.

[185] See VT H0168.

[186] *Id.*

[187] *See, e.g.,* C-SPAN, US Senate: Senators on Daylight Saving Time Legislation (Sen. Patty Murray, naming states that had adopted trigger laws to support her recommendation to adopt the Sunshine Act), https://www.c-span.org/video/?518686-5/senators-daylight-saving-time-legislation.

passed legislation or resolutions to make Daylight Saving Time year-round."[188] Senators were convinced and adopted the Sunshine Protection Act on March 15, 2022.[189] However, the bill languishes before the House,[190] 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.[191]

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This Part has described states' strategies for dissenting from federal preemption. While it mapped two relatively well-known strategies, evasion and dissent, its main contribution was describing a new strategy by which states craft their public laws to invite sister states to join the dissent and offer Congress information about state dissent and states' self-organizing capacities.

At this point, an obvious question is how transferable a state strategy to advance immutable topics like daylight saving time is to other matters of national and state interest. 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 dissent 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. Instead, as discussed in further detail in Part IV, it argues that states' various dissent strategies all involve trade-offs and will align with different objectives. Before doing so, the next Part explains why states' conditional and trigger clauses and states' objectives persuade coordination among states and convince Congress to amend preempting legislation.

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[188] *See* Murray, *supra*.

[189] *See* All Information (Except Text) for S.623 - Sunshine Protection Act of 2021, 117th Cong. (2021-2022), at https://www.congress.gov/bill/117th-congress/senate-bill/623/all-info (accessed Nov. 25, 2023).) [hereinafter, Sunshine Protection Act Information].

[190] *See* Sunshine Protection Act Information, *supra* note 82.

[191] *See* Addy Bink, *Bill to Make Daylight Saving Time Permanent Reintroduced in Congress*, The Hill (March 02, 2023) (accessed Nov. 3, 2024), https://thehill.com/homenews/nexstar_media_wire/3880009-bill-to-make-daylight-saving-time-permanent-reintroduced-in-congress/.

## III. UNDERSTANDING PERSUASIVE DISSENT

This Article has mapped the various forms of state dissent to national laws and policies and has argued that state trigger and conditional clauses mark a significant development in state strategies. That development, it has argued, stems from the potentially persuasive nature of those clauses on sister state organizing and federal decision-making. Left aside until now is an explanation of why those clauses might be convincing, or at least more persuasive than evasion and litigation.

A significant body of psychological and behavioral scholarship establishes a link between instrumental design and regulated behavior.[192] It begins with the assumption that regulated individuals make choices based on available information, which may be flawed, biased, or erroneous but is nevertheless self-serving.[193] Game theory intervenes in those assumptions by showing how instruments such as laws can sometimes offer information to improve coordination among actors and their ultimate decision-making.[194] In the preemption context, decision-making is often premised on the presupposition of states' collective action problems and the utility of preemption to overcome them. This Part establishes a typology of regulatory persuasion for heuristics purposes, focusing on (1) signaling; (2) sites of resistance; and (3) decision-making autonomy.

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192 *See, e.g.,* THALER & SUNSTEIN, THALER & SUNSTEIN, *supra*, note 26, 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); Ann E. Carlson, *supra* note 94, at 1099 ("The most innovative 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.").

193 *See* THALER & SUNSTEIN, THALER & SUNSTEIN, *supra*, note 26, at 137-38 (describing how regulators can improve decision-making by making better information available than might otherwise have been otherwise shared).

194 *See* Stephen Morris & Hyun Song Shin, Global Games: Theory and Applications, *in* ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, EIGHTH WORLD CONGRESS 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).

### A. *Signaling*

The most important feature of states' persuasive dissent is its public signaling device.[195] Those signals are directed horizontally to sister states and vertically to the federal government. A vast body of behavioral and game theory literature explains how those signals can coordinate decision-making by helping states overcome collective action problems and the federal government identify social preferences and state capacities.

#### 1. Signaling Sister States

A central feature of states' persuasive dissent is its ability to signal preferences and commitments to other states. Doing so offers information to other states, facilitating self-organizing and coordination. By coordinating themselves, states may convince the federal government to reconsider its decision to preempt or, as in the case of daylight saving time, amend its preempting approach to reflect the widespread interests of large coalitions of states. States' success, therefore, rests on whether they can overcome their coordination problems by combining their actions in a certain way (legislation), recognizing that more than one possible solution could suffice.

Legal scholars often depict coordination problems as a prisoner's dilemma.[196] This dilemma stems from a lack of information. Two prisoners are detained separately and offered a choice between remaining silent or incriminating the other. If both remain silent, they each receive a relatively light sentence (five years). If they both incriminate the 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. The relative payoffs are often represented in a two-by-two matrix reflecting the possible sentences.

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

[196] *See, e.g.*, Huq, *supra*, note 31, at 24.

Fig. 1 Prisoners' Dilemma

| | | 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 fee | 7 years, 7 years |

According to this theory, now legal lore, without information about the other's action, both prisoners are enticed to incriminate the other, resulting in the worst sentence for each. The prisoners' dilemma shows the undesirable yet inevitable effects of individually rational actions. While this model is usually used for individual actions, legal scholars have found it helpful in the context of public law, where multiple actors follow the same theoretical dynamic.[197]

Beyond the prisoners' dilemma, game theory proposes coordination games to elucidate the importance of signaling in deciding among multiple solutions.[198] One of the games that is helpful in the present context is the assurance (otherwise known as the stag hunt) game.[199] 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 it is selecting Strategy B and receiving 3 points. 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. Because the payoffs are equivalents, Player 1 has the same preferences. Consequently, the players want to match strategies. The game has two strategy equilibria: A/A and B/B:

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197 *Id.* at 11.

198 *See* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209 (2009) (218-225) (explaining three games of coordination).

199 *Id.* at 220-21.

Fig. 2 Assurance Game

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

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). 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 because it guarantees 3 points, while Strategy A could afford 4 or 0 points. Without an assurance of the other player's selection, both players may take the more conservative option of Strategy B/B, thus earning lower points. 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 action.[200] Studies find that information announced publicly, such as through legislation, is more assuring than bilateral dialogues with the same information.[201] States' willingness to commit to their 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."[202]

Take, for instance, the legislative hearings in Vermont, where advocates and legislators hotly debated whether "all of the New England states" would

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[200] *See* Morris & Shin, *supra* note X, 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).

[201] *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.")

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

adopt the same policy regarding daylight saving time.[203] 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."[204] 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.[205]

As the assurance game suggests, states' conditional clauses are extremely risky.[206] Interstate cooperation is not a foregone conclusion. Some states have not decided whether to join the pack of states favoring permanent daylight saving time. Having these initiatives unfold publicly may generate signals of interstate chaos rather than organization, which could lead to conclusions that federal interventions are necessary to protect 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."[207] Drawing from Coasean theory, Robert Cooter and Neil Siegel argue that the volume of participants is critical to determining transaction costs.[208] These studies conclude that "[t]he more states there are that must work together…the larger the costs of cooperation, and the greater chance of failure."[209]

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. Doing so avoids the unruly collective action problem, where states situated differently (in this case, proximity to the sun) would feel compelled to decide differently based on their rational interests. By coordinating piecemeal, state laws demonstrate the social desirability of an option otherwise unavailable under preempting legislation. They also demonstrate that they can sufficiently self-coordinate despite having

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[203] VT H267 ("And if Vermont just does this, the suggestion was wouldn't it be better if all of the New England states did this?").
[204] *Id.*
[205] *See* New Hampshire House Hearing on Permanent Standard Time & DST (2024 January 24) (accessed Nov. 3, 2024), https://www.youtube.com/watch?v=QHehGl_hVf4.
[206] *See* Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS 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.").
[207] *See* Huq, *supra* note 31, at 45 (citing Cooter & Siegel, supra note 45, at 140-41).
[208] See Cooter & Siegel, supra note 45, at 120-139.
[209] *See* Huq, *supra* note 31, at 15-16.

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.[210] They often freeride on the innovations modeled by other states.[211] In this instance, states may freeride on the legislative efforts of different states, which have drafted the trigger and conditional clauses states can reproduce in their laws. Moreover, states' trigger clauses buy states time to persuade one another and lobby domestically because their bills only enter into effect once federal decision-makers become 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.

Risk aside, conditional clauses are no panacea for interstate cooperation. Critics may worry that, should the federal government offer states more options, the relative decentralization of state decision-making will reduce economic gains and augment negative externalities[212] and transaction costs.[213] By maintaining its position at the helm in preempting areas, the federal government reduces transaction costs by centralizing and coordinating those solutions.[214]

Also, consider that states' conditional clauses invoke "a future fact, and the statutes designed no authority to determine the fact."[215] Many states named

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[210] *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEG. STUD. 593, 614-616 (1980) (finding that political cost and risk aversion results in a lack of innovation).

[211] *See* Huq, *supra* note 31, at 46 ("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.").

[212] 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 45, at 137 (describing negative externalities).

[213] *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.").

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

[215] *See* Lindsay, *supra* note 25, 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 (Michael Faure, Wicher

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. Nor did they designate monitoring mechanisms to review the implementation of agreed-upon standards across neighboring states.

This section does not intend to paint an overly rosy picture of states' persuasive dissent. Drawing from behavioral and game theory literatures, its argument here is that if states intend to demonstrate to Congress that initial presumptions of states' collective action problems and lacking coordination were wrong, conditional clauses are a helpful coordinating mechanism. However, states have other objectives and priorities. Part IV sketches out when they should elect alternative dissent strategies.

### 2. Signaling the Federal Government

Individuals often make decisions that reflect inherent biases or errors.[216] The same holds for federal legislators. When Congress legislates cooperative programs or preempts legislation, it does so based on a series of assumptions or biases regarding state behavior. Preemption often reflects the belief that states suffer regulatory gaps and market failures or will compete with and undermine one another to the detriment of national welfare.[217] Even barring those state-centric objectives, states may lack coordinating capacities, demanding a centralized authority to coordinate decisions on their behalf.

Recall that those kinds of assumptions contributed to the UTA, which organizes states' time zones by region and offers states only two options –

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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.").

[216] *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 decisionmaking).

[217] *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.").

default biannual clock adjustments and an opt-out. States' conditional clauses interlinking initiatives offer Congress better information about their coordinating capacities to align themselves across additional options, potentially motivating Congress to revisit its initial approach.

In her article *Dissenting by Deciding*, Gerken argues that dissenting actions like passing laws that conflict with the majority approach present a "real-life instantiation of what successful" counter-approaches would look like.[218] Even if states' coordinated efforts prove unsuccessful, dissenting through coordinated actions advances "the marketplace of ideas" by encouraging society to evaluate its views and make corrections where necessary.[219] Because minority dissent "takes an outlier decision, not an argument, it is inherently visible to the polity."[220] The public attention such dissent generates[221] may further compel the federal government to consider its approach and the presumptions behind it when formulating a response. Gerken cautions that initial decisions may be sticky but emphasizes that showing the majority practical alternatives may make it more difficult for the majority to proceed under its preferred approach.[222]

"Acting radically," such as passing legislation, is more visible than traditional dissenting through oration.[223] More than mere words, dissenting actions bind the dissenting party. When a state passes legislation, for instance, it has put its commitments to an alternative approach in writing. Reversing the decision would take a legal act. The binding nature of the dissent "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.[224] The same logic holds for states that lack institutional arrangements to voice their views interstitially in preempting regimes.[225] In that sense, dissenting through trigger and conditional legislation can serve as an "equalizer of sorts" by paving expressive pathways to congressional decision-making.[226]

Although Gerken avoids the question of preemption, she uses "hard

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[218] *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1766-68 (2005).
[219] *Id.* at 1759.
[220] *Id.* at 1760.
[221] *Id.*
[222] *Id.* at 1764.
[223] *Id.* at 1761.
[224] *Id.* at 1762.
[225] *Id.* at 1763.
[226] *Id.*

federalism" as an example of how action-based dissent is often misunderstood as battles between competing sovereigns rather than a decision of a minority of the polity.[227] Referring to *U.S. Term Limits, Inc. v. Thornton*,[228] in which the Supreme Court invalidated a terms-limit rule passed by 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.[229]

Like state citizens and representatives, state legislators comprise the federal polity. Although 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 dissent 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.

Again, the point is not to suggest that states' persuasive dissent will always convince Congress to change its preempting approach. Instead, it is that 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 dissenting legislation than if they evade or litigate.

Considering that state laws can ignite an upward influence in preemption requires a shift in traditional federalism thinking. Currently, the scholarship is replete with examples of how federal actors "ghostwrite" state laws[230] or otherwise nudge state actors into compliance.[231] It also embraces cooperative federalism for offering states channels to input into national agendas.[232] Far less attention has been paid to how states offer feedback to or otherwise influence federal lawmakers in the preemption context. This section argues that by making their coordinated, dissenting approaches visible through

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[227] *Id.* at 1790.
[228] 514 U.S. 779 (1995).
[229] Gerken, *supra* note 222, at 1790.
[230] *See, e.g.*, Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L. J. 1802, 1806-07 (2024) (describing how the federal government writes state laws and policies behind the scenes).
[231] *See, e.g.*, Jenna Bednar, *Nudging Federalism towards Productive Experimentation*, 21 REG. & FED. STUD. 503, 508-510 (2011) (arguing that the federal government should encourage state experimentation).
[232] *See* Huq, *supra* note 31, at 67-69 (describing various cooperative programs, arguing that conventional wisdom around collective action "does not always or fully capture the extent and success of states' input into the federal legislative process.").

legislation, states persuade amendments to preempting laws and policies, suggesting that input and ghostwriting are more bidirectional than presently assumed.

### 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."[233] In game theory, a salient and coordinating feature must intervene in the participants' expected payoffs. By adopting bills with trigger clauses expressing the desire for Congress to amend the UTA to allow permanent daylight saving time, states create "sites of resistance to the federal government."[234] Participants organize around focal points by coordinating their efforts to achieve an expected outcome.[235] That is not to suggest that coordination is a given, but merely that states are more likely to coordinate if they are aware of coordinating efforts and prospects and can witness momentum among states.[236]

By building focal sites of resistance, such as through conditional clauses interlinking states' alternative policy preferences, states' strategies are not a bug but a feature of contemporary federalism. They serve as necessary feedback loops by correcting the federal government's incomplete information during implementation.[237] They signal and engender multidirectional frictions:

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[233] *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 57 (1960).

[234] *See* Jessica Bulman-Pozen, *supra* note 175, at 395 (describing the historical role of states' regional organizing). *See also* SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AN 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).

[235] *See, e.g.*, *See* 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*.") (emph. in original).

[236] *Id.* 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*.") (emph. in original).

[237] *Compare 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 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.").

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

As state numbers grow, so does the persuasive effect on Congress to amend its preempting legislation, assuming initial preempting decisions were based partly on assumptions of state disorganization.[238] In the federalism context, states demonstrate a social convention or norm.[239] A social convention or norm exists when "almost everyone in a community agrees that they ought to behave in a particular way in specific circumstances, and this agreement affects what people actually do."[240]

Notably, during the congressional hearings on the Sunshine Protection Act, legislators focused on the number of states opting for permanent daylight saving time.[241] Similarly, the National Popular Vote Compact fixes entry into effect "when enacted by states with a majority of the electoral votes (270 of 538)."[242] Those initiatives intuit that social norms and conventions require demonstrable support, not mere assertion.

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

This subsection argues that states' persuasive dissent is influential because it leaves sister state and federal decision-making autonomy unfettered.[243] Voluntary self-regulation and autonomy have proven influential in coalescing interests around common approaches.[244] The more decision-makers feel empowered over their choices, the behavioral regulatory literature finds, the more likely they are to comply with their decisions.[245]

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[238] *See, e.g.*, TARROW, *supra* note 161, 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….").

[239] *See* Huq, *supra* note 31, at 35 (arguing that a preliminary criterion for voluntary decision-making is recognition "of a social *convention* or norm respecting the resource's management.") (emph. in original).

[240] *See* Robert Cooter, *Expressive Law and Economics*, 27 J. LEG. STUD. 585, 587 (1998).

[241] *See* Senators on Daylight Saving Time Legislation, *supra* note 160.

[242] *See* Agreement Among the States to Elect the President by National Popular Vote (accessed Nov. 8, 2024), https://www.nationalpopularvote.com/written-explanation.

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

[244] *See* Huq, *supra* note 31, at 35.

[245] *See generally* THALER & SUNSTEIN, *supra* note 26, at 20 ("Better governance often requires

Behavioral studies also show that when decision-makers have agency, they tend to discover their "preferences through reasoning," resulting in "building cognitive capability and motivation through the regular activation of reflective processes."[246] State legislators balance the invitation to enact similar legislation against the information available concerning the health and safety of their unique populations.[247] For instance, Vermont's daylight saving time bill "cites 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."[248] Vermont's concerns about protecting its citizens may or may not align with sister state efforts. Preserving decision-making autonomy is a critical feature that enables states like Vermont to make the best decisions for their local interests as well as coordinate within broader interstate movements.

States' trigger clauses also preserve the federal government's decision-making autonomy. Part I explained how states often turn to litigation to enlist judges to forcefully minimize or overturn federal preemption. In those instances, judges may require the federal government to abandon its preempting approach. By contrast, states' trigger clauses enlist the federal government's assistance by persuading it of states' social norms and conventions.

If states build their political and persuasive power, even if the federal government remains autonomous, aren't they necessarily 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 Gardaum argues persuasively that

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less in the way of government coercion and more in the way of freedom to choose."); 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.").

[246] *See* Sanchayan Banerjee, Till Grüne-Yanoff, Peter John & Alice Moseley, *It's Time we Put Agency into Behavioural Public Policy*, 8 BEHAVIORAL PUB. POL'Y 789, 797 (2024).

[247] *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/ (outlining the various considerations states are giving to their approaches to daylight saving time).

[248] *See* VT H0168 Summary (accessed July 20, 2024), https://www.billtrack50.com/BillDetail/1296498.

state and federal power can grow in tandem.[249] 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."[250] Cooperative regimes, after all, are celebrated for enabling federal and state governments to realize parallel regulatory power. In preemption, states' collective power enhances oppositional voice but does nothing to dissipate 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 the federal government should revise its preempting approach.[251] Those senators hail from states that have passed permanent daylight-saving time legislation. 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. 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 federal government's national agenda, or vulnerable to state cost-exportation,[252] it remains free to disregard it.

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This Part has explained why dissenting states' conditional and trigger clauses are persuasive. Those clauses assure sister states of decision-making and invite coordination. They signal collective action to Congress, asking it to reconsider its priors about state competition and collective action problems. They create focal sites of resistance through legislation while preserving the decision-making autonomy of both groups of actors, encouraging

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[249] *See* Stephen Gadaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 UNIV. CHI. L. REV. 483, 486 (1997).

[250] *Id.*

[251] *See* C-Span2, Senators on Daylight Saving Time Legislation (March 15, 2022), https://www.c-span.org/video/?c5112739/user-clip-us-senate-senators-daylight-saving-time-legislation [hereinafter "Senators on Daylight Saving Time Legislation"].

[252] *See* Hills, *supra* note 62, 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.").

participation and ownership.

Concededly, this Article treats state legislators as monoliths, recognizing that legislative initiatives are far less linear or singular. Miriam Seifter and others expose the heavy influence of state officials, private interest groups, advocates, and other third-party organizations on states' legislative initiatives.[253] Of course, the same can be alleged of federal lawmakers who have been so influenced by "powerful interest groups" that they can be "lure[d] … far from the public good of federalism ideals.[254]

Strong interest groups and political actors play a role in national and state legislation. As mentioned, states' time zone bills reflect local advocacy by schools, parents, farmers, chambers of commerce, and sleep experts.[255] That advocacy has motivated state legislators to experiment with persuasive dissent. Such participation by diverse actors within states and the federal government does not necessarily lessen the persuasive value of conditional and trigger clauses. Nonetheless, it is important to bear in mind the political economy of persuasion when considering state strategies in light of objectives, as discussed in Part IV.

Against that multifaceted backdrop, persuasive dissent through conditional and trigger clauses marks a seismic change in the relationship between states and national policies. That state strategy seems to support what Gerken and Abbe Gluck call the "nationalist school of federalism"[256] or "national federalism."[257] Those theories trace 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 dissent strategies show

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[253] *See* Seifter, *supra* note 50, at 957-58 (arguing that the homogeneous "state view" is actually constructed by heterogeneous state officials settling for the "lowest common denominator"); Charles W. Tyler & Heater K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COL. 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….").

[254] *See* Huq, *supra* note 31, at 22.

[255] *See* Coalition for Permanent Daylight Saving Time (accessed Nov. 22, 2024) (describing advocacy efforts), https://ditchdst.com/.

[256] *See* Heather K. Gerken, *Federalism and Nationalism: Time for a Detente*, 59 ST. LOUIS U. L.J. 997, 1001-02 (2015) (arguing that the new nationalists favor devolution as a means to achieve nationalist aims).

[257] *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.").

how states have blurred the line further 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 a sympathetic Congress) promises to decentralize regulatory governance and terminate federal programs, policies, and laws – many of which justified progressive support for federal preemption. State actors that may have been content with evading the reach of federal preemption may sense the need to take greater protective action. State attorneys general who sought to use 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 or not states change their approach will likely turn on the policy in question and the specific state objectives. Yet, as mentioned, states have no formal mechanisms to intervene in preempting areas ex post, even when circumstances like administrations and federal approaches to rights and liberties change.

This Part considers states' strategies to dissent in preempting regimes interstitially and sketches the trade-offs of those strategies. 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 in question. Instead, it considers strategies in light of their objectives, recognizing that states face competing demands and circumstances.

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

States might sometimes favor federal preemption, even when they hope for different options under preempting laws. State legislators 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 are made possible through preempting laws and attendant federal funding. In the daylight saving time context, states seemed to recognize the need for overarching federal control, centering their efforts on adding a preferred option instead of challenging preemption altogether. One can imagine various circumstances in which maintaining federal responsibility, resources, and accountability might appeal to state lawmakers.

Consider, for instance, the case of right-to-work states, where state politicians cater to powerful corporate interests yet need the votes of worker

constituents. Rather than claim accountability for laws that render workers and working conditions vulnerable by outsizing the relative power of capital, politicians can cite the NLRA and its preempting provisions cementing the right of workers to refrain from coalescing their power through unions.

If state actors hope to preserve federal authority while influencing preempting approaches, they need a strategy that promotes a dialectic. In these instances, neither evasion nor litigation suffice. Evasion lacks the public signaling effects necessary to assure, coordinate, and ignite a dialogue. It suggests states acquiesce to, if not accept, preempting approaches. States that exploit federal underenforcement of trade instruments or loopholes in the NLRA and tax regulations rarely try to engage in a discourse with federal actors. States may particularly hope to avoid openly disputing the Trump administration, which is known for punishing non-compliant states.[258]

Litigation, too, is unlikely to move the needle on new *national* approaches. As Nolette describes, multistate litigation sometimes seeks to motivate Congress to overcome its inertia and advance progressive federal policies like policies to mitigate climate change. While litigation could be effective during administrations already predisposed to adopting more progressive positions, it will likely become unattractive during the Trump administration.

Imagine what would happen under the Trump administration if states seek 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 inefficiency grounds.[259] Similarly, states' 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, states hoping to engender new approaches to the national agenda should adopt the persuasive approach.

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[258] *See* Jeff Amy, *Georgia Official: Trump Call to "Find" Votes was a Threat*, AP (Nov. 2, 2021) ("Raffensperger — known as a conservative Republican before Trump targeted him — writes that he perceived Trump as threatening him multiple times during the phone call.").

[259] *See* CBS NEWS (Nov. 12, 2024) (quoting Trump's promise "to dismantle Government Bureaucracy, slash excess regulations, cut wasteful expenditures, and restructure Federal Agencies - Essential to the 'Save America' Movement."), https://www.cbsnews.com/news/trump-elon-musk-vivek-ramaswamy-new-department-of-government-efficiency/.

They should adopt bills that signal their resistance to the current approach, coordinate state resistance, and signal its coordinating capacities to Congress. Notwithstanding the Trump administration's shrinking policy space, there are certain regulatory pathways that collective state action could influence. For example, states could continue to push immutable issues like time zone legislation, making a clear business case for better aligning regional state regulations with their proximity to the sun. Adopting the Daylight Sunshine Protection Act would ensure that business operations remain predictable, thereby assuring investors and companies of continuity, all while giving states an additional option reflecting sister-state support.

States could also opt for persuasive dissent to reform the NLRA. Rather than litigate, states could coordinate their legislation to ban right-to-work business policies, arguing that such policies harm the blue-collar workers the Trump administration claims to support and,[260] by keeping workers subordinate, lower production and efficiency in businesses.[261]

Of course, states' persuasive dissent is not the only technology that states could use to signal preferences and persuade sister states to harmonize approaches. State governors, for example, have created official alliances to foster cross-state collaboration, including "the sharing of essential tools, knowledge, and resources."[262] 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

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[260] *See* Paul Kiernan, *Trump Made big Gains Among Blue-Collar Workers. Is He Really on Their Side?*, THE WALL STREET JOURNAL (Nov. 18, 2024) ("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."), https://www.wsj.com/politics/elections/trump-labor-policy-working-class-voters-923e8861.

[261] *See* Desirée LeClercq, *Labor Strife and Peace*, 15 U. CAL. IRVINE L. REV. (forthcoming, 2024) (showing how protections for organizing are central to maintaining worker motivation and productivity).

[262] *See* Governors Safeguarding Democracy (accessed Nov. 22, 2024), https://govsfordemocracy.org/about-us/.

areas of state statutory law."[263] Nonprofit organizations[264] and regulators[265] 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.[266]

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 signal collective preferences to federal lawmakers. Consequently, they tend to affect national agendas indirectly. That's not to suggest that they are a worse strategy, but merely that their signals to Congress are weaker than persuasive dissent 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.[267] The sheer volume of states' evading laws had salient effects on conversations around marijuana usage on the federal level. In 2013, the Department of Justice (DOJ) announced it would not prioritize the enforcement of federal marijuana laws in states.[268] Nevertheless, lacking a conditional clause, neighboring states did not necessarily match or welcome these atomized state initiatives. When states like

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[263] *See* Uniform Law Commission, About Us (accessed Nov. 22, 2024), https://www.uniformlaws.org/aboutulc/overview.

[264] *See, e.g.* the National Employment Law Project, Model State Legislation (accessed Nov. 22, 2024) ("Use these state legislative models to draft bill language to introduce in the legislature."), https://www.nelp.org/explore-the-issues/unemployment-insurance/ui-policy-hub/model-state-legislation/.

[265] *See, e.g.,* the North American Securities Administrators Association (NASAA), NASAA Model Acts (accessed Nov. 22, 2024) ("NASAA Model Acts are state-level legislative proposals developed by committees of NASAA members."), https://www.nasaa.org/policy/legislative-policy/model-state-legislation/.

[266] *See* Mark C. Miller, *State Attorneys General, Political Lawsuits, and other Collective Voice in the Inter-Institutional Constitutional Doctrine*, 48 J. OF LEG. 1, 5 (2022) (describing the role of the National Association of Attorneys General in multistate litigation).

[267] For a review of those state laws and their relationship to preempting federal law, *see* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015) ("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.").

[268] *Id.* at 77.

Colorado legalized marijuana, they compelled neighboring states to *strengthen* law enforcement to combat trafficking marijuana and restrict access within their borders.[269]

Unintended spillover effects aside, it is also unlikely that the same evasion strategies 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.[270] Federal judges hadn't weighed in on the preemption argument, and the U.S. Supreme Court had denied certiorari.[271] Against that ambiguous reach, A Trump administration federal policy imposing obligatory deportation actions would undoubtedly be enforced by federal officials.

### B. *Objective #2: Dismantle the National Agenda*

There are many cases and instances where states hope to dismantle federal preemption. They may wish to govern differently, avoid costly and prescriptive regulations, or respond with more nuance to the demands and interests of their local constituents. If states intend to dismantle, rather than amend, preempting approaches, they should use multistate litigation. As mentioned earlier, increasingly conservative judges have seized the opportunity to declare preempting federal laws unconstitutional or ambiguous, amplifying state power.[272]

That is not to suggest that litigation is foolproof. Although subject to

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[269] *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)

[270] *See* Chemerinsky et al., *supra* note 266, at 100-102.

[271] *Id.* at 101 & n. 97 (citing a series of federal cases, including cases in which the Supreme Court had denied certiorari.

[272] *See, e.g.*, PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 31-32 (2015) ("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."); 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.").

debate in recent years, Erwin Chemerinsky argued that, at least in 2005, the conservative Supreme Court was inconsistent, if not blatantly hypocritical, when deciding preemption cases.[273] 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*[274] and *City of Boerne v. Flores*,[275] in "case after case, the Court has gone out of its way to broadly construe preemption to strike down state laws."[276] Recent court decisions prove 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 of those governments," but concluding "this has not been the case."[277] Ultimately, litigating preempting laws is a gamble that often turns on the regulatory matter and the ideologic position of the judges.[278]

Not only are judges unreliable states' rights champions, but litigation costs are high and tend to be borne by local taxpayers. Studies show that states devote significant time and resources to litigation.[279] Nolette explains that attorneys general "office budgets increased 300 percent and 500 percent, respectively, between 1970 and 1989."[280] Examining litigation to protect right-to-work ordinances from federal preemption across twelve Kentucky countries, Ariana Levinson, Alyssa Hare, and Travis Fietchter show that

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[273] *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.").
[274] 514 U.S. 549 (1995) (holding that a federal gun law restricting possession of a gun within a thousand feet of a school exceeded Congress' commerce law authority).
[275] 521 U.S. 507, 519 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress' power under Sec. 5 of the 14th Amendment).
[276] *See* Chemerinsky, *supra* note 273, at 72.
[277] *See, e.g.,* Earl M. *Maltz, Faint-Hearted Federalism: The Role of State Autonomy in Conservative Constitutional Jurisprudence*, 72 S. CAL. L. REV. 55, 68 & ns. 91-92 (2020).
[278] 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. MED. ASSOC. 2036 (2009) (comparing the Roberts' Court's upholding federal preemption over state common law claims challenging FDA-approved devices in *Riegel v. Medtronic Inc.*, 128 S. Ct. 999 (2008) to *Wyeth v. Levine*, 555 U.S. 555 (2009), rejecting preemption as a bar to pharmaceutical lawsuits).
[279] *See, e.g.,* Levinson, Hare & Fiechter, *supra* note 112, 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.").
[280] *See* Nolette, *supra* note 271, at 33.

litigation costs were ultimately funded through taxpayer dollars.[281] These costs may not justify the results if, in the long term, Congress merely revives preemption through redrafted legislation.

Finally, while evasion avoids the costs and uncertainty, it does nothing to dismantle federal authority. On the contrary, evasion signals that states accept federal authority and are content to work within it. It would be difficult, for instance, for a state to argue before Congress about the harmful effects of the trade agreements on local businesses when their laws and MOUs demonstrate creative workarounds.

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

There are instances in which states will continue to look for unique opportunities under preempting national schemes. In the trade and investment context, for example, states will likely continue to need to be innovative. The Trump administration has had an acrimonious relationship with formal trade agreements. He withdrew the United States from the Trans-Pacific Partnership Agreement during his first administration[282] 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.[283] States have little room to maneuver or litigate because only the president may enter international treaties.[284]

Persuasive dissent could be a viable alternative – states could link their legislative initiatives to demonstrate preemption's opportunity costs. For instance, interstate MOUs with foreign actors stipulating trade and investment opportunities could render visible the areas that U.S. export and import

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[281] *See* Levinson, Hare & Fiechter, *supra* note 112, 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.").

[282] *See* OFF. U.S. TRADE REP., *The United States Officially Withdraws from the Trans-Pacific Partnership* (accessed Nov, 28, 2024), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

[283] *See* Ari Hawkins, *Trump Says he will Quickly Impose Tariffs of 25% on goods from Canada and Mexico*, POLITICO (Nov. 25, 2028) (quoting Trump: "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."), https://www.politico.com/live-updates/2024/11/25/congress/trumps-tariff-threat-00191615.

[284] U.S. Const. art. II, §2, cl. 2.

markets could gain from formal trade agreements. Nevertheless, states may lack the incentive to devote the time and resources to coordination. They have too much to gain from discovering unique opportunities to evade preempting law in commercial contexts like trade. Had North Carolina centered its efforts on coordinating states rather than going it alone with the United Kingdom, Marshall Aerospace may have invested its $50 million project elsewhere.[285]

Even when states are not competing, evasion strategies offer states immediate opportunities to get out from under repressive 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.[286] The TCJA includes a highly disputed provision limiting individual state and local income taxes (SALT) deductibility.[287] Various efforts driven by high-income (mainly Democrat) states to repeal the SALT cap (which Republican states tend to favor) have proven unsuccessful.[288] A handful of states have responded by enacting workarounds that permit pass-through entity owner-taxpayers to pay (and deduct) SALT liabilities on behalf of the PTW's owners.[289] Those initiatives went into effect immediately, rather than states' conditional and trigger laws, which take time to percolate and trigger antecedent action.

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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. It does not attempt to adjudicate strategies. Nor does it suggest a linearity or predictability insensitive to the quotidian interactions of state and federal actors and their respective interests. Instead, it frames the emergence of persuasive dissent as one more tool in the state toolbox during the lifetime of preemption, each with strengths and weaknesses.

State objectives that call for persuasion, such as persuading Congress to

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285 *See* Ohnesorge, *supra* note 123 (noting the investment project following the North Carolina-UK MOU).

286 Pub. L. No. 115-97 (2017)).

287 *See* Richard Stephenson McEwan, *State Workarounds the IRC's SALT Cap: The Past, the Present, and Building for the Future*, 2 INDIANA 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.").

288 *Id.* at 669-70.

289 *Id.*

amend preempting laws, will benefit from conditional and trigger clauses for the reasons set out in Part III. Objectives to dismantle the national agenda and redistribute power to the states call for litigation, while objectives to gain a competitive edge over other states or otherwise enjoy unique advantages under preemption will lend themselves to evasion. None of those strategies will have predictable outcomes. State and federal lawmakers are, after all, irrational. They do not always respond to signals and influence the same way. 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. It may intervene in state strategies to advance a broader, deregulatory agenda divorced from states' objectives. The point is that states have options and strategies in preemption and that some of those strategies may succeed.

## CONCLUSION

Until now, scholars have assumed that states' dissent strategies in preemption are restricted to acquiescence or litigation. Progressives who opted for a robust federal government undoubtedly approved those restricted interventions when they felt that Congress and the president supported fundamental rights and civil liberties. However, as Young prophesized during the Bush administration, sentiments around preemption and state dissent tend to be fickle. The solution is not to flip every time the administration flops. It is to find a way for states to signal opposition and dissent interstitially without necessarily crossing into federal terrain.

Consider how the Trump administration's policies will affect states without institutional arrangements to dissent. Its anti-abortion rhetoric, backed by Congress' refusal to legislation protections for abortion procedures, will continue to render vulnerable countless lives when medical emergencies arise. Persuasive dissent could entice Congress to act, if states collaborate and persuade one another sufficiently. The Trump administration could legislate weaker protections for LGBQT and trans communities, leaving states without the necessary federal protections and support. If states have no way of signaling opposition to those regressive policies to Congress, they will have no way of laying the groundwork for the necessary restorative measures once the administration changes guard. These federal policies are significant and have a direct bearing on vulnerable lives. States need a voice and means to force a debate on behalf of their citizens, who have been rendered silent and more vulnerable because of federal policies.

This Article has shown an emerging strategy for states to dissent persuasively from preempting federal policies. Their conditional and trigger clauses signal a preferred alternative, coordinate states around focal sites of resistance, and grant decision-makers ownership over their policy decisions. That persuasive dissent strategy elides constitutional scrutiny while creating a centrifugal force around preferences and norms. It engenders a dialectic among states and between state and federal actors.

States' persuasive dissent in the daylight time zone context may appear inconsequential. It has not yet coordinated all states under a unified approach or motivated the House of Representatives to pass the Sunshine Protection Act. Overlooking that burgeoning strategy, however, would be a mistake. It has enormous implications for state voice and interstitial deliberations within preempting regimes.

By engendering discussions and offering information about state coordination, norms, and capacities to self-organize, states' conditional and trigger clauses motivate informed decision-making on the federal level. The intervening conversations position Congress to identify and respond to changed circumstances, correct biased or erroneous decision-making, and shift some of the oversight obligations from it to the states. States could adopt similar bills to influence changes to the preempting laws regarding labor, immigration, taxes, and a host of other preempting topics that affect their interests. The federal government remains free to ignore them if they fail to galvanize a sufficient state coalition.

The emergence of states' strategies to resist preemption does not suggest that states' alternative strategies cease to be helpful. States have different objectives, depending on the policy in question and their local political pressures. There may be instances in which states 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. 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, states may prefer dismantling a national policy through litigation to gain greater regulatory power.

This Article has highlighted states' various strategies and objectives, focusing on persuasive dissent, to unsettle the existing terrain on interstitial dissent to preemption. Whether states and the federal government respond to that dissent and whether states, on the aggregate, hope to advance national or state-centric agendas remain open questions. Under the Trump administration, however, state resistance and dissent in any form may be the only opportunity

to salvage rights and protections on state and national levels. Hopefully, states seize it.