

Making Preemption Less Palatable: State Poison Pill Legislation

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ABSTRACT

Congressional preemption constitutes perhaps the single greatest threat to state power and to the values served thereby. Given the structural incentives now in place, there is little to deter Congress from preempting state law, even when the state interests Congress displaces far exceed its own. The threat of preemption has raised alarms across the political spectrum, but no one has yet devised a satisfactory way to balance state and federal interests in preemption disputes. This Article devises a novel solution: state poison pill legislation. Borrowing a page from corporate law, poison pill legislation would enable the states to make preemption less palatable, by threatening to withhold valuable state services from Congress if Congress preempts state law. In more abstract terms, the Article re-imagines preemption as an as-yet untapped opportunity for intergovernmental bargaining, one in which poison pill legislation would facilitate beneficial trades between the state and federal governments over their respective constitutional entitlements. The Article explains how poison pill legislation would work, drawing upon a diverse array of case studies to illustrate the many potential applications of the tactic. It also proffers a normative defense of poison pill legislation, arguing that the tactic should produce better preemption decisions, from a welfarist perspective, without usurping Congress's legislative prerogatives—a problem endemic to extant solutions like the presumption against preemption. Finally, the Article lays the foundation for future work examining the use of threats to influence other legal decisions apart from preemption.

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INTRODUCTION

Congressional preemption constitutes perhaps the single greatest threat to state power and to the values served thereby.¹ Preemption blocks state law, leaving it without effect. It helps determine whether and to what extent the states can exert their influence over policy domains in which Congress has legislated. As Professor Ernie Young has surmised: “Preemption doctrine . . . goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy.”² Indeed, given the judiciary’s reluctance to

¹ E.g., David A. Dana, *Democratizing the Law of Federal Preemption*, 102 Nw. U. L. REV. 507, 507 (2008) (“Preemption is an issue that implicates not just particular regulatory outcomes, but also our fundamental commitments to preserving and fostering democratic values.”); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (noting that preemption “is almost certainly the most frequently used doctrine of constitutional law in practice”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2255 n.314 (1998) (suggesting that “preemption threatens the constitutional legislative function of state governments more than does concurrent authority”); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 2 (2011) (“Preemption has emerged as the contemporary federalism battleground.”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010) (opining that “preemption may be the most important issue for modern federalism theory”); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450 (2008) (“Preemption is the fiercest battle in products liability litigation today.”); Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 166 (2011) (arguing that federal preemption “is quite possibly the most important public law question of the day”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848 (2005) (“[T]he most important problem of federalism doctrine is how to limit federal preemption of state law.”).

² Young, *supra* note 1, at 1850; see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687 (1991) (“Federal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens’ public values and ideas—state and local governments—and have concomitantly undermined citizens’ rights to participate directly in governing themselves.”); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 732 (2008) (“Displacement . . . has dramatic consequences for the scope of state authority. . . . Once state law is declared to be

impose constraints on Congress's enumerated powers,³ it is difficult to overstate the importance of preemption. Today, there may be few, if any, state laws that are truly immune from congressional override.

Even though the states have much to lose from preemption, their interests in preserving their lawmaking authority are largely ignored in preemption decisions.⁴ The Constitution, of course, grants Congress the power to decide whether or not to preempt state law.⁵ In making its preemption decisions, Congress has every reason to look out for its own interests.⁶ But it has little reason, and certainly no obligation, to subjugate its interests to the interests of the states whenever the two conflict.⁷ Congress can thus be expected to displace state laws that impair Congress's objectives, regardless of whether Congress's gain from so doing is greater than the cost to the states.

The states, of course, can lobby Congress to preserve their regulatory prerogatives.⁸ But no one has yet explained why the congressional majority would listen to their entreaties, especially when it would require the congressional majority to sacrifice its own policy objectives.⁹ After all, as Professor Rick Hills has previously noted,

displaced, state actors no longer have any authority to regulate in the area declared to be displaced.”); Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 915 (2007) (noting that “state regulatory diversity—valued both for its expression of the varied interests of a heterogeneous public and for its ability to promote the improvement of policy generally—is diminished when state laws are preempted”).

³ See, e.g., Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1391 (2010) (“[T]he principle of limited federal government has largely fallen by the wayside.”); Ernest A. Young, *“The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 261 (noting that “the law of federalism has generally moved on to a concurrent model” of overlapping state and federal regulatory authority).

⁴ See *infra* Section I.B.

⁵ E.g., *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“The Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land[] . . .’ Under this principle, Congress has the power to preempt state law.” (quoting U.S. CONST. art. VI, cl. 2)).

⁶ I recognize that Congress is a “they” and not an “it.” I use the phrase “Congress’s interests” and “federal interests” as shorthand for the interests of the congressional majority that passed the legislation at issue.

⁷ See *infra* Section I.B.

⁸ See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (positing that states have influence in the national lawmaking process). For more recent work expanding on and refining Wechsler’s original political safeguards thesis, see generally, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395 (2012).

⁹ See *infra* Section I.C.

“[f]ew with influence in the political process care about promoting state power as an end in itself.”¹⁰

The courts, for their part, generally seek only to enforce Congress’s preemption decisions, not second guess them. In other words, the courts do not attempt to weigh Congress’s interests against those of the states. Indeed, the courts do not attempt to gauge state interests *at all* when applying extant preemption doctrine.¹¹ Instead, they consistently maintain that state law simply must give way whenever it impedes Congress’s objectives.¹² As the Supreme Court bluntly acknowledged in *Free v. Bland*,¹³ “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”¹⁴

By focusing unilaterally on the interests of Congress,¹⁵ the current approach to preemption decisionmaking runs the risk of preempting too much state law and, consequently, of reducing societal welfare in our federal system. To illustrate the danger, consider the potential impact of a nascent preemption challenge to Colorado’s Amendment 64,¹⁶ the 2012 initiative that legalized recreational marijuana in Colorado.¹⁷ Among other things, Amendment 64 establishes an elaborate regulatory scheme to govern sales of marijuana, a scheme designed to limit youth access to the drug, inform consumers about the products they buy, and ensure the payment of taxes imposed by the state.¹⁸

While Colorado forges ahead, several parties, including two of its neighbors, Nebraska and Oklahoma, are seeking to block Amendment 64 as preempted.¹⁹ Though the challengers acknowledge that

¹⁰ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 36 (2007).

¹¹ Mark D. Rosen, *Contextualizing Preemption*, 102 Nw. U. L. REV. 781, 784 (2008) (“Preemption doctrine asks courts to focus almost exclusively on the federal law and federal interests.”); Young, *supra* note 3, at 313 (“[C]ourts construe what law Congress intended to preempt and do not place any countervailing value on state law.”).

¹² See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (instructing that state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

¹³ 369 U.S. 663 (1962).

¹⁴ *Id.* at 666 (citing U.S. CONST. art. VI, cl. 2).

¹⁵ Rosen, *supra* note 11, at 782 (“[P]reemption doctrine deploys a ‘unilateralist’ approach that looks only to federal interests . . .”).

¹⁶ COLO. CONST. art. XVIII, § 16.

¹⁷ See *infra* Section III.B.

¹⁸ See *id.*

¹⁹ Complaint at 6, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 144, Orig.) (seeking declaration that regulatory structure created by Amendment 64 conflicts with federal law and is

they cannot force Colorado to ban marijuana, they nonetheless claim they can block Colorado from implementing its novel regulatory scheme because it “promote[s]” and “facilitate[s]” development of an industry that Congress has sought to eradicate.²⁰ If these challengers succeed in convincing a court that Amendment 64 undermines Congress’s objectives, they would halt Colorado’s bold experiment. Namely, the court would have to block the implementation and enforcement of Colorado’s regulations, including the state’s extensive licensing and oversight system. While this might advance the interests of the congressional majority (a debatable point, given waning support for prohibition across the nation),²¹ it could diminish the overall welfare of the nation. After all, Colorado might care much more about preserving Amendment 64 than Congress cares about blocking it.

The threat of excessive preemption spawned by the current system has not gone unnoticed. Indeed, a veritable chorus of lawmakers, jurists, and scholars from across the political spectrum has lamented the growing corpus of state laws that have been scuttled by preemption.²² In the last decade alone, courts have found preempted state

thus void). Nebraska and Oklahoma asked the Supreme Court to hear their challenge under its original jurisdiction, but the Court declined. *Nebraska*, 136 S. Ct. at 1034 (denying motion for leave to file complaint). The two states subsequently joined two other, virtually identical preemption suits brought by private landowners, a public interest group, and state and local officials. *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1289–90 (D. Colo. 2016) (dismissing suit on grounds that Congress did not authorize private parties to initiate a preemption challenge under the Controlled Substances Act); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS, 2016 WL 223815 (D. Colo. Jan. 19, 2016) (same). Those challenges have been consolidated and are currently on appeal before the Tenth Circuit. *See* Order Granting Motion to Consolidate Appeals, *Smith v. Hickenlooper*, No. 16-01095 (10th Cir. Apr. 1, 2016).

²⁰ Complaint, *supra* note 19, at 5, 22.

²¹ *See* Christopher Ingraham, *Support for Marijuana Legalization Has Hit an All-Time High*, WASH. POST: WONKBLOG, (Mar. 25, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/25/support-for-marijuana-legalization-has-hit-an-all-time-high/>.

²² *E.g.*, Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005) (arguing that Supreme Court preemption decisions reflect “traditional conservative hostility to civil rights laws and traditional conservative preference for business”); Dana, *supra* note 1, at 510–13 (claiming implied preemption doctrine improperly displaces state laws with strong majoritarian backing); Hills, *supra* note 10, at 16–26 (decrying judicial preemption for stymying the states’ positive impact on the national lawmaking process); Metzger, *supra* note 1, at 3 (“State and local governments increasingly have protested expansions of federal preemption, and legal scholars have sounded alarms over the impact of creeping preemption on state governance capacity.”); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1018 (2010) (lamenting the rise of null preemption, which “infringes upon states’ sovereignty . . . [and] impedes the ability of states to ensure the health and safety of their constituents”); Sharpe, *supra* note 1, at 167 (lamenting that the Supreme Court has “proven increasingly sympathetic to claims of preemption in recent years, thereby allowing defendants

and local laws governing a breathtaking array of subjects, including immigration, drug, retirement, environmental, products liability, and property law.²³ Although commentators disagree about individual cases, hardly anyone appears to think that the overall volume of preemption is now justified.

Commentators have also devised a variety of mostly court-imposed solutions to address the threat. Most of these solutions rest upon the fiction that Congress necessarily cares about preserving state regulatory authority, even at the cost of sacrificing some of its own policy aspirations.²⁴ The presumption against preemption, for example, instructs courts to assume that Congress normally does not want to displace the historic police powers of the states.²⁵ Naturally, if we assume away some portion of Congress's appetite for preemption, courts should find fewer state laws preempted.

But no one has yet proposed a way to satisfactorily address the underlying problem identified here: the reality that Congress has no reason to sacrifice its own policy objectives in the service of objectives espoused by the states. For one thing, manufacturing a degree of congressional forbearance that does not actually exist usurps Congress's legislative prerogatives.²⁶ The Constitution, after all, empowers *Congress* to decide whether or not to preempt state law. The courts are ultimately supposed to enforce Congress's preemptive designs, not ignore or second guess them. Furthermore, extant solutions fail to accurately gauge the states' interest in preserving their laws.²⁷ The presumption against preemption, for example, assigns Congress's (fictional) self-control a uniform and quite nebulous weight, whether the state law being challenged governs mud flaps or childhood vaccines or marijuana. Clearly, however, the strength of the states' interests in

otherwise subject to suit under state law to escape liability") (footnote omitted); David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 97 (2005) ("[T]he safety net of tort liability is under assault by aggressive, and often successful, assertions of federal preemption.").

²³ See, e.g., Pursley, *supra* note 1, at 513–14 (surveying policy domains affected by preemption).

²⁴ See, e.g., Young, *supra* note 3, at 275 (equating the presumption against preemption to a "thumb on the scale" representing the value of state autonomy").

²⁵ Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

²⁶ See *infra* Section I.C for a critical examination of the presumption and other proposals for curbing congressional preemption.

²⁷ See Merrill, *supra* note 2, at 742 ("The Court's categories of preemption and its presumption against preemption suggest that the same formal analysis is appropriate without regard to whether the issue under consideration has historically been undertaken by the federal government or the states.").

avoiding preemption will vary from one policy domain to the next. But because courts have no way to adjust their antipreemption canons to match these variable interests, the canons may provide too little protection in some cases and too much in others. In any event, the most widely discussed solutions have already proven largely ineffective in practice. The presumption against preemption, for example, has been around since at least 1947,²⁸ yet few would say that it has satisfactorily checked congressional preemption over the succeeding seven decades.²⁹ The problems inherent in such bulwarks against preemption suggest that it might be time to supplement them, if not replace them outright.

This Article devises a novel solution to the problem of congressional incentives that avoids these shortcomings. The solution, what I call *poison pill legislation*, would go to the heart of the problem by giving Congress a reason not to preempt state law. As the name suggests, the proposal borrows from a widely-used tactic in corporate law. The shareholder rights plan, better known as the corporate poison pill, helps to deter hostile takeover bids by imposing a cost on a bidder when it acquires a threshold interest in the target firm.³⁰ In a similar fashion, state poison pill legislation would seek to curb Congress's appetite for preemption by imposing a "cost" on Congress when it preempts a cherished state law.

The tactic, of course, requires that the state have something of value to withhold from, or offer to, Congress—this is the metaphorical "poison." Although Congress would appear to hold all the cards in preemption disputes, there is no shortage of leverage the states could exploit to extract preemption concessions from Congress.³¹ This leverage stems from the states' extensive legislative and administrative services—in other words, their ability to pass and enforce regulations.³² These are services Congress plainly values, but which Congress may not compel the states to provide;³³ that is, the states may demand compensation for them.

²⁸ See *Rice*, 331 U.S. at 230.

²⁹ See, e.g., Merrill, *supra* note 2, at 742 ("[Preemption] doctrine . . . exaggerates the judicial reluctance to displace state law. While continuing to invoke the presumption against preemption, federal courts apply preemption more than any other constitutional doctrine.").

³⁰ For a helpful discussion of how poison pills work in the corporate context, see George S. Geis, *Internal Poison Pills*, 84 N.Y.U. L. REV. 1169, 1200–01, 1201 n.128 (2009).

³¹ See *infra* Section II.A.

³² *Id.*

³³ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not compel the states to enact or enforce laws); *New York v. United States*, 505 U.S. 144, 188 (1992) (same).

To initiate this bargain, the state would pass legislation threatening to withhold some service that Congress *favors*, call it state law *B*, if Congress proceeds to preempt another state law Congress *opposes*, call it state law *A*. In other words, the state would offer to provide *B* in return for congressional forbearance on *A*. The tactic would make preemption less palatable than under the status quo because it would require Congress to forego the service the state is offering unless Congress spares the objectionable state law.

To make the proposal more concrete, return to the illustration above. Suppose that Colorado had included a poison pill provision in Amendment 64. In particular, the provision would make Colorado's regulations (*A*) inseverable from another provision of state law that Congress plainly favors (*B*), for example, the special restrictions the state now imposes on marijuana purchases made by nonresidents.³⁴ The provision would make Congress—or a court deciding on its behalf—think twice before preempting Colorado's regulations. While Congress might not like Colorado's regulated marijuana industry, it might like this alternative, in which nonresidents could access marijuana more easily, *even less*.

In more abstract terms, the Article reimagines preemption as an untapped opportunity for intergovernmental bargaining, rather than a purely unilateral congressional decision. Legal scholars have recognized the important role that intergovernmental bargaining now plays in our federal system—a system Professor Erin Ryan describes as *negotiated federalism*.³⁵ Scholars have already identified many ways in which states bargain (in a loose sense) with the federal government to shape the administration of federal laws.³⁶ To date, however, the intergovernmental bargaining literature has failed to recognize the potential for states to bargain over *preemption*.³⁷ This is a serious shortcoming of the extant literature, given the important role preemption now plays in our federal system. This Article helps to fill the gap by devising a way for states to use their leverage to preserve their own regulatory authority.

³⁴ See *infra* Section III.B.

³⁵ See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 5–6 (2011).

³⁶ See generally, e.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L. J. 2094 (2014).

³⁷ See *infra* Section II.A.

Importantly, unlike many solutions now being discussed to curb preemption, state poison pill legislation would not require courts to ignore or manufacture congressional intentions.³⁸ The legislation instead gives Congress a concrete reason to forbear when deciding whether to preempt state law. And, because the states themselves set the price for preemption, for example, by deciding what services to offer or withhold from Congress, poison pill legislation should provide Congress and the courts a more accurate proxy of the states' interest in preserving their regulatory authority. The legislation would not, of course, always deter preemption. Congress would continue to preempt state law whenever a state's offer proves insufficiently enticing. But the objective here is to prompt Congress to make more efficient preemption decisions, not to eschew preemption altogether. And though it is no panacea, poison pill legislation should help improve Congress's preemption decisionmaking.³⁹

The Article proceeds as follows. In Part I, it first identifies and more closely examines the core problem that now besets preemption decisionmaking: the neglect of states' interests. It also examines several proposals that have been offered to curb congressional preemption, and it explains why these proposals ultimately fall short. Part II then develops the novel idea of state poison pill legislation, explains how the legislation would work, and provides a normative defense of the tactic. Part III discusses three real-world policy domains in which the states could apply this tactic, including immigration, drug, and products liability law. These case studies help to flesh out the details of how poison pill legislation would work, and they also help explain why the tactic would be both effective and potentially beneficial. Finally, the Conclusion offers some tentative thoughts on the use of poison pill devices to influence other legal decisions, laying the foundation for future research.

I. THE PROBLEM: IGNORING STATE INTERESTS IN PREEMPTION DECISIONS

This Part illuminates the core problem that poison pill legislation is designed to address. Section A begins by highlighting the inherent tradeoff preemption makes between the interests of the national government and the interests of the states. It explains why our federal system should endeavor to balance these competing interests, much as it does in other doctrinal contexts. Section B then explains why our

³⁸ See *infra* Section II.B.

³⁹ See *id.*

current approach to preemption decisionmaking fails to do so—in other words, that the current approach duly considers Congress’s interests in blocking state law but largely ignores the states’ interests in preserving their own regulatory authority. It also explains why the system’s myopic focus on federal interests results in the displacement of more state authority than may be normatively desirable. Section C then concludes by explaining why extant proposals to curb preemption not only fail to address the core incentive problem that distorts preemption decisions, but also introduce new problems of their own creation.

A. *The Preemption Tradeoff*

Under the Supremacy Clause, state law must give way when it conflicts with federal law.⁴⁰ This “rule of decision”⁴¹ is a bedrock principle of our constitutional law. But it does not follow that the interests that are served by preempted state laws are somehow illegitimate or even less substantial than the interests that are served by the federal laws that displace them.⁴² After all, the states serve a legitimate and important function in our federal system,⁴³ and this function is impaired by preemption. Indeed, the courts have recognized that there is a very real cost to preempting state law,⁴⁴ even though (for reasons explained below) that cost does not presently factor into the courts’, or Congress’s, preemption decisions.

⁴⁰ E.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988))).

⁴¹ Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1688 (2008) (“The Supremacy Clause establishes a rule of decision for courts resolving conflicts between state and federal law.”).

⁴² To be sure, the Framers may have chosen *this* rule of decision because they believed the nation’s interests would *normally* outweigh the states’ interests in cases of conflict. But the fact they made the rule discretionary—i.e., Congress can turn it off—suggests they did not necessarily believe the nation’s interests would invariably outweigh the states’ interests in all cases of conflict.

⁴³ For discussions of the values served by centralization and decentralization, see generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Rodríguez, *supra* note 36; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

⁴⁴ E.g., *Gade*, 505 U.S. at 108 (acknowledging that Illinois regulation of the hazardous waste industry the Court found preempted had served state’s “valid” and “compelling” interests in protecting the health and welfare of the state’s population).

The recognition that both sets of interests (state and federal) in any preemption dispute are legitimate has an important implication for normative evaluations of preemption decisionmaking. Namely, from a welfarist perspective, it suggests that preemption decisions should strive to balance the two sets of interests in order to maximize the net welfare of society.⁴⁵ To simplify somewhat, Congress should preempt state law only when the benefit it derives from doing so exceeds the cost that preemption imposes upon the state. Consider the preemption challenge to Amendment 64 introduced above. Suppose, for sake of argument, that we could measure Colorado's interest and found it to be 100 (the denomination does not matter). In this case, Congress should preempt Colorado's Amendment 64 only if doing so benefits Congress by 100 or more, i.e., an amount equal to or greater than the value Coloradans hypothetically assign to their law. Satisfying this condition is the only way we can be certain that preemption makes a good tradeoff in a welfarist sense, i.e., that it enhances, rather than diminishes, overall welfare.

Indeed, while it is normal to focus myopically on federal interests in preemption decisions (as discussed below), it is worth noting that we do strive to balance federal and state interests in a strikingly similar context: the dormant Commerce Clause, also known as dormant *preemption*. The dormant Commerce Clause pits the interests of the federal government in the free flow of interstate commerce against the states' interests in protecting the health, safety, and morals of their populations. But crucially, the dormant Commerce Clause inquiry is not blind to state interests. Indeed, the *Pike* balancing test that courts use to scrutinize neutral state laws expressly balances state and federal interests and condemns state law only when the latter interests exceed the former: "Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative

⁴⁵ See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 823–24 (1996) (arguing that the Necessary and Proper Clause "at a minimum . . . require[s] that the interests and position of the states be considered and taken seriously by Congress before it chooses to preempt them"); Merrill, *supra* note 2, at 747 ("Ideally, an institution deciding whether to displace state law would do so in a manner that . . . [inter alia] promotes a proper balance of authority between the central government and the states."); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 625 (2008) (suggesting that "the touchstone for conflict analysis should be whether the state measure unduly interferes with an existing federal regulatory scheme"); Rosen, *supra* note 11, at 797 (arguing that "preemption decisions are best made[] . . . when they take account of a multitude of considerations").

local benefits.”⁴⁶ Though courts struggle to apply balancing tests like *Pike*,⁴⁷ the fact they deem balance a worthwhile goal in such a similar context suggests that balance is something we should strive for in making preemption decisions as well.

Ultimately, it is difficult to overstate the importance of making preemption decisions judiciously. In the distant past, federal courts tried to maintain balance in the federal system by assigning the national and state governments their own, largely exclusive spheres of influence.⁴⁸ Because state and federal laws seldom overlapped, preemption was relatively unimportant.⁴⁹ But the courts have long since abandoned their effort to enforce zones of exclusive state authority.⁵⁰ In fact, there are vanishingly few activities the federal government today is not allowed to regulate, and hence, scarcely any state laws that are truly immune from the threat of preemption. For this reason, the balance of state and federal power today hinges largely on how preemption decisions are made. As Professor Young cogently argues, “[t]he doctrine of preemption, grounded in the Supremacy Clause rather than in Article I’s scheme of limited and enumerated powers, is the key instrument by which the law manages [the] overlap” of state and federal law.⁵¹

B. *The Incentives Problem*

Unfortunately, however, when it comes to making preemption decisions, our current system utterly fails to balance the interests of the states against those of the federal government. It focuses almost exclusively on one side of the scale, namely, Congress’s interest in blocking state law, and ignores the other side, the states’ interest in preserving their regulatory authority. As Professor Mark Rosen has surmised, “preemption is a ‘unilateralist’ doctrine that takes account

⁴⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁴⁷ See *infra* note 108 and accompanying text (discussing the challenges posed by balancing tests).

⁴⁸ For an enlightening description of the old dual federalism system and its demise, see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

⁴⁹ Young, *supra* note 3, at 263–64 (“Under dual federalism, preemption of state authority within areas delegated to national control could not unbalance the system, because the states retained their own realm of exclusive authority in which they could provide government services and beneficial regulation to their citizens.”).

⁵⁰ *Id.* at 256 (“[N]ational and state authority is largely concurrent, not limited by exclusive subject-matter spheres.”).

⁵¹ *Id.* at 254.

of only one of the institutions whose interests are at stake: the federal government.”⁵²

The problem arguably arises because the Constitution gives Congress unilateral authority to decide whether or not to preempt state law.⁵³ It is axiomatic that “the question whether a certain state action is pre-empted by federal law is one of *congressional intent*.”⁵⁴ Thus, as long as it possesses the power to regulate a given subject (a largely foregone conclusion, as just noted), Congress gets to choose whether or not to block state laws governing the same subject.⁵⁵

Naturally, Congress can be expected to consider its own interests in making this choice. Few would expect it to do otherwise.⁵⁶ After all, the majority that passes legislation through Congress wants to make sure such legislation accomplishes its purposes. But there is no reason for Congress to give any weight to state interests, especially when they run counter to its own. In fact, implied preemption doctrine is grounded on the premise that Congress normally wants to preempt state law when it “stands as an obstacle to the accomplishment and execution” of its own purposes and objectives.⁵⁷

To be sure, the states can always lobby Congress to spare laws that undermine its objectives.⁵⁸ But the strength of the states’ influence over the national lawmaking process is hotly contested. In a candid and probably widely held assessment, Professors Lynn Baker and Ernie Young assert that “[t]he most obvious problem with the political safeguards . . . is that practically no one really seems to believe in them anymore.”⁵⁹ The political safeguards against preemption are no

⁵² Rosen, *supra* note 11, at 785.

⁵³ U.S. CONST. art. VI, cl. 2 (“[The] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”).

⁵⁴ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)) (emphasis added).

⁵⁵ Gardbaum, *supra* note 45, at 797 (acknowledging conventional view that “if Congress can legislate at all in a given area, then it can always preempt state power in that area”).

⁵⁶ *E.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000) (opining that “one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict” with state law).

⁵⁷ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁵⁸ See sources cited *supra* note 8 (discussing the political safeguards of federalism); see also Huq, *supra* note 36, at 1637 (suggesting states could lobby Congress to forego preemption).

⁵⁹ Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112 (2001). For a taste of the skepticism expressed towards the effectiveness of the political safeguards of federalism, see also Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1071 (2001) (“With the so-called safeguard of politics in place, these theorists have argued that the states’ interests are adequately secured. This trust in the invisible hand of politics, however, is misplaced.”) (foot-

exception.⁶⁰

Ultimately, the problem is that the states have not yet devised an effective way to extract preemption concessions from Congress. Most agree that simply invoking the principle of states' rights does little to dissuade Congress from preempting state legislation that impedes its objectives.⁶¹ Furthermore, the states commonly must compete with relatively powerful lobbying groups that *favor* preemption, including business and trade associations.⁶² And unlike the states, this pro-preemption lobby does have something to offer members of Congress: campaign contributions and other chits to boost members' reelection bids. In short, because Congress has no incentive to sacrifice its own interests at the altar of states' rights, it can be expected to preempt state laws anytime they conflict with its own.⁶³

Congress, of course, cannot clearly resolve every imaginable preemption dispute, past, present, and future, when drafting legislation. It lacks the linguistic tools, time, and foresight required to do so.⁶⁴ It

note omitted); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 99 (2004) (decrying a persistent "subordination of federalism to substantive policy objectives" in Congress).

Even some proponents of the safeguards take issue with long-standing formulations of them. *E.g.*, Kramer, *supra* note 8, at 218 ("[H]owever convincing Wechsler's reasoning may have been in its original context, subsequent experience and later developments have robbed his analysis of much, if not all, of its force.").

⁶⁰ Professor Garrick Pursley has even suggested that preemption has undermined the political safeguards of federalism. Pursley, *supra* note 1, at 513 ("Constricting state regulatory authority reduces states' capacity to provide benefits to their citizens, which in turn diminishes states' effectiveness at checking national expansionism in the political process—a critical prerequisite for a functioning set of 'political process' safeguards for federalism.").

⁶¹ See Hills, *supra* note 10, at 36; see also Hamilton, *supra* note 59, at 1083 ("It is common knowledge on Capitol Hill that federalism or states' rights are nonstarters as objections to legislation. Members spout federalism rhetoric to block legislation they oppose for other reasons, but it is never a dispositive consideration.").

⁶² In his cogent analysis of the relative influence of pro- and anti-preemption lobbies in Congress, Rick Hills suggests that "those regulated industries that support preemption have a greater capacity to elicit a specific congressional response to a bill—either a floor vote or committee hearings—than the interest groups that oppose preemption." Hills, *supra* note 10, at 17.

⁶³ It is telling that Congress seldom elevates state laws above its own. For a rare example, see 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ."). Even though Congress adopts "savings clauses" more commonly than reverse preemption provisions, these clauses do not actually shield state laws from the ordinary principles of conflicts preemption. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (holding state tort suit preempted by federal regulations, notwithstanding savings clause in federal statute, because tort action undermined Congress's policy objectives).

⁶⁴ Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 14–29 (2013) (illuminating the challenges that prevent Congress from addressing many of the preemption issues that arise).

thus falls upon federal administrative agencies and federal courts to make many preemption decisions on Congress's behalf.⁶⁵ Nonetheless, neither of these other federal actors is likely to reach a different conclusion than Congress when making preemption decisions.

Consider, first, federal administrative agencies. Administrative agencies frequently opine on whether or not the regulations they promulgate or the congressional statutes that authorized them preempt state law.⁶⁶ Although presidents have issued two decrees ostensibly designed to curb agency preemption, neither of these decrees, nor any other feature of the administrative state, comes close to ensuring that federal agencies balance federal interests against those of the states.⁶⁷

The first decree, the Federalism Executive Order ("FEO"),⁶⁸ was originally promulgated by President Ronald Reagan and later amended by President Bill Clinton in 1999.⁶⁹ It declares that agencies may issue preemptive regulations only when Congress has clearly delegated preemptive authority or, crucially, *when state law conflicts with those regulations*.⁷⁰ The FEO also instructs agencies to consult with the states and prepare a "federalism impact statement" when promulgating regulations that threaten to preempt state law.⁷¹ The second decree, the Presidential Memorandum Regarding Preemption, was issued by President Barack Obama in 2009.⁷² The Memorandum seeks to enforce and expand upon the FEO. It reminds agencies of the demands imposed by the earlier FEO,⁷³ scolds them for ignoring those

⁶⁵ *Id.* at 57 ("[T]here remains a vital role for courts (and, to some extent, for federal agencies) in seeking to integrate federal legislation with state and local bodies of law so as to craft a working and effective legal order.").

⁶⁶ See generally Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012) (examining ways agencies take positions on preemption).

⁶⁷ For the view that agencies may be somewhat more inclined to protect state interests, see Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2020 (2008) ("On most measures, agencies are usually a better forum for resolving questions of the state-federal balance than Congress."); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 957 (2014) (claiming that "state interest groups deliver richly on the prominent federalism goal of defending states as institutions").

⁶⁸ Federalism, Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

⁶⁹ See Sharkey, *supra* note 66, at 529 (discussing history of the Federalism Executive Order).

⁷⁰ Federalism, 64 Fed. Reg. at 43,257 § 4 (a)–(b).

⁷¹ *Id.* at 43,258 § 6(c)(1)–(2).

⁷² Presidential Memorandum Regarding Preemption, 74 Fed. Reg. 24,693 (May 20, 2009).

⁷³ *Id.* at 24,693 ("Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132.").

demands,⁷⁴ and instructs them to correct their previous noncompliance.⁷⁵ It also specifically forbids agencies from espousing preemption in their regulatory preambles,⁷⁶ a tactic that had been used during the George W. Bush Administration to sidestep notice and comment requirements.⁷⁷

While some federal agencies may have taken a softer approach to preemption during the Obama Administration,⁷⁸ it would be a gross exaggeration to suggest that all agency preemption decisions now balance state and federal interests. After all, even taken at face value, the decrees barely constrain agencies' preemptive authority, if they do so at all. Most importantly, they expressly allow agencies to preempt state law anytime it conflicts with a congressional statute or an agency regulation, regardless of the damage done to state interests.⁷⁹ Though the decrees do impose novel deliberation and consultation requirements on agencies, those requirements, even if followed, do not curb agencies' incentives to preempt state laws.⁸⁰ Agencies are no more inclined to sacrifice their regulatory interests at the altar of states' rights than is Congress.⁸¹ It should come as no surprise, then, that prior to

⁷⁴ *Id.* ("In recent years . . . notwithstanding Executive Order 13132 . . . executive departments and agencies have sometimes announced that their regulations preempt State law . . . without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.").

⁷⁵ *Id.* at 24,693–94 ("Where the head of a department or agency determines that a regulatory statement of preemption or codified regulatory provision cannot be [justified under applicable legal principles governing preemption], the head of that department or agency should initiate appropriate action, which may include amendment of the relevant regulation.").

⁷⁶ *Id.* at 24,693 ("Heads of departments and agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.").

⁷⁷ See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 254 (2007) (discussing agency use of regulatory preambles during George W. Bush Administration).

⁷⁸ Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 594 (2011); see also Sharkey, *supra* note 66, at 527–28 (suggesting the Presidential Memorandum on Preemption "not only put an end to the 'preemption by preamble' trend but has also triggered real transformations within some federal agencies").

⁷⁹ Federalism, 64 Fed. Reg. at 43,257 § 4(a) (recognizing agency authority to construe congressional statutes to preempt state law "where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute"); *id.* § 4(b) (recognizing agency authority to issue preemptive regulations "when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute").

⁸⁰ Cf. Sharkey, *supra* note 66, at 537–38 (detailing softening of National Highway Traffic Safety Administration's assessment of state-imposed safety requirements following review of preemption position required by Presidential Memorandum).

⁸¹ Merrill, *supra* note 2, at 756 ("Not every agency is bent on empire building or is captured by the firms it regulates. But these phenomena are not unheard of and warrant caution

the Presidential Memorandum, agencies commonly flouted even the modest mandates imposed by the FEO.⁸² While they appear to have been more compliant since, that trend may simply reflect the fact that the Obama Administration is more supportive of state regulations than was its predecessor.⁸³ In other words, agencies might simply revert to their old ways under the next presidential administration.

In any event, even assuming agencies were (for whatever reason) inclined to balance state and federal interests, their influence over preemption decisions is limited in scope. Most importantly, agencies have no authority to second guess Congress's own preemption decisions. Thus, while courts might give agency opinions "some weight" when Congress's intentions are in doubt, agencies cannot salvage a state law when it appears that Congress would clearly prefer to preempt it.⁸⁴

Beyond agencies, the courts play an even more prominent supporting role in making preemption decisions.⁸⁵ They are commonly called upon to adjudicate preemption challenges to state laws. In performing this task, however, courts steadfastly defer to what Congress wanted, or, at least, what they believe Congress would have wanted, had it confronted the preemption issue before them.⁸⁶ In so doing, the courts do not second guess Congress's judgments; that is, they do not

before automatically deferring to agency judgments about the need for preemption. Agencies may also resent the implicit competition from other sources of regulatory authority like states."); Young, *supra* note 3, at 279 (arguing that federal agencies have no incentive to take state interests into account and "can generally increase their own power by preempting state law").

⁸² See Sharkey, *supra* note 66, at 526–27 (noting studies showing that compliance with the Federalism Executive Order had been "inconsistent").

⁸³ During the Administration of George W. Bush, for example, several commentators noted that agencies were espousing increasingly aggressive preemption positions toward state regulation of businesses. See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. REV. 695, 695 (2008) ("Federal agencies are increasingly taking aim at state law, even though state law is not expressly targeted by the statutes the agencies administer."); Sharkey, *supra* note 77, at 228 (decrying "[f]ederal agency momentum towards increased preemption").

⁸⁴ See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); see also Sharkey, *supra* note 66, at 523 (noting that courts "increasingly rely on the views propounded by federal agencies either in regulations or else in preambles or litigation briefs" to resolve preemption questions, but continue to treat Congress's intentions as paramount).

⁸⁵ See generally Meltzer, *supra* note 64 (discussing crucial role courts play in preemption).

⁸⁶ E.g., *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (noting that Congressional intent is the "ultimate touchstone" for determining whether state laws are preempted); see also Dana, *supra* note 1, at 510 ("One ostensibly uncontroversial proposition in preemption doctrine is that congressional intent governs whether, and to what extent, federal law preempts state law.").

engage in any sort of independent balancing of state and federal interests in preemption cases. Professor Young describes the limited approach taken by the courts:

In express preemption cases . . . courts construe what law Congress intended to preempt and do not place any countervailing value on state law. And even in implied conflicts cases, where courts may deem some minor level of conflict tolerable for the sake of preserving state authority, courts do not generally “weigh” federal interests against state ones.⁸⁷

Thus, if a court finds that a state law impedes one of Congress’s objectives, it will declare the law unenforceable, no matter the magnitude of the state interests it served. In the words of the Supreme Court, “even state regulation designed to protect *vital state interests* must give way to paramount federal legislation.”⁸⁸

To be sure, the Supreme Court has developed canons of statutory interpretation that ostensibly curb congressional preemption.⁸⁹ The presumption against preemption and its close cousin, the clear statement rule, instruct courts to assume that “the historic police powers of the States were not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress.”⁹⁰ In theory, these canons are supposed to prompt Congress to deliberate more about the preemptive impact of statutes,⁹¹ and, better still, counterbalance

⁸⁷ Young, *supra* note 3, at 313 (footnote omitted).

⁸⁸ *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (emphasis added); *see also* *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be.” (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968))).

⁸⁹ Cf. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1609 (2007) (“The Court developed the presumption against preemption at the same time that it gave Congress broader Commerce Clause authority, and the initial purpose of the presumption appears to have been to protect some measure of state authority in light of Congress’s newly recognized power to legislate in virtually any field.”).

⁹⁰ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁹¹ E.g., Young, *supra* note 3, at 265 (“By requiring Congress to speak clearly in order to preempt state law, *Rice* ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives.”). The assumption, of course, is that more deliberative decisions are also necessarily more conducive to states’ interests. Cf. Brian Galle & Mark Seidenfeld, *Preemption and Federal Administrative Law*, 34 ADMIN. & REG. L. NEWS 5, 7 (2009) (“A thorough, deliberative decision, weighing the conflicting factors that might justify or undermine preemption, in which state and private stakeholders have a place at the table and a mean-

Congress's self-interest in preempting state law.⁹²

In practice, however, the canons have proven remarkably unsuccessful at curbing preemption. The courts have been dutifully reciting the canons for nearly seven decades, but that has not stemmed the rising tide of preemption, nor has it quelled attendant concerns over the diminution of state authority.⁹³ At best, the canons have provided only spotty protection for states' interests.⁹⁴ Professor Thomas Merrill has expressed the sentiment of many commentators in remarking that the canons "exaggerate[] the judicial reluctance to displace state law."⁹⁵

The disregard of state interests demonstrated by Congress, administrative agencies, and the courts, suggests that preemption decisions now threaten to displace too much state authority, from a welfarist perspective. Indeed, preemption has already doomed a staggering number of state and local laws. The Supreme Court *alone* has found state laws preempted in at least 241 cases to date.⁹⁶ This already substantial figure, of course, does not include the even larger number of lower federal and state court rulings finding state and local laws preempted by federal statutes. Nor does it include the innumerable circumstances in which government officials have declared state or local laws preempted and unenforceable outside the context of a litigated dispute.⁹⁷ Of course, not all of these preemption decisions are welfare-reducing. But it should come as no surprise that preemption

ingful voice in outcomes, should command substantial respect, because it resolves many of the concerns that would motivate resistance to federal action.”).

⁹² See Young, *supra* note 3, at 275 (suggesting the canons put a “‘thumb on the scale’ representing the value of state autonomy”).

⁹³ See *supra* note 22.

⁹⁴ See Rosen, *supra* note 11, at 784–85 (“Preemption doctrine’s exclusive focus on the federal law is moderated only slightly by the presumption against preemption in fields of law ‘which the States have traditionally occupied’ because, among other reasons, it is only inconsistently invoked and applied.” (quoting *Rice*, 331 U.S. at 230)); Sharkey, *supra* note 1, at 454 (noting that the presumption against preemption “breaks down in the products liability realm, rearing its head with gusto in some cases, but oddly quiescent in others”).

⁹⁵ Merrill, *supra* note 2, at 742.

⁹⁶ U.S. GOV’T PUBL’G OFFICE, STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW (2014), <https://perma.cc/7AWF-CYXD> (listing every Supreme Court decision through October 2013 Term holding state or local law preempted by federal law).

⁹⁷ See, e.g., Reed Hellman, *Cannabis Inc.: The Slow Road to Legal Use*, BUS. MONTHLY (Feb. 1, 2013), <https://perma.cc/988R-SCPJ> (“The creation of the state-licensed, privately owned compassion centers [in Delaware] has been suspended by the state. Based on guidance from the US Attorney, the compassion centers concept conflicts with federal law. As a result, there is no plan to open compassion centers at this time.”); see also Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 14–15 (2013) (providing several

has raised the hackles of commentators of all political stripes and raised alarms about the continued vibrancy of our federal system.⁹⁸

C. *Flawed Fixes*

Although there have been many attempts, no one has yet devised a satisfactory way to balance state and federal interests in preemption decisions. Not straying far from the judicial canons previously noted, commentators have generally called for the courts to require Congress to consider states' interests when making its preemption decisions, or else for the courts to consider those interests themselves in deciding whether or not state law is preempted.⁹⁹ But relying on the courts alone to improve the balance struck by preemption decisions is misguided, for three basic reasons.

First, requiring Congress to consider states' interests—through clear statement rules, deliberation requirements, etc.—is too haphazard a means by which to improve the balance struck by its preemption decisions. On the one hand, the demand for more clarity, consultation, or deliberation may inadvertently *over-protect* states' interests. Because these demands arguably reflect misguided assumptions about how Congress actually functions, Congress may find it impossible to satisfy them in practice.¹⁰⁰ When this happens, weightier congressional

examples of state medical marijuana laws that have “fallen prey to the rhetoric of conflict preemption outside the courts”).

⁹⁸ See *supra* note 22.

⁹⁹ For a sampling of proposals, see Chemerinsky, *supra* note 22, at 70–74 (urging courts to apply clear statement rules more aggressively); Dana, *supra* note 1, at 512 (urging courts to balance “the level of certainty regarding congressional intent to preempt state law against the weight of democratic support for the kind of state law or laws at issue”); Gardbaum, *supra* note 45, at 826 (urging courts to demand that Congress “carefully . . . consider the position and interests of the states” and conclude that “the claims of uniformity prevail and so justify ending the constitutionally concurrent legislative authority of the states”); Hills, *supra* note 10, at 68 (urging courts to “refus[e] to find preemption absent clear evidence that state law announces policies that contradict policy judgments contained in federal statutes”); Mendelson, *supra* note 83, at 699 (urging courts not to “assume that Congress authorized a federal agency to preempt state law unless that authority is clearly delegated”); Merrill, *supra* note 2, at 779–80 (urging courts to “demand an express legislative statement by Congress delegating authority to preempt before agencies can preempt on their own authority”); Young, *supra* note 3, at 332 (urging courts to apply the presumption a gainst preemption more broadly).

¹⁰⁰ See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1709 (2002) (criticizing assumptions behind clear statement rules and other deliberation-forcing requirements, and warning that Congress “cannot satisfy the Court’s requirement of due deliberation and rational, articulated decision[making]”); see also Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 117 (2001) (warning that “telling Congress how to perform its information-gathering functions misunderstands and subverts the legislative process”).

interests might be sacrificed for less substantial states' interests. Indeed, the danger of imposing heightened clarity or deliberation requirements on Congress is especially pronounced in the preemption context, given the unique difficulty Congress faces in anticipating and addressing all of the possible preemption issues that proposed congressional legislation might spawn in the future.¹⁰¹ Even federal administrative agencies, with a comparative surfeit of time and resources on hand, struggle to meet the preemption consultation and deliberation requirements imposed on them by the FEO.¹⁰² Needless to say, if Congress cannot meet the courts' demands, more state laws will be preserved. But those laws will include some that *should* be preempted, i.e., ones that unduly impair federal interests, and not just ones that should be spared.

On the other hand, if we assume that Congress could easily satisfy the courts' procedural requirements, those requirements would not necessarily change Congress's decisions. After all, procedural requirements do not limit Congress's options, nor do they make preemption any less palatable to Congress.¹⁰³ In other words, at best the procedural requirements might simply provoke Congress to speak more clearly with its mouth full, while doing nothing to curb its appetite for preemption.

The courts would fare no better if they attempted to weigh state interests against Congress's interests themselves when making preemption decisions. The presumption against preemption, which is intended, in part, to serve as a proxy for states' interests,¹⁰⁴ helps to demonstrate the shortcomings of this approach. Like court-imposed deliberation requirements, the presumption against preemption attempts to impose balance in a very crude way. It provides the same degree of protection for states' interests regardless of the actual strength of those interests in the case at hand.¹⁰⁵ But because the actual strength of a state's interest in preserving its law is likely to vary

¹⁰¹ See Meltzer, *supra* note 64, at 28–29.

¹⁰² Cf. Sharkey, *supra* note 66, at 571, 584 (reporting that agencies sometimes struggle to identify who best represents state interests and that “[m]ost rules with potential preemptive effect receive no comments from state or local government officials or their representatives”).

¹⁰³ As Professor Stephen Gardbaum has suggested, a “procedural constraint on Congress’s power to preempt the states . . . is important but not sufficient in terms of adequately . . . protecting the background principle of federalism.” Gardbaum, *supra* note 45, at 826. He explains that “[a]s long as it demonstrated that it had carefully thought about the relevant issues, Congress would be free to exercise its power of preemption unreasonably from a federalism perspective.” *Id.*

¹⁰⁴ See Young, *supra* note 3, at 275–76.

¹⁰⁵ See *supra* notes 27–29 and accompanying text; see also Young, *supra* note 3, at 333–40

substantially from one domain to the next, the presumption—like deliberation requirements—may protect state interests too much in some cases and not enough in others. For example, California probably cares more about preserving its regulatory authority over marijuana, immigration, and climate change than it cares about its regulatory authority over foie gras, bedding, or even grapes, but the presumption (if it works at all) puts the same thumb on the scale against preemption in all of these contexts.

The problems with judicial attempts to balance state and federal interests may prove insurmountable. For one thing, extant proposals for judicial balancing have failed to explain *how* courts are supposed to accurately gauge states' interests in any given case,¹⁰⁶ especially without any formal input from the states.¹⁰⁷ Neither do they explain how courts are supposed to compare those interests to Congress's, a task that the late Justice Scalia once likened to "judging whether a particular line is longer than a particular rock is heavy."¹⁰⁸ For these reasons, judicially imposed solutions are likely to remain haphazard at best, perhaps achieving a *different* balance but not necessarily a *better* one.

Second, even if courts could somehow engineer more balanced preemption decisions, it is unclear why they would bother to undertake this task. As already noted, courts have been less than enthusiastic in applying existing, and relatively modest, antipreemption canons.¹⁰⁹ And as Professor Andrew Koppelman has observed, "[n]o Justice has indicated any interest in moving [preemption] doctrine in . . . [the] direction" of "polic[ing] the legislative process to make sure that Congress thinks seriously about the merits of disrupting the

(acknowledging that courts should adjust the presumption to reflect interests that vary across regulatory domains).

¹⁰⁶ Cf. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 200 (arguing that courts are ill-equipped "to develop more fine-grained canons" of statutory construction); Young, *supra* note 1, at 1847 (acknowledging that the values associated with federalism are "are insufficiently determinate to be much help in fashioning particular doctrines").

¹⁰⁷ See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 53 (2006) (reporting that states are seldom a party to litigation that challenges one of their own laws). Even when states do provide their input, courts (and Congress) have little reason to trust their (self-serving) assessments of the impact preemption would have on their interests. After all, talk is cheap, and state officials might exaggerate the costs of preemption in order to convince a court (or Congress) to forbear.

¹⁰⁸ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

¹⁰⁹ See *supra* notes 93–95 and accompanying text.

existing federal-state balance.”¹¹⁰ Thus, whatever their merits, proposals calling for more judicial scrutiny of preemption decisions are likely to remain just that: proposals.

Third, and perhaps most fundamentally, proposals calling for more aggressive judicial review of Congress’s preemption decisions and the processes that generate them raise substantial legitimacy concerns. Rightly or wrongly, the Framers decided to entrust preemption decisions to Congress.¹¹¹ The dominant view is that Congress’s constitutional authority to preempt state law is unfettered.¹¹² As the Supreme Court itself has opined, “[i]n determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our *sole* task is to ascertain the intent of Congress.”¹¹³ There are, of course, good reasons to be concerned about how Congress makes preemption decisions. As just explained, it presently has very little incentive to spare state laws that undermine its policy interests, no matter the cost to the states. But manufacturing a degree of congressional forbearance to “correct” this problem, or manufacturing a congressional duty to consider states’ interests alongside its own, usurps Congress’s legislative prerogatives in a very direct way.¹¹⁴

Preemption decisions should be made judiciously. Because preemption entails both benefits and costs to society, both must be considered to make welfare-enhancing preemption decisions. The problem is that we currently do not adequately consider the costs in deciding whether state law is preempted. The interests of the states

¹¹⁰ Andrew Koppelman, *How “Decentralization” Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 24 n.60 (2003).

¹¹¹ See *supra* notes 53–55 and accompanying text.

¹¹² Gardbaum, *supra* note 45, at 797 (acknowledging the prevailing wisdom that “in areas of concurrent power, Congress has unlimited constitutional authority to preempt the states”).

¹¹³ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (emphasis added).

¹¹⁴ E.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (arguing the presumption enables judges to “rewrite the laws enacted by Congress,” and thereby “risk[s] an illegitimate expansion of the judicial function”); Goldsmith, *supra* note 106, at 200 (arguing that presumptive canons “have an uncertain justification . . . and . . . probably conceal more than they enlighten about what drives the judicial decision to preempt or not”); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2025–29 (2009) (criticizing the presumption against preemption and other judicially crafted clear statement rules for disregarding choices and compromises made by other government actors); Note, *supra* note 89, at 1607 (arguing that “there is no straightforward textual basis in the Constitution for favoring states when interpreting the preemptive scope of statutes”). But see Gardbaum, *supra* note 45, at 820–28 (arguing that because Congress’s preemption power stems from the Necessary and Proper Clause, rather than the Supremacy Clause, courts may scrutinize Congress’s justifications for preemption without usurping its authority).

are largely ignored in the political process, and they do not fare much better in the judicial process when Congress's preemption decisions are enforced. Although preemption has generated concern across the political spectrum, no one has yet devised a realistic way to accurately and effectively incorporate state interests into preemption decisions, at least without depriving Congress of its constitutional entitlement to make those decisions. In sum, a new solution is needed.

II. THE SOLUTION: MAKE PREEMPTION LESS PALATABLE

This Part details a novel way to curb Congress's appetite for preemption. I call it *state poison pill legislation*. In a nutshell, the legislation would condition the performance of some valuable state service on Congress deciding not to preempt state law. The legislation would thus impose an opportunity cost on preemption, giving Congress an incentive it now lacks to forebear from displacing state laws that otherwise conflict with its own.

Section A provides more detail on how and why poison pill legislation would work. It starts by illuminating the leverage that states could use to influence Congress's preemption decisions. This leverage stems from constitutional entitlements like the anti-commandeering rule. The Section then explains how states could trade these entitlements for preemption concessions. It demonstrates that the pill could make forbearance a more palatable option than preemption, and thus change Congress's and the courts' preemption decisions.

Section B then sketches a tentative welfarist defense of poison pill legislation. It shows that poison pill legislation could enhance societal welfare by facilitating Coasean bargaining over constitutional entitlements. While acknowledging that the pill is no panacea, the Section explains why it is superior to competing proposals discussed earlier that aim to improve preemption balancing exclusively via judicial review.

A. *The Mechanics of Poison Pill Legislation*

The states' leverage over Congress's preemption decisions stems from valuable constitutional entitlements they possess but have not fully utilized to their advantage. For ease of exposition, my analysis focuses on the most valuable of these entitlements: the anti-commandeering rule.¹¹⁵ The anti-commandeering rule stipulates that Congress

¹¹⁵ Another valuable entitlement is sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of [state] sovereignty not to be amenable to the suit of an

“may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”¹¹⁶ Importantly, Congress may not force a state to relinquish this entitlement, even when a state’s refusal to do so frustrates congressional objectives. In *Printz v. United States*, for example, the Court insisted that commandeering is impermissible even if a federal statute “serves very important purposes . . . and places a minimal and only temporary burden upon state officers.”¹¹⁷ But because this entitlement is alienable, i.e., because the states can voluntarily part with it, the states can use it as a bargaining chip. In other words, they may agree to pass or enforce laws, *for a price*.¹¹⁸

The states have considerable leverage in negotiating the price for their services because Congress often prefers and sometimes even needs the states to implement its laws and thereby achieve its own policy objectives.¹¹⁹ For one thing, state and local agencies can perform some functions more cheaply than their federal counterparts. In other words, Congress may see cost advantages to outsourcing the implementation of federal law to the states.¹²⁰ In addition, because state and local governments employ simpler, more majoritarian lawmaking processes, Congress might prefer to utilize them to fill in the details of federal regulatory programs, rather than take its chances in the more

individual *without [the state’s] consent.*” (quoting THE FEDERALIST NO. 81 (Alexander Hamilton))).

¹¹⁶ 521 U.S. 898, 935 (1997).

¹¹⁷ *Id.* at 931–32; see also 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, 823 (1998) (noting that the anti-commandeering rule “allows state governments to hold out and refuse to implement national legislation even when the costs to the state of such implementation are trivial and the benefits to the national government are quite large”).

There are some exceptions to the rule, but they are irrelevant for present purposes. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 76–77 (discussing the rule and the exceptions thereto).

¹¹⁸ Hills, *supra* note 117, at 858 (“*New York* does not merely give the states something to use but, just as important, something to *sell*.”); Huq, *supra* note 36, at 1635 (noting that “the anti-commandeering and sovereign immunity doctrines . . . [b]oth create property-like entitlements rather than . . . inalienability rules . . . and both leave open the possibility that states can engage in mutually beneficial trading with Congress using those property rules”).

¹¹⁹ It is important to recognize that the leverage wielded by a state is distinct from and perhaps much greater than any leverage wielded by its congressional delegation. This is why a state might be able to extract preemption concessions from the congressional majority even if its congressional delegation is unable to do so, say, because the delegation lacks the votes needed to block legislation or to logroll.

¹²⁰ See Hills, *supra* note 117, at 819 (explaining that differences in the cost of providing services have created a “vigorous intergovernmental marketplace”).

cumbersome and compromise-ridden federal lawmaking process.¹²¹ Lastly, whether or not state administration has any fiscal, substantive, or other advantages, in some cases Congress simply has no choice but to utilize state officials to administer its laws. As Professors Jessica Bulman-Pozen and Heather Gerken have remarked, “[w]hile the federal government may threaten to administer a program itself if the state does not cede to its demands, its capacity to do so is often limited, and the state may call Congress’s bluff.”¹²²

Not surprisingly, states have been able to use this leverage, what Gerken calls the “power of the servant”, to shape the *enforcement* of federal law.¹²³ As Professor Aziz Huq has explained, “[t]he practical effect of the constitutional structure is to assign to states a set of regulatory resources that can be leveraged to secure shifts to federal policies.”¹²⁴ To give just one recent example, states have leveraged federal reliance on state law enforcement agencies to reshape federal immigration enforcement policy. Namely, by refusing to honor requests from Immigration and Customs Enforcement (“ICE”) to detain some low-level immigration offenders, states have arguably prompted ICE to focus on detaining and removing immigration offenders who pose the greatest threat to public safety.¹²⁵

121 Cf. Clark, *supra* note 8, at 1324 (arguing that federal lawmaking procedures protect states in part by “making federal law more difficult to adopt”); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1688–89 (2007) (arguing that their comparatively majoritarian friendly lawmaking processes give states several regulatory advantages vis-à-vis the federal government).

122 Bulman-Pozen & Gerken, *supra* note 36, at 1267; *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994) (arguing that “because the federal government depends so heavily on state officials to help administer its programs[,] [r]ealistically speaking, Congress can neither abandon these programs nor ‘fire’ the states and have federal bureaucrats assume full responsibility for them”).

123 Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006) (explaining that the “the power of the servant” stems from “ability of an institutional actor placed somewhere down the chain of command to influence the decision-maker who is nominally the boss” and to thereby “check a power imbalance”).

124 Huq, *supra* note 36, at 1641; *see also* Bulman-Pozen & Gerken, *supra* note 36, at 1274–80 (discussing ways states have shaped implementation of federal environmental, welfare, and national security laws); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 703 (2011) (arguing that “[w]hile preemption prevents states from making and enforcing their own laws[] . . . states can continue to exert influence through enforcement of federal law”); Ryan, *supra* note 35, at 4 (“[C]ountless real-world examples show that the boundary between state and federal authority is actually negotiated on scales large and small, and on a continual basis.”).

125 *See infra* Section III.A, for a more detailed discussion of immigration detainees and immigration policy.

Scholars have dubbed this cat-and-mouse game intergovernmental bargaining. Intergovernmental bargaining represents an important and distinct means by which power is allocated and states' interests are protected in our federal system.¹²⁶ It provides an alternative to the more traditional judicial safeguards of federalism, through which courts divine, devise, and enforce more formal and stationary boundaries on state and federal authority.

However, while valuable, using the states' leverage to shape the enforcement of federal law has an obvious shortcoming: it fails to preserve the states' independent legislative authority, in other words, their ability to pass their own laws, especially ones that conflict with federal policy.¹²⁷ It is this authority that has been steadily eroded by preemption, generating the chorus of criticisms noted earlier.¹²⁸ The problem is that no one has yet developed an effective way for states to bargain over preemption itself, the same way they now bargain, in a loose sense, over how to implement federal law. Indeed, as discussed earlier, most proposals to reform preemption decisionmaking instead resort to the more traditional judicial safeguards, notwithstanding their own shortcomings.

This Article proposes a novel way for states to bargain with Congress over preemption: poison pill legislation. The insight is in recognizing that the states could use their leverage to extract preemption concessions from Congress, rather than just enforcement concessions. For example, a state could offer some assistance to Congress, but make its performance of that assistance conditional on Congress forbearing from preempting another state law. To frame it slightly differently, poison pill legislation would impose an opportunity cost on preemption. Namely, to preempt state law, Congress would have to forego valuable state assistance. The pill would thus give Congress something it now lacks: an incentive to spare an objectionable state law.

¹²⁶ See generally Bulman-Pozen & Gerken, *supra* note 36; Hills, *supra* note 117; Huq, *supra* note 36; Lemos, *supra* note 124; Ryan, *supra* note 35.

¹²⁷ As Gerken has noted, "[u]nlike the sovereign, the servant lacks autonomy and, if push comes to shove, must cede to the higher authority." Gerken, *supra* note 123, at 2635; see also Bulman-Pozen & Gerken, *supra* note 36, at 1268 ("It would be a mistake, however, to equate the autonomy of the sovereign with the autonomy of the servant. . . . The servant's power to decide is interstitial and contingent on the national government's choice not to eliminate it. The servant thus enjoys microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master. That is not the sort of autonomy typically invoked by federalism scholars, who emphasize separateness and independence, the state's ability to govern without interference from the federal government.").

¹²⁸ See *supra* Section I.B.

A simple numerical example helps to illustrate how state poison pill legislation would change Congress’s preemption incentives.¹²⁹ The table below lists the value to the state and federal governments, respectively, of two distinct state laws, *A* and *B*. The content of these laws is largely irrelevant here, but the next Part discusses some concrete examples drawn from diverse policy domains. For present purposes, all that matters is that Congress may preempt *A*, but it may not compel the state to pass *B*.

BENEFIT (COST) BY LEVEL OF GOVERNMENT

	A	State Law B	A and B
State Benefit (Cost)	25	(10)	15
Federal Benefit (Cost)	(10)	30	20
Sum of State and Federal	15	20	35

As the table makes clear, the two governments have opposite views of each state law. Whereas the state favors *A* and opposes *B*, the federal government favors *B* and opposes *A*. If considered separately, we would expect Congress to preempt *A*, as it is entitled to do. Indeed, a court hearing a challenge to *A* would almost certainly conclude that Congress wanted to do so. The negative value Congress assigns to *A* (-10) is just another way of indicating that *A* undermines some congressional objective, i.e., that it conflicts with federal law. And as discussed above, the conclusion that *A* is preempted follows almost ineluctably from this conflict, no matter how strong may be the states’ countervailing interest in preserving the law (here, +25).

But poison pill legislation could change the fate of an endangered law like *A* by linking it to a second state law (*B*) that promotes Congress’s interests. In a nutshell, the state would offer to pass *B*, something *it* would not otherwise do given the cost to the state, but only if Congress spares *A*, something Congress would not otherwise do. As the table demonstrates, the state’s offer would likely persuade Congress to forbear from preempting *A*, because the package deal (*A* and *B*) maximizes Congress’s net payout (+20) among all of the realistic options. Even though *A* still diminishes Congress’s welfare (by -10), *B* more than makes up for it. The package deal is also an attractive one for the state to make. If Congress accepts the deal, as

129 The illustration is inspired by Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 322, 323 (Dennis C. Mueller ed., 1997) (providing similar illustrations to demonstrate the potential benefits of logrolling within one legislature).

seems likely, the state's payout would be fifteen (+15). And if Congress rejects the bargain, i.e., it preempts *A*, the state is still no worse off than it is under the status quo: after all, *A* is doomed anyway.¹³⁰

The key trick is in finding a way to move Congress to respond to the state's offer. Congress's intentions are paramount in preemption, but for reasons discussed above, it cannot easily address all preemption questions that arise.¹³¹ Some poison pill legislation might be provocative enough to occasion an explicit Congressional response. Imagine a state threatening to end its prohibition on recreational marijuana if Congress preempts its medical marijuana regulations.¹³² And Congress has responded to some state threats in the past, for example, loosening the reins under the Coastal Zone Management Act when states threatened to walk away from the program.¹³³ But it seems unrealistic to expect Congress to explicitly respond to every offer the states make, especially offers made by a single state with a small congressional delegation.¹³⁴ To be more effective, then, poison pill legislation needs to be designed in a way that enables other federal actors, and especially the courts, to respond even when Congress is unable to do so.

The states could satisfy this requirement and engage Congress, federal agencies, and the courts by including an express inseverability provision in poison pill legislation. State legislatures have discretion to specify that if one provision of law is blocked, e.g., because it is preempted, another provision shall be deemed repealed as well, even if it suffered from no legal defect of its own.¹³⁵ Though state

¹³⁰ This assumes, of course, that the state has not already traded *B* for some other concession (e.g., federal grant funds, enforcement discretion, etc.). If it has, the model would need to incorporate the benefit the state reaps from that concession, because that benefit might have to be sacrificed to obtain the preemption concession.

¹³¹ See *supra* notes 64–65 and accompanying text.

¹³² See *infra* Section III.B (providing a more detailed discussion of how a state might use poison pill legislation to preserve more of its regulatory authority in the marijuana policy realm).

¹³³ See JOHN COPELAND NAGLE ET AL., *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 784 (3d ed. 2013) (noting that “many states resented” the planning and management step required by the Coastal Zone Management Act (“CZMA”) as an “unfunded mandate and yet another layer of federally-induced regulation of local land use,” but “[r]epeated threats by coastal states to leave the CZMA program and attacks on the program in Congress . . . eventually led EPA and [the National Oceanic and Atmospheric Association] to appease the states by adding greater flexibility to the program at the administrative level”).

¹³⁴ This may be one reason why intergovernmental bargaining scholars have overlooked the potential for bargaining over preemption.

¹³⁵ See generally John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

lawmakers usually prefer to make their laws severable,¹³⁶ they do employ inseverability provisions, and they have even done so to influence the decisions of other government actors.¹³⁷ In poison pill legislation, the state legislature would adopt a rule making the assistance it offers Congress inseverable from the fate of the objectionable law it is seeking to preserve. In the illustration, for example, the rule would make the congressionally disfavored law (*A*) inseverable from the congressionally favored law (*B*). The implication is that preempting *A* would necessarily and automatically also block *B*.

The inseverability provision would present Congress with a clear choice. Because the state would not need to pass additional legislation to execute its threat, there would be no cause for Congress to second guess the state's intentions.¹³⁸ The provision would thus make the

136 See NORMAN SINGER & SHAMBIE SINGER, 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 44:1 (7th ed. 2008) ("There is a presumption in favor of severability."). The common assumption is that severability serves the interests of lawmakers, because it allows them to preserve at least a portion of their handiwork if the legislation they pass is found to have a defect. But by making severability the default rule, state lawmakers may have inadvertently made preemption more palatable to Congress. As a practical matter, severability enables Congress to excise only those provisions of state law it opposes, leaving intact other provisions of state law it favors. It seems reasonable to suppose that Congress would be more inclined to employ this preemption "scalpel" than it would a blunter preemption instrument. Cf. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 207, 341 (2006) ("[T]he argument that a president must always veto a bill if it has what he believes to be an unconstitutional provision is unrealistic in an age of omnibus legislation: presidents are often presented with dozens and even hundreds of provisions in a bill, often on multiple subjects, and as a political matter they will not be able to veto such bills simply because of constitutional concerns about a particular provision.").

137 For example, the Pennsylvania legislature once made pay raises for state employees (including state judges) inseverable from controversial expense accounts it had created for sitting state legislators. See *Kennedy v. Commonwealth*, 546 A.2d 733, 734–35 (Pa. Commw. Ct. 1988). To the chagrin of taxpayers, who claimed the accounts were tantamount to an unconstitutional pay raise for those legislators, a state appeals court upheld the law. See *id.* at 739. This raised allegations that the court had been influenced by the inseverability provision; after all, it would have required the court to scuttle the pay raises for all state employees, including state judges. See Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 999 (2005). For commentary on the decision and the legislature's chosen tactic, see Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 915–16 (1997); Kameny, *supra*, at 998–99 (2005). For discussion of a more recent example in which a state legislature employed a similar tactic, see Joe Palazzolo, *Kansas Lawmakers' Budget Links Court Funding to Judicial Decision*, WALL ST. J. (May 19, 2015, 7:10 P.M.), <http://www.wsj.com/articles/kansas-lawmakers-budget-move-links-court-funding-to-court-decisions-1432067876> (discussing Kansas legislature's tactic of linking the state court's budget to the fate of a controversial law limiting the state Supreme Court's administrative powers).

138 The inseverability clause would not, of course, prevent the state from reenacting the law Congress favors (*B*) at some point in the future. Cf. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 (2011)

state's threat credible and add urgency to Congress's consideration of the state's proposal.

Even more importantly, the inseverability provision would enable the courts to consider the state's offer even if Congress fails to do so explicitly.¹³⁹ Indeed, poison pill legislation plays neatly into the framework of extant implied preemption doctrine. Under that doctrine, the courts already must attempt to divine what Congress would have wanted had it actually considered some piece of state legislation. The conclusion courts reach, in turn, hinges on whether that state legislation frustrates congressional purposes. The pill would not require courts to deviate from this inquiry. The only change required by the poison pill is that the courts would have to ask whether a *package* of state laws (*A* and *B*) *together* frustrates congressional purposes, rather than whether one of them standing alone does so.

While the poison pill might thus complicate the courts' inquiry somewhat, the added difficulty is far from insurmountable. Indeed, the resulting inquiry is no more complicated than ones courts already undertake in preemption cases. In some cases, for example, courts must decide whether a single state law is preempted when it frustrates one congressional purpose but furthers another.¹⁴⁰ Incorporating

("Ordinary legislation cannot be made unrepealable, and future governments are free to revisit the policy choices of their predecessors."). But as long as the state lacks an incentive to pass the congressionally favored law (it is costly, after all), its intentions would not be in doubt and Congress could not bank on escaping the cost imposed by the pill. In any event, it would take the state some time to reenact any repealed law, and during this period Congress would have to forego the benefits of the repealed law.

¹³⁹ Federal courts will follow whatever severability rule is chosen by the state legislature. *See, e.g.,* *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Severability is a state law issue that binds federal courts.").

¹⁴⁰ The Seventh Circuit confronted just such a scenario in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012). A mortgagor sued Wells Fargo Bank for violations of state law, claiming the bank had fraudulently refused to modify her home loan in accordance with the federal Home Affordable Mortgage Program ("HAMP"). *Id.* at 554. HAMP was designed, in part, to encourage lenders to agree to loan modifications. *See id.* at 556–57. Wells Fargo moved to dismiss, claiming the mortgagor's cause of action was preempted because "potential exposure to state liability may discourage servicers from participating in HAMP." *Id.* at 580. While acknowledging that "Wells Fargo may be right," the Seventh Circuit still found "that is hardly an argument for conflict preemption." *Id.* The court explained:

We can reasonably assume that *one* purpose of Congress in enacting [the program] was to ensure mortgage servicers participated in the foreclosure mitigation programs But *another* goal was surely to prevent these banks from hoodwinking borrowers in the process. Nothing in [the program] suggests that Congress saw servicer participation as the [program's] paramount purpose that would trump any concerns about whether servicers were actually complying with the program and with their contractual obligations.

poison pill legislation into preemption decisions also poses a less daunting challenge than administering the *Pike* balancing test in dormant Commerce Clause cases. Under *Pike*, courts must determine whether a given state law burdens the federal government's interest in the free flow of commerce more than it advances the state's interest in protecting the health, safety, and morals of its population¹⁴¹—the inquiry the late Justice Scalia likened to “judging whether a particular line is longer than a particular rock is heavy.”¹⁴² By contrast, poison pill legislation would not require courts to explicitly balance disparate state and federal interests. Indeed, in line with current preemption decisionmaking, courts would not have to consider state interests *at all*. That is, courts could continue to focus exclusively on Congress's interests. The only difference is that Congress would now have an interest in preserving state law.

In most cases, courts should reach the same decision that Congress would have reached had it addressed the poison pill legislation. As long as the poison pill provides a sufficiently good reason for Congress to forbear, the court would preserve the state's regulatory authority. The only exception may be cases in which Congress adopted an express preemption provision before the state adopted its poison pill. In such cases, a court is likely to consider itself obliged to enforce the express preemption provision, even if Congress would, in hindsight, regret it.¹⁴³ As a result, poison pill legislation may prove less effective against federal statutes with clear express preemption clauses.¹⁴⁴ But since clear express preemption clauses are relatively uncommon, this limitation does not detract much from the overall utility of the poison pill device.

B. The Normative Case for Poison Pill Legislation

The previous Section explained how poison pill legislation would work and why it could change the outcome of at least some preemp-

Id. (emphases added).

¹⁴¹ See *supra* note 46 and accompanying text.

¹⁴² *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in judgment).

¹⁴³ See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (“If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ [sic] pre-emptive intent.”).

¹⁴⁴ The same may be said of federal statutes that courts have already found to impliedly preempt state law. However, the adoption of poison pill legislation would arguably make the earlier decision distinguishable on the facts and thereby enable a court to revisit its earlier holding regarding Congress's intentions.

tion decisions. This Section explains in more detail why this change would be normatively desirable and why the pill would be superior not only to the status quo but to competing reform proposals as well.

The poison pill does what no other proposal does: it addresses the root cause of the problem now besetting preemption decisionmaking, namely, Congress's lack of incentives to forbear from preempting state laws that undermine its own objectives, even when doing so comes at great cost to the states. The pill not only gives Congress an incentive to preserve the states' regulatory authority, but it should do so in a way that is commensurate with the states' interests in that authority. Because the pill is formulated by a state, it should reflect the strength of the state's interest in preserving its regulatory authority over a given domain; the stronger the state's interest, the more willing the state should be to "pay" to preserve it, e.g., by offering more services. Through this process, the pill should generate better preemption decisions, namely, decisions that more judiciously balance the competing interests of both Congress and the states. In other words, the pill would not increase the power of the states indiscriminately; it would increase the power of the states in a way that should enhance total welfare.

The illustration from the prior Section helps to demonstrate the societal benefits of poison pill legislation.¹⁴⁵ It demonstrates how the pill would enable the passage of two state laws (*A* and *B*), neither of which would be passed under the current system even though both are, on balance, good for society. Under the current system, Congress would preempt *A*, even though the law benefits the state more than it harms congressional interests. Likewise, the state would refuse to pass *B*, even though that law benefits Congress more than it costs the state. By enabling both laws to be passed, the pill would capitalize on these otherwise foregone opportunities, increasing overall societal welfare by thirty-five (+35).¹⁴⁶

The more theoretical point to be made here is that the poison pill facilitates Coasean bargaining over preemption.¹⁴⁷ The pill provides an effective mechanism by which the state can trade its entitlement not to pass or enforce a law for Congress's entitlement to preempt

¹⁴⁵ See *supra* Section II.A.

¹⁴⁶ This figure (+35) represents the sum of the four payouts from the table (+25, -10, -10, and +30). See *id.*

¹⁴⁷ The Coase theorem posits that in the absence of transaction costs, parties will reallocate entitlements to their highest valued user. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6 (1960).

state law. The Coase theorem has been used to demonstrate the potential efficiency of trades between private actors (e.g., the farmer and the rancher),¹⁴⁸ trades within a single level of government (e.g., logrolling),¹⁴⁹ and more recently, the intergovernmental bargains over the enforcement of federal law discussed above.¹⁵⁰ To date, however, no one has figured out an effective way for the state and federal governments to bargain over preemption. The poison pill could provide a solution and thereby expand the opportunities for mutually beneficial intergovernmental bargaining.

Maximizing welfare is not, of course, the only relevant consideration when deciding the fate of a challenged state law. The Constitution elevates the protection of certain, fundamental and inalienable rights above the goal of preference satisfaction. The poison pill envisioned here, however, would not jeopardize any constitutionally protected rights. It would not shield unconstitutional state legislation, such as a law invidiously discriminating on the basis of race, from legal challenge. Even if Congress approved of such legislation, say, because the state made a particularly tempting offer, Congress has no power, i.e., no entitlement, to authorize state violations of the Constitution.¹⁵¹

For similar reasons, poison pill legislation would not threaten the immutable features of the structural Constitution. In particular, the states could not bargain for Congress's inalienable entitlements. A state, for example, could not negotiate with Congress for the power to make treaties, because the Constitution has reserved that power exclusively to the federal government.¹⁵² In similar fashion, the states

¹⁴⁸ *Id.* at 5–6.

¹⁴⁹ Logrolling describes the practice of two or more legislators trading their votes on separate bills to secure the passage of the one each desires, and which might otherwise not garner majority support. Political economy scholars have identified the potential societal benefits of logrolling. *E.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 133 (1962) (“Permitting those citizens who feel strongly about an issue to compensate in some way those whose opinion is only feebly held can result in a great increase in the well-being of both groups . . .”).

¹⁵⁰ Hills, *supra* note 117, at 896–97 (explaining efficiency justification for intergovernmental market for administrative services); Huq, *supra* note 36, at 1603 (suggesting that Coase theorem provides insights on when intergovernmental bargaining will “generate desirable results on roughly welfarist grounds”).

¹⁵¹ By analogy, the Court has held that Congress's spending power “may not be used to induce the States to engage in activities that would themselves be unconstitutional.” *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). “Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.” *Id.* at 210–11.

¹⁵² U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”).

also could not coerce Congress into parting with its alienable entitlements. Although the danger of *state* coercion might seem remote, one could at least imagine a state using poison pill legislation to force Congress to back down on preemption.¹⁵³ Imagine, for example, if Colorado made all of its drug prohibitions—e.g., bans on heroin, cocaine, methamphetamines, and so on—inseverable from the fate of Amendment 64. Faced with such a threat, Congress likely would have no choice but to acquiesce and allow Amendment 64 to stand, even if it undermines congressional interests. In such a case, however, the courts could presumably refuse to enforce the inseverability clause because it puts a “gun to the head” of Congress, the same way they refused to enforce conditional federal grants that put a “gun to the head” of states considering expansion of their Medicaid programs.¹⁵⁴ In short, the courts could police abuse of poison pill legislation in the same way they now police abuse of similar tactics like conditional spending legislation.

Just as importantly, poison pill legislation is a superior option to extant solutions that have been offered to curb preemption, because it would avoid the three problems that beset those solutions. First, by giving the states a prominent role to play in preemption decisions, poison pill legislation should address the accuracy problems that inhere in judicial balancing and deliberation requirements. As already explained, those requirements generally do not give states the opportunity to provide their input in preemption decisions, suggesting that the balancing that takes place will be the product of much guesswork.¹⁵⁵ Poison pill legislation, by contrast, puts the states front and center. By adjusting the services they offer Congress in return for forbearance, the states can credibly communicate the strength of their interests in preserving specific laws against preemption.¹⁵⁶

To be sure, the poison pill tactic cannot guarantee perfectly balanced preemption decisions. In part, this is because the pill might not

¹⁵³ Cf. Hills, *supra* note 117, at 875–86 (acknowledging but downplaying the danger posed by the hold-out problem in state-federal bargaining).

¹⁵⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (invalidating conditional spending provisions of the Affordable Care Act on grounds that “the financial ‘inducement’ Congress [chose was] much more than ‘relatively mild encouragement’—it [was] a gun to the head”). Policing coercion by the states would, of course, pose the same practical and conceptual challenges as does policing coercion more generally. For a discussion of those challenges, see generally Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013).

¹⁵⁵ See *supra* note 102 and accompanying text.

¹⁵⁶ Because it requires states to *do* something for Congress, the pill also addresses the “cheap talk” problem discussed *supra* note 107.

change preemption decisions previously made by Congress through express preemption provisions, as previously discussed.¹⁵⁷ But it is also because the pill only requires Congress to consider what a state actually offers to avoid preemption, and not what the state might gain thereby. Thus, to the extent a state is unable to make an offer that is commensurate with its interests, the pill will under-protect those interests.¹⁵⁸ This problem, of course, is not unique to poison pill legislation, it besets all Coasean bargaining; that is, entitlements do not necessarily wind up in the hands of whoever values them most if one of the parties faces wealth constraints. Nevertheless, given the extent of the states' leverage vis-à-vis Congress, the pill should prove an effective means by which to protect states' interests in many cases, even if not all of them.

Second, because it does not require any institution to act against its own self-interest, poison pill legislation offers a more realistic way to protect states' interests than many proposals dreamt up thus far. First and foremost, the pill does not require Congress to eschew its own self-interest. In fact, the pill works by playing into Congress's self-interest. Neither does the pill require courts to abandon longstanding precedent or to undertake any new inquiries they may be unwilling or unable to perform. Indeed, the poison pill tactic easily fits into the tests the courts have been applying for decades in implied preemption cases. Of course, the states must put the ball in motion by passing poison pill legislation. But the states are the one institution that is motivated to act; after all, the pill is designed to help them preserve more of their own regulatory authority.

Third, poison pill legislation offers a more legitimate means by which to balance state and federal interests. Unlike proposals that call upon courts to second-guess Congress's preemption decisions and its decisionmaking processes, poison pill legislation does not usurp Congress's constitutional authority. Instead, the poison pill lessens the *need* to second-guess Congress's decisions by giving it an incentive not to preempt state law.

¹⁵⁷ See *supra* notes 143–44 and accompanying text.

¹⁵⁸ In the illustration above, for example, imagine that *B* is the only service the state has to offer Congress, and that Congress only values *B* at five (+5). Under these facts, the state's offer of *B* would not be enough to change Congress's mind about preempting *A*, even though *A* would still be a welfare-enhancing law (on balance). For a quick introduction to the challenge wealth effects pose to all Coasean bargaining, see Coase, *supra* note 147, at 15–16.

III. APPLICATIONS

This Part fleshes out the proposal sketched above by discussing how states could utilize poison pill legislation to preserve more of their regulatory authority in three important and diverse policy domains: immigration, marijuana, and products liability law. It outlines how the legislation could change preemption decisions that have threatened specific state regulations in these domains. Each Section identifies the legitimate interests the states are trying to pursue, why those interests have been jeopardized by preemption, and the leverage the states could use to protect them going forward. Ultimately, these case studies serve to demonstrate how poison pill legislation can influence different decisionmakers across a broad array of policy domains and using different sources of leverage.

A. Immigration

Immigration has been a perennial federalism battleground. Congress has passed comprehensive immigration statutes that govern nearly every facet of this domain.¹⁵⁹ However, red and blue states alike are dissatisfied with the federal government's handling of immigration policy.¹⁶⁰ Unable to push Congress to enact federal reforms,¹⁶¹ the states have sought to reshape immigration policy by passing their own immigration laws.¹⁶² These laws govern such matters as the employment, housing, questioning, and arrest of immigrants.¹⁶³

¹⁵⁹ See Rodríguez, *supra* note 45, at 623 (“Congress has legislated expansively in the immigration area.”).

¹⁶⁰ See NAT'L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT 2–4 (2014), <https://perma.cc/7QB8-DREJ> (detailing state concerns over federal immigration policy).

¹⁶¹ In 2013 alone, for example, states adopted a record thirty-one resolutions imploring Congress and the President to take action on immigration policy. *Id.* at 2. But the prospects for passage of federal immigration reforms appear dim. *E.g.*, Dan Nowicki, *No Comprehensive Immigration Reform Until 2017?*, ARIZ. REPUBLIC (Feb. 9, 2015, 10:54 A.M.), <https://perma.cc/3UAK-7QUB> (reporting that Congress is unlikely to address immigration reform before the 2016 presidential election).

¹⁶² Between 2011 and 2013, for example, states enacted more than 500 laws concerning immigration. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 160, at 5. The new laws added to an already substantial corpus of state immigration law. *See, e.g.*, Rodríguez, *supra* note 45, at 569 (reporting that “[i]n the first six months of 2007 alone, more than 1400 bills addressing immigration and immigrants in some capacity were introduced in state legislatures across the country, and nearly 200 of those bills became law”); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1341 (2013) (reporting that “[s]ince 2005, states have enacted more than one thousand laws concerning immigration”).

¹⁶³ See generally CRISTINA M. RODRÍGUEZ ET AL., MIG. POL'Y INST. TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES (2007) (surveying state laws).

Congress, however, has shown little tolerance for state laws that supplant its own immigration policy. It has preempted a broad swath of state and local immigration laws it believes impose excessive burdens on businesses,¹⁶⁴ interfere with foreign relations,¹⁶⁵ hamper enforcement of federal immigration laws,¹⁶⁶ or else circumvent the procedural safeguards imposed on such enforcement.¹⁶⁷

Even if state immigration laws have upset Congress's choices, however, it is far from clear that Congress has struck the right balance by preempting them.¹⁶⁸ It is important to remember that states too have strong and legitimate interests in shaping immigration policy.¹⁶⁹ Among other things, the states have an interest in protecting the job prospects of lawful residents,¹⁷⁰ combatting crime and other social harms they attribute (rightly or wrongly) to unlawful migration,¹⁷¹ and promoting the integration and well-being of immigrant communi-

¹⁶⁴ See, e.g., *Lozano v. City of Hazleton*, 724 F.3d 297, 312–13 (3d Cir. 2013) (holding that city ordinance prohibiting the hiring of unauthorized immigrants was preempted because it undermined the balance Congress had struck between deterring employment of unauthorized immigrants and “avoiding undue burdens on employers” when it adopted a narrower prohibition).

¹⁶⁵ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2506–07 (2012) (holding that Arizona statute authorizing arrest of removable immigrants was preempted, in part, because it undermined need for country to speak with “one voice” on issues implicating foreign relations).

¹⁶⁶ See, e.g., *City of New York v. United States*, 179 F.3d 29, 32, 37 (2d Cir. 1999) (holding that city policy denying access to information collected by city employees concerning the immigration status of city residents was preempted because it impaired federal agency’s ability to remove unlawful immigrants).

¹⁶⁷ E.g., *Arizona*, 132 S. Ct. at 2505–07 (holding Arizona statute authorizing arrest of removable immigrants preempted, in part, because it failed to provide the same procedural safeguards Congress had imposed on the Executive’s power to arrest removable immigrants).

¹⁶⁸ Cf. *Rodríguez*, *supra* note 45, at 611–17 (arguing that the states’ interests in shaping immigration policy have been neglected over time, and Congress’s interests in exclusive control of the domain exaggerated).

¹⁶⁹ E.g., Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 263 (2011) (acknowledging that states have legitimate interest in regulating “the rights and burdens of noncitizens residing” in their borders); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 948–49 (1995) (noting that “[s]tates have a valid interest in regulating persons within their borders, including aliens” even if they do not have a legitimate interest in regulating entry itself).

¹⁷⁰ See, e.g., *De Canas v. Bica*, 424 U.S. 351, 356–57 (1976) (“Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.”).

¹⁷¹ *Arizona*, 132 S. Ct. at 2500 (“Accounts in the record suggest there is an ‘epidemic of crime, safety risks, serious property damage, and environmental problems’ associated with the influx of illegal migration across private land near the Mexican border. . . . The problems posed to the State by illegal immigration must not be underestimated.”) (citation omitted).

ties.¹⁷² And yet in preemption decisions, these interests are assigned little, if any, weight.¹⁷³ As the Court remarked in *De Canas v. Bica*, a case involving a challenge to a California law prohibiting the employment of unauthorized immigrants, “even state regulation designed to protect *vital state interests* must give way to paramount federal legislation.”¹⁷⁴ Even Justice Kennedy, who has acknowledged the “importance of immigration policy to the States,” has noted that states’ interests are no more than mere “background for the formal legal analysis” the Court must apply in preemption cases.¹⁷⁵ At bottom, because preemption decisions focus on only one set of interests (federal) and neglect the other (state), those decisions cannot be expected to necessarily favor the greater of the two.

*City of New York v. United States*¹⁷⁶ illustrates the potentially harmful tradeoffs that preemption decisions now make. In the case, the United States Court of Appeals for the Second Circuit found a New York City sanctuary policy preempted by federal immigration law. The City policy barred the federal Immigration and Naturalization Service (“INS”) from accessing any information City employees had collected concerning the immigration or citizenship status of any individual.¹⁷⁷ In reaching its decision, the court emphasized that the INS needed the information to help enforce federal removal policy.¹⁷⁸ It reasoned that denying the INS access to it would “reduce the effectiveness” of federal immigration policy and prevent INS from reaching its removal goals.¹⁷⁹

The court’s decision is defensible, at least as an application of extant preemption doctrine.¹⁸⁰ But that does not mean that preempting New York City’s policy was necessarily the welfare-maximizing

¹⁷² See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 247–49 (2012).

¹⁷³ Cristina Rodríguez has even suggested that the courts “put a thumb on the scale *in favor of preemption*” in immigration cases. Rodríguez, *supra* note 45, at 621 (emphasis added).

¹⁷⁴ *De Canas*, 424 U.S. at 357 (emphasis added) (remanding for determination of whether the California law stands as an obstacle to the purposes of the Immigration and Nationality Act).

¹⁷⁵ *Arizona*, 132 S. Ct. at 2500.

¹⁷⁶ 179 F.3d 29 (2d Cir. 1999).

¹⁷⁷ *Id.* at 31–33 (describing city policy).

¹⁷⁸ *Id.* at 35–37.

¹⁷⁹ *Id.* at 37.

¹⁸⁰ For a criticism of the court’s decision on other grounds, see Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103, 143–44 (2012) (arguing that the court should have found a commandeering violation).

choice. After all, preemption impeded important local goals, just as it advanced federal ones.¹⁸¹ The court explained,

The City's concerns [over its policy] are not insubstantial. The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved.¹⁸²

Nevertheless, the local policy had to give way because it conflicted with federal law, no matter how important it was to the City.

Now consider how states could use poison pill legislation to negotiate a different balance between state and federal authority over immigration policy. Notwithstanding its apparent disapproval of state immigration regulations, Congress has depended heavily on the states' assistance in enforcing its own immigration laws.¹⁸³ Perhaps most notably, the states have played a crucial role by detaining removable aliens at the request of ICE. Under programs like Secure Communities and its successor, Priority Enforcement,¹⁸⁴ ICE has issued more than 500,000 immigration detainers to state and local law enforcement agencies.¹⁸⁵ These detainers are essentially requests that state agencies continue to hold a removable alien who is already in their custody (say, because of a nonimmigration arrest) until ICE is able to assume custody. When state and local agencies honor the requests, they save

¹⁸¹ *City of New York*, 179 F.3d at 37 (noting the City's claim that confidentiality "is essential to the provision of municipal services and to the reporting of crimes because these governmental functions often require the obtaining of information from aliens who will be reluctant to give it absent assurances of confidentiality"). For a more detailed discussion of the purposes served by sanctuary laws, see Rodríguez, *supra* note 45, at 600–05.

¹⁸² *City of New York*, 179 F.3d at 36.

¹⁸³ The federal government itself has acknowledged the myriad ways states help enforce federal immigration policy. See U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 13–14 (2015), <https://perma.cc/ERF4-HJ5H> (acknowledging valuable assistance states provide, including executing warrants for suspected immigration violators, supplying facilities, equipment, and services for federal enforcement campaigns, participating in cooperative task forces, detaining individuals and seizing evidence at the request of federal officials, and referring suspected violations of federal immigration law to the Department of Homeland Security).

¹⁸⁴ The Secure Communities Program was terminated and replaced by the Priority Enforcement Program in November 2014. Memorandum from Jeh Charles Johnson, Sec'y of the U.S. Dep't of Homeland Sec., to Thomas C. Winkowski, Acting Dir. of ICE 1 (Nov. 20, 2014), <https://perma.cc/4XUK-PZFX>. For a detailed discussion and empirical analysis of the Secure Communities Program, see generally Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013).

¹⁸⁵ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION DETAINERS DECLINE 39 PERCENT SINCE FY 2012 (Nov. 12, 2014), <https://perma.cc/93NC-GM3W> (reporting detainer statistics from October 2011 to March 2014).

ICE the considerable trouble of relocating and apprehending an individual for removal. As the numbers suggest, the detainers have been an integral part of ICE's enforcement strategy.

The value that Congress attaches to the states' assistance, including, but not limited to the states' help with federal immigration detainers, gives the states some leverage to enact their own immigration policy. Indeed, as commentators have noted, some communities have already used this leverage to shape federal removal policy. For example, by refusing to detain some low-level offenders they believe should not be removed, some local jurisdictions have pushed ICE to focus on removing only those immigrants who pose a serious threat to community safety.¹⁸⁶ The states, however, could do more; they could arguably use their leverage to preserve more of their own legislative authority as well. To illustrate, a state could pass poison pill legislation providing that in the event a particular law—like New York City's sanctuary law—is found preempted, state and local law enforcement agencies would immediately cease to process all or perhaps just some immigration detainers issued by ICE.¹⁸⁷

It is easy to see why Congress might choose to spare the state's law when confronted with the poison pill legislation. After all, Congress could not easily replace the state's services.¹⁸⁸ It might value those services even more than it objects to the law the state is seeking to preserve. In any event, even if Congress itself balked at the state's offer, the tactic might still deter ICE from attempting to breach the state or local government's confidentiality policy. The agency is probably even more acutely aware of the value of state assistance than is Congress, and thus might be even more reluctant than Congress to take action that would trigger the pill.

¹⁸⁶ See Rodríguez, *supra* note 36, at 2117 n.58 (citing RANDY CAPPS ET AL., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011), <https://perma.cc/9UFQ-DMB5> (examining 287(g) enforcement priorities across different jurisdictions)).

¹⁸⁷ Because of the anti-commandeering rule discussed earlier, the states can refuse to honor ICE detainers. *Galarza v. Szalczuk*, 745 F.3d 634, 643 (3d Cir. 2014) ("Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government.").

¹⁸⁸ See Daniel G. Iles, Note, *With a Little Help from My Friends: The Federal Government's Reliance on Cooperation from the States in Enforcing Immigration Policy*, 31 WASH. U. J.L. & POL'Y 193, 194 (2009) (explaining that "the execution of United States immigration policy . . . is dependent on the cooperation of other governmental systems, particularly state law enforcement and correctional entities, because federal immigration officials are few and underfunded") (footnote omitted).

It is also easy to see why this poison pill legislation would be an appealing gambit for some states. The states incur fiscal and other costs when they honor ICE's immigration detainers,¹⁸⁹ but state governments might be willing to absorb these costs in order to preserve certain regulations—like confidentiality provisions—they might value even more.

Of course, poison pill legislation could not rebalance every preemption decision in the immigration realm. For one thing, the legislation would not prevent so-called constitutional, or structural, preemption. For example, the states still could not directly regulate the entry and removal of immigrants, even if Congress gave them its blessing, because the Constitution arguably reserves power over entry and removal to the federal government exclusively.¹⁹⁰ Nor would the pill necessarily shield state law from express preemption. As noted above, courts may feel bound to enforce express preemption language, even if they think Congress would not have chosen the same language had it been aware of the pill.¹⁹¹ Hence, poison pill legislation likely would not preserve state laws that Congress has already indicated—via clear statutory language—should be preempted.¹⁹² Nonetheless, given that federal immigration statutes, like other federal statutes, clearly resolve only a fraction of the preemption issues that arise under them,¹⁹³ the poison pill tactic could be an effective means by which to change the balance struck in a broad range of immigration preemption cases that now fill court dockets.

189 See Cox & Miles, *supra* note 184, at 109–10 (discussing financial and political costs local governments bear in honoring immigration detainers).

190 See Chin & Miller, *supra* note 169, at 263–64 (distinguishing between immigration law, which “defines the procedures for admission and exclusion,” from alienage law, which “describes the rights and burdens of noncitizens residing in the United States,” and suggesting that the federal government has exclusive authority over the former). *But see* Rodríguez, *supra* note 45, at 611–17 (questioning the exclusivity thesis).

191 See *supra* notes 143–44 and accompanying text.

192 For example, the Immigration Reform and Control Act (“IRCA”) expressly “pre-empt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2) (2012). Barring congressional repeal or amendment of this clause, a state would continue to be barred from imposing a fine on a firm for hiring an unauthorized immigrant.

193 *Cf.* Arizona v. United States, 132 S. Ct. 2492, 2504–05 (2012) (recognizing that express preemption provisions do not address all preemption issues, and that “the existence of an ‘express pre-emption provisio[n]’ does *not* bar the ordinary working of conflict pre-emption principles” (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–72 (2000) (alteration in original))).

B. *Marijuana*

Marijuana law has quickly emerged as one of the most important federalism battlegrounds of our time. Until recently, every state had joined the federal government in banning marijuana outright.¹⁹⁴ These prohibitions reflected the widespread view that marijuana is harmful and lacks any redeeming value.¹⁹⁵ But times have changed. In response to softening views of marijuana's harms and growing awareness of the possible benefits of the drug, more than twenty states have now legalized marijuana for at least some purposes.¹⁹⁶ These states have replaced their prohibitions with regulations similar to those governing pharmaceuticals (in the case of medical marijuana) or alcohol (in the case of recreational marijuana).¹⁹⁷ Under state law, individuals are allowed to possess, cultivate, and sell marijuana, but they must abide by extensive state-imposed conditions. For example, Colorado's Amendment 64 requires marijuana suppliers to obtain licenses from the state, label their products, and collect and remit state and local taxes on the drug, among many other things.¹⁹⁸

To be sure, as state reforms have grown in popularity, the federal government has begun to relax enforcement of its ban, thereby lessening somewhat the tension between state and federal law. In nonbinding guidance, the U.S. Department of Justice ("DOJ") has urged United States Attorneys not to prosecute people who possess and traffic marijuana in compliance with state law, so long as numerous conditions are satisfied.¹⁹⁹ And for the current budget cycle at least, Congress has forbidden the DOJ from spending any funds to block the implementation of state medical marijuana laws (though it is far from clear what exactly this means).²⁰⁰

¹⁹⁴ See *Gonzales v. Raich*, 545 U.S. 1, 5–15 (2005) (discussing historical parallels between state and federal laws governing marijuana).

¹⁹⁵ *Id.* at 14–15.

¹⁹⁶ NAT'L CONFERENCE OF STATE LEGISLATURES, MARIJUANA OVERVIEW (Aug. 2, 2016), <https://perma.cc/G7HS-YG9F> (surveying state marijuana laws).

¹⁹⁷ *Id.*

¹⁹⁸ *E.g.*, COLO. REV. STAT. §§ 12-43.4-101 to -105 (2013) (Colorado Retail Marijuana Code).

¹⁹⁹ Memorandum from James M. Cole, Deputy Att'y General, to U.S. Att'ys 3 (Aug. 29, 2013), <https://perma.cc/8VPY-KTYB> (urging federal prosecutors not to pursue legal action against marijuana traffickers who comply with "strong and effective" state regulations, so long as they do not implicate other federal enforcement priorities, such as preventing "the distribution of marijuana to minors").

²⁰⁰ See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) ("None of the funds made available in this Act to the Department of Justice may be used . . . to prevent [certain] States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

But the states are not out of the woods just yet—far from it. Although enforcement of the federal ban has waned, the DOJ’s acquiescence does not remove the threat of preemption. The reason is simple: the DOJ does not have the exclusive power to bring preemption challenges under federal law, in the same way that it has exclusive power to initiate criminal prosecutions under federal law.²⁰¹ Indeed, there is no shortage of private litigants and even state officials who have the incentive and standing to levy preemption challenges against state marijuana laws.²⁰²

Thus, the threat of federal preemption continues to constrain state regulatory authority, even if the threat of federal criminal enforcement does not. In particular, preemption poses a threat to the sundry regulations the states have adopted to replace prohibition, including, for example, Colorado’s licensing system for marijuana vendors—the prime target of Nebraska and Oklahoma’s ongoing suit against Colorado.²⁰³ Indeed, preemption challenges have already blocked the operation of some state marijuana reforms that courts

The meaning and practical import of this provision remain hotly contested. See *United States v. McIntosh*, Nos. 15–10117 et al, 2016 WL 4363168, at *2 (9th Cir. Aug. 16, 2016).

²⁰¹ See Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 661–64 (2011) (explaining that the DOJ’s decision not to enforce the federal marijuana ban neither stops third parties from raising preemption challenges nor reduces their likelihood of success).

²⁰² For a discussion of who could bring such suits in both state and federal court, see *id.* To be sure, the Supreme Court recently may have limited the ability of private litigants to *initiate* preemption challenges against state law. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383–85 (2015) (holding that Supremacy Clause does not create a private preemption cause of action, and that suits to enjoin state law as preempted are “subject to express and implied statutory limitations”); see also *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1289–93 (D. Colo. 2016) (citing *Armstrong* and concluding that Congress had barred private parties from initiating preemption challenges under the Controlled Substances Act); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS, 2016 WL 223815, at *3–5 (D. Colo. Jan. 19, 2016) (same). Even so, however, the Supreme Court recognized that private parties could still raise preemption challenges defensively, for example, when they are sued under a state law that “federal law prohibits.” See *Armstrong*, 135 S. Ct. at 1384. *Armstrong* thus does not close the door on private preemption challenges altogether, even if the *Safe Streets Alliance* and *Smith* decisions are upheld on appeal and the DOJ continues to forbear from bringing a preemption challenge of its own.

²⁰³ *Nebraska v. Colorado*, *motion for leave to file complaint denied*, 136 S. Ct. 1034 (2016) (No. 144, Orig.). For a discussion of the status of the suit against Amendment 64, see *supra* note 19 and accompanying text.

Not all state marijuana reforms are subject to preemption. As I have explained in a separate piece, the anti-commandeering rule empowers Colorado and other states to legalize marijuana as a matter of state law, even if it does not necessarily empower them to regulate the drug as they deem fit. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1445–50 (2009) (distinguishing between state marijuana reforms that are preemptable and those that are not).

have found to conflict with the federal marijuana ban.²⁰⁴ Examples include state laws protecting medical marijuana users from employment discrimination²⁰⁵ and state enforcement of contract and property rights in marijuana.²⁰⁶ Additional preemption challenges are now in the pipeline, including Nebraska and Oklahoma's nascent suit against Amendment 64. And even without a court ordering it, many provisions of state law have been blocked by state officials on the grounds they conflict with federal law.²⁰⁷

Even assuming that state reforms—or some portion thereof—do, in fact, conflict with federal law, it is far from clear that the federal government's interest in combatting marijuana necessarily exceeds the interests that are served by those preempted state regulations. On the one hand, the federal government's interest in preempting these state laws may be quite small. Though research is still preliminary, studies have suggested that some state reforms, including the legalization of medical marijuana, have had only a small impact on overall marijuana use, especially among children (one of the chief concerns of the federal government).²⁰⁸ And the impact attributable to some types of reforms, like state laws banning employment discrimination against medical marijuana users, is likely to be even more remote, as discussed below.²⁰⁹ On the other hand, the states' interests in pursuing

²⁰⁴ See Mikos, *supra* note 97, at 6–7 & nn.9–16 (listing state and local laws that have been blocked because of preemption concerns).

²⁰⁵ See *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (en banc).

²⁰⁶ *Hammer v. Today's Health Care II*, No. CV2011-051310, at 3–4 (Ariz. Sup. Ct. Apr. 17, 2012) (ruling that investment contract with Colorado licensed marijuana dispensary was void as against federal drug policy); Mich. Med. Marihuana Act, 2011 Mich. OAG No. 7262 (2011) (concluding that the provision of Michigan law that requires police to return marijuana seized from qualified medical marijuana patients poses a direct conflict with and is preempted by the federal Controlled Substances Act).

²⁰⁷ See *supra* note 97.

²⁰⁸ See, e.g., Sarah D. Lynne-Landsman et al., *Effects of State Medical Marijuana Laws on Adolescent Marijuana Use*, 103 AM. J. PUB. HEALTH 1500, 1504 (2013) (reporting that authors “found no evidence of intermediate-term effects of passage of state [medical marijuana laws] on the prevalence or frequency of adolescent nonmedical marijuana use . . . with 2 minor exceptions”).

²⁰⁹ What is more, although preemption inquiries focus on the interests of the enacting Congress—in this case, the 91st Congress that passed the Controlled Substances Act in 1970—it is worth noting that Congress's interest in combatting marijuana has probably waned in the ensuing decades. After all, a much larger portion of the population (and number of congressional districts) now supports legalization than did in 1970. See PEW RESEARCH CTR., IN DEBATE OVER LEGALIZING MARIJUANA, DISAGREEMENT OVER DRUG'S DANGERS 1 (Apr. 14, 2015), <https://perma.cc/D9YV-DZKJ> (noting that public support for legalization has jumped from just twelve percent in 1969 to fifty-three percent in 2015).

and preserving marijuana reforms appear to be quite strong. The states have found an ever-growing list of reasons to abandon outright prohibition, including promising new medical applications for the drug, concerns over racial disparities in the enforcement of criminal bans, and the allure of a new stream of vice tax revenues from legalized marijuana sales, to name a few.²¹⁰ Not surprisingly, then, popular support for reforms has reached an all-time high, with more than half of the country now supporting legalization of recreational marijuana,²¹¹ and more than seventy percent supporting legalization of medical marijuana.²¹² But in adjudicating preemption disputes, courts do not even consider the states' interests in preserving their reforms. The sole query is whether a challenged state law undermines to any degree Congress's objective in combatting the marijuana market.

Consider a preemption challenge against a state law that protects disabled medical marijuana users from employment discrimination.²¹³ In *Emerald Steel Fabricators Inc. v. Bureau of Labor and Industries*, the Oregon Supreme Court found such employment protection preempted by federal law.²¹⁴ The case was brought by a qualified medical marijuana patient who had been terminated from his job for failing his employer's mandatory drug test.²¹⁵ The patient claimed his employer failed to make a reasonable accommodation for his disability, namely, using marijuana off of the job to treat panic attacks.²¹⁶ The court, however, dismissed the suit, finding that by "affirmatively authorizing" legal action against a company based on conduct that federal law prohibits, the state law "stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."²¹⁷ In particular, as I have explained in a previous article, the court appeared to believe that the state law would "under-

²¹⁰ See, e.g., *id.* at 2–3 (detailing survey respondents' rationales for supporting legalization).

²¹¹ See *id.* at 1.

²¹² See PEW RESEARCH CTR., *MODEST RISE IN PERCENTAGE FAVORING GENERAL LEGISLATION: BROAD PUBLIC SUPPORT FOR LEGALIZING MEDICAL MARIJUANA* 1 (Apr. 1, 2010), <https://perma.cc/X4N8-G4HA> (reporting that seventy-three percent of survey respondents favored legalizing medical marijuana).

²¹³ Several states have passed such laws. See, e.g., CONN. GEN. STAT. ANN. § 21a-408p (West 2015) ("No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . . Nothing . . . shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.").

²¹⁴ 230 P.3d 518, 529 (Or. 2010) (en banc).

²¹⁵ *Id.* at 520–21.

²¹⁶ *Id.*

²¹⁷ *Id.* at 529; see also *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 166 (Or.

mine Congress's goal of combatting drug abuse because it would protect marijuana users from adverse employment sanctions . . . that might otherwise deter their drug use."²¹⁸

Judged by the standards of conflict preemption doctrine, the *Emerald Steel* court's decision is defensible. But even so, the court's decision does not imply that Congress's interest in curbing drug use was necessarily stronger than Oregon's interest in preventing discrimination against disabled persons who use marijuana for medical purposes. Indeed, the opposite may have been true. After all, while the law's impact on drug use was indirect and probably small, its impact on the well-being of disabled residents was direct and potentially substantial, considering that only the seriously ill are ostensibly allowed to use medical marijuana, and employment protection is a key civil right for such a vulnerable population. The problem is that neither Congress nor the court had any reason to give the state's interest any weight.

State poison pill legislation could mitigate the lingering threat of preemption and give states more room to regulate marijuana as they deem fit. The states have tremendous leverage vis-à-vis Congress in this realm, perhaps even more so than in the realm of immigration policy. This is because the federal government depends on the states to achieve its drug policy objectives. For one thing, Congress depends on the states to help federal agencies to enforce federal drug laws, as, for example, when the states participate on joint federal-state drug task forces and conduct seizures on behalf of the federal government.²¹⁹ But the states also acquire leverage by enacting and enforcing their own marijuana prohibitions. Every state continues to ban marijuana possession and trafficking in at least *some* circumstances, e.g., for nonmedical purposes or by minors. Even if these comparatively narrow prohibitions appear tame when compared to the outright prohibitions of the past, they still help promote Congress's goal of combatting marijuana use. For example, if a state arrests, prosecutes, and imprisons someone for selling marijuana to minors, it furthers not only the state's interests but Congress's interests as well—and at no cost to Congress. Indeed, it is difficult to overstate the importance to Congress of maintaining some state restrictions on marijuana, no mat-

2006) (Kistler, J., concurring) ("Federal law preempts state employment discrimination law to the extent that it requires employers to accommodate medical marijuana use.").

²¹⁸ Mikos, *supra* note 97, at 10.

²¹⁹ *E.g.*, NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 279 (3d ed. 2000) (noting that federal drug enforcement emphasizes the "use of . . . task force[s]" comprised of "teams of federal, state, and local enforcement personnel").

ter how relaxed those restrictions might be when compared to the strict federal ban. Historically, state law enforcement officials have handled the overwhelming share of all marijuana cases.²²⁰ The federal government would struggle to replace state enforcement and the impact it has had on the marijuana market.

The poison pill would enable a state to exploit this leverage. The state could make one of the services it now provides in this realm conditional on Congress sparing a regulation that Congress would otherwise prefer to preempt. Consider just one simple example: a state could pass a law restricting nonresident access to marijuana,²²¹ but make this restriction inseverable from the fate of one or more of its preemption-vulnerable marijuana regulations. More concretely, a state could promise not to recognize out-of-state medical marijuana identification cards so long as Congress does not preempt state employment protections for its own medical marijuana users.

Even this modest proposal would be a bitter pill for Congress to swallow. Congress has a particularly strong interest in curbing the flow of marijuana across state lines,²²² but it lacks the resources needed to combat marijuana trafficking on its own. If a state were to allow non-residents to purchase marijuana from its medical marijuana dispensaries, Congress probably could not stop those people from taking the drug back home.²²³ Federal agencies like the Drug Enforcement Agency (“DEA”) simply do not have the personnel needed to seal off

²²⁰ See Mikos, *supra* note 203, at 1424 (“Only 1 percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities.”).

²²¹ Many states have banned outsiders from participating in their medical marijuana programs, e.g., MINN. STAT. ANN. § 152.22 (West 2011) (“‘Patient’ means a Minnesota resident . . .”), and at least one state had (until recently) specifically limited the quantity of recreational marijuana that outsiders were allowed to purchase, see COLO. REV. STAT. § 12-43.4-901(4)(f) (2013) (making it unlawful for any licensee to “[t]o sell more than a quarter of an ounce of retail marijuana . . . during a single transaction to a nonresident of the state”); Ricardo Baca, *Tourists Visiting Colorado Can Now Buy a Lot More Weed Than They Ever Could Before*, THE CANNABIST (Jun. 15, 2016, 4:21 P.M.), <http://www.thecannabist.co/2016/06/15/tourists-colorado-buy-weed/56244/> (reporting that Colorado repealed the limitation in 2016). For an analysis of such discriminatory provisions and the constitutional issues surrounding them, see Brannon P. Denning, *One Toke over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2299 (2014) (suggesting that states have “good arguments” that “nonresident purchase limits” are constitutional).

²²² The Department of Justice’s stated enforcement policy, for example, lists “[p]reventing the diversion of marijuana from states where it is legal under state law . . . to other states” as one of its enforcement priorities. Memorandum from James M. Cole, Deputy Att’y General, to U.S. Att’ys, *supra* note 199, at 1.

²²³ See Mikos, *supra* note 203, at 1424 (“The federal ban may be strict—and its penalties severe—but without the wholehearted cooperation of state law enforcement authorities, its impact on private behavior will remain limited.”).

the borders of a state. The opportunity cost imposed by the pill should thus demonstrate to Congress or a court that Congress's interests, on balance, are better served by sparing the state's employment protections, rather than preempting them.

The pill might also persuade the federal executive branch to do more to help preserve state regulatory authority. The DOJ has already demonstrated a willingness to work with the states, by not prosecuting some individuals who are supplying marijuana with the states' blessing. But the DOJ could reverse course. Nothing it has said or done would prevent the agency from cracking down on state approved marijuana trafficking if it had a change of heart or administration.²²⁴ The pill, however, could be used to deter the DOJ from reversing its nonenforcement policy. For example, a state could make those restrictions on nonresident access to marijuana inseparable from the DOJ's continued adherence to a nonenforcement policy. The pill might also encourage the DOJ to lend its valuable assistance in defeating preemption challenges that have been brought by private parties and other states.²²⁵

The pill outlined above would also be a tempting option for many states. The marginal cost of enforcing the restriction on nonresident access to marijuana would be small, since states already have regulatory systems in place to closely monitor marijuana transactions.²²⁶ The states would also have to forego the tax revenues that would otherwise be earned on sales to nonresidents. But the states might be willing to incur these costs in order to shield vulnerable regulations from preemption challenges.

The pill might also help states prevent their own officials from surreptitiously blocking implementation of state reforms. As noted earlier, some state officials have refused to implement reforms by claiming those reforms are preempted by federal law, even when no one has yet challenged the reforms in court.²²⁷ In some cases, these officials may be faithfully interpreting their legal obligations; they do, after all, swear an oath to uphold the federal Constitution, and not

²²⁴ See Mikos, *supra* note 201, at 645.

²²⁵ See Greve & Klick, *supra* note 107, at 73–74 (noting influence of amicus briefs filed by the Solicitor General, especially those arguing *against* preemption). Indeed, the Office of the Solicitor General recently urged the Supreme Court not to hear Nebraska and Oklahoma's suit against Colorado under its original jurisdiction, arguing that the case is not the sort over which the Court has traditionally exercised such jurisdiction. See Brief for the United States as Amicus Curiae, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 144, Orig.).

²²⁶ E.g., COLO. REV. STAT. §§ 12-43.4-101 to -105 (2013).

²²⁷ See *supra* note 97.

just state law. But some state officials might be asserting preemption claims disingenuously in order to block reforms they opposed on the merits but failed to stop at the ballot box.²²⁸ Because such officials, like Congress, are likely to find the pill unpalatable, poison pill legislation would make them think twice before invoking the specter of preemption.

C. *Products Liability*

Lastly, consider briefly the federalism tug of war over products liability. The federal government has regulated the design and labeling of products ranging from pharmaceuticals to cars to pesticides.²²⁹ Broadly speaking, these federal regulations are designed to protect consumers from injury and to promote the national market for the regulated products.²³⁰ But products liability also falls squarely within the states' power to protect the health, safety, and morals of the population. Through court created common law and through enacted legislation, the states have sought to provide their own protection for consumer safety and, more uniquely, compensation for consumer injuries.²³¹

Even though their goals often coincide, the state and federal governments do not always agree upon how to pursue and make tradeoffs among them, sparking conflicts between state and federal products liability policies. Manufacturers have cited these conflicts to challenge a slew of state products liability laws, leading Professor David Owen to remark that the "defense of federal preemption in recent years has grown from little more than a blip on the radar screen to one of the most powerful defenses in all of products liability law."²³²

Once again, it is not clear that preemption is the welfare-maximizing choice, even in cases of real conflict. The success of the preemption defense has significantly eroded the states' regulatory

²²⁸ See, e.g., Evan Wyloge, *U.S. Attorney for Arizona: Gov. Brewer and AG Horne's Lawsuit Logic 'Disingenuous'*, ARIZ. CAPITOL TIMES (May 27, 2011) (reporting cynical reactions to Governor Jan Brewer's decision to delay implementation of Arizona medical marijuana program because of preemption concerns).

²²⁹ See, e.g., Sharkey, *supra* note 77, at 230–42 (surveying federal regulations governing a wide range of products).

²³⁰ See Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359, 369–370 (2014) (describing Congress's objectives in products liability realm).

²³¹ See Sharkey, *supra* note 1, at 459 (describing states' objectives in products liability realm).

²³² David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 412 (2003).

authority in the products liability domain and the interests served thereby.²³³ But in this domain, as in the ones discussed earlier, preemption decisions have turned solely on whether state law impedes Congress's interests.²³⁴ Unless Congress has incorporated them, the states' own interests in providing compensation for injuries or additional protection for safety are left out of the equation.²³⁵

*Geier v. American Honda Motor Co.*²³⁶ illustrates how federal interests invariably prevail over states' interests when the two clash in the products liability realm. In the case, an injured driver sued Honda under state tort law, claiming the manufacturer "had designed its car negligently and defectively because it lacked a driver's side airbag."²³⁷ Under the plaintiff's theory of the case, "to be safe, a car must have an airbag."²³⁸ Honda moved to dismiss, claiming the plaintiff's suit was preempted by Department of Transportation ("DOT") regulations promulgated under the National Traffic and Motor Vehicle Safety Act. Honda had complied with DOT regulations, which required manufacturers to install a passive restraint device on only a portion of their cars (for the time being) and let manufacturers choose among several devices to fulfill this requirement.²³⁹ The company alleged that DOT regulations set a ceiling for safety standards, beyond which the states could not require more, and the Supreme Court agreed.²⁴⁰ Employing implied conflict preemption doctrine,²⁴¹ the majority found that the state tort suit undermined DOT's ability to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote [the regulation's] safety objectives."²⁴²

²³³ See, e.g., Sharkey, *supra* note 230, at 362–63 ("Recent U.S. Supreme Court decisions undoubtedly, and significantly, constrict the scope of state-law tort claims for allegedly defective FDA-approved medical devices and generic drugs that can survive federal preemption.").

²³⁴ See *id.* at 375 ("At the core of these controversies regarding the viability of state tort law claims in the shadow of preemption is the extent to which state tort law actions tread upon, as opposed to supplement or facilitate, federal enforcement of health and safety standards.").

²³⁵ See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1364 (2006) (recognizing that "the power of the states is displaced notwithstanding how legitimate their own needs and policies may be").

²³⁶ 529 U.S. 861 (2000).

²³⁷ *Id.* at 865.

²³⁸ *Id.* at 886.

²³⁹ *Id.* at 879.

²⁴⁰ *Id.* at 880–83.

²⁴¹ Although the Act included a savings clause, the Court found that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." *Id.* at 869 (emphasis added).

²⁴² *Id.* at 875. The National Highway Traffic Safety Administration's stated purpose is to

Though the Court was closely divided (5-4), the majority's analysis of the federal interest in preemption seems entirely plausible. The majority explained that DOT's approach "would help develop data on comparative effectiveness [of different devices], would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems."²⁴³ Needless to say, a state tort standard that says, in effect, *all* cars must have *airbags now* undermines to at least some degree DOT's flexible, slower-paced approach.

The problem is that no one bothered to balance these federal interests against the state interests that were served by the tort suit. The state, too, had a legitimate interest in protecting local motorists, and for any number of reasons, it may not have been satisfied by the level of protection provided by the federal regulations.²⁴⁴ What is more, the state had a legitimate interest in providing a remedy for the plaintiff in *Geier* and others like her²⁴⁵—a remedy that federal law utterly failed to provide.²⁴⁶ Nonetheless, the *Geier* court "evinced little desire to balance the states' interest in compensating victims of commercial behavior that transgresses local norms against the drawbacks associated with the existence of nonuniform tort law in a national automobile market."²⁴⁷

Poison pill legislation could help to protect these state interests and preserve more of the states' regulatory authority in the products liability domain. The states have different sources of leverage they could use to persuade Congress to forbear, but consider one inspired by the *Geier* decision itself: the states' unique ability to change the

"reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101 (2012).

²⁴³ *Geier*, 529 U.S. at 879.

²⁴⁴ For example, the state might place a higher value on life than does DOT, or it might think the regulation promulgated by DOT had become obsolete in light of new information. See Brief of the National Council of State Legislatures et al. as Amicus Curiae in Support of Petitioners at 13–14, *Geier*, 529 U.S. 861 (2000) (No. 98-1811) (arguing that tort suits allow for the continuous development of safety standards as new information and technology become available, whereas legislation and regulations can only be amended "periodically, and with substantial lag time").

²⁴⁵ *E.g.*, *Feldman v. Lederle Labs.*, 479 A.2d 374, 391 (N.J. 1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products.").

²⁴⁶ Indeed, state tort law provides the only avenue of relief for most injured parties because most federal statutes, including the Act in *Geier*, do not create private causes of action. See Sharkey, *supra* note 77, at 228–29.

²⁴⁷ Sharkey, *supra* note 1, at 462.

way consumers use products.²⁴⁸ Nearly every state, for example, has passed a law requiring at least some motorists and passengers to wear seat belts, and every state has established speed limits on its roads.²⁴⁹ Both sets of laws substantially further the federal government's interest in reducing the costs of accidents on the road, and neither deviates from the federal government's passive restraint regulations. Indeed, DOT itself has suggested that seat belts, if worn, and lower speed limits, if obeyed, could provide as much safety as passive restraints, and at potentially much lower cost.²⁵⁰ But without state assistance, neither Congress nor DOT could get motorists to buckle up or slow down. For one thing, passing either a mandatory seat belt law or a speed limit at the federal level would be politically infeasible.²⁵¹ However, even if one or both of these measures made it through the cumbersome federal lawmaking process, the federal government would still need state law enforcement agencies to enforce it.²⁵²

The states' unmatched influence over consumers gives them leverage they could use to preserve more of their regulatory authority over manufacturers. In this domain, a state could condition a new or existing restriction on consumer behavior (*B*) on its retaining authority to impose safety requirements (*A*) on manufacturers that conflict with those imposed by Congress. For example, a state could lower its speed limit or toughen its mandatory seat belt law, but make those actions inseverable from tort suits that apply a heightened standard of care than is applicable under federal automobile design regulations.

²⁴⁸ See *Geier*, 529 U.S. at 881.

²⁴⁹ For a survey of state speed limit laws, see *Speed Limit Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Aug. 2016), <https://perma.cc/6YUV-PZ66>. For a survey of state mandatory seat belt laws, see *Seat Belt Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Aug. 2016), <https://perma.cc/S4ZA-CYEZ>.

²⁵⁰ *Geier*, 529 U.S. at 880 (noting DOT's belief that "ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower cost—if only auto occupants would buckle up").

²⁵¹ To be sure, Congress once established a "National Maximum Speed Limit" in response to an oil embargo in the early 1970s, but the measure did not directly apply to drivers; instead, it offered federal highway grant funds to states that lowered their own speed limits. Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, § 114, 88 Stat. 2281, 2286 (1974). After two-decades of political resistance, even this measure was eventually repealed. National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 205(d), 109 Stat. 568, 577 (1996) (repealing speed limit condition on federal highway grants).

²⁵² Congress's experience with the national speed limit is instructive. Even though every state lowered its speed limit in return for federal grants, many of them undermined the limits through lax enforcement. See Scott Kraft, *Rural States Chafe at 55 Speed Limit*, L.A. TIMES, Apr. 14, 1986, at B1 (describing forms of state resistance to the federally authored speed limit).

The poison pill would make preemption of state tort suits like the one in *Geier* a less palatable option for Congress. Although the suits would still impede DOT's preferred approach to promoting the development and installation of automobile safety technology, Congress would have to weigh that impediment against the added safety that the other state measures would provide if they were allowed to remain in force. The *Geier* court itself suggested that the federal government might be willing to abandon its own regulations if states found another way to enhance safety.²⁵³ It remarked that DOT had proposed to rescind immediately its own passive restraint requirements if states representing two-thirds of the nation's population adopted a mandatory seat belt law.²⁵⁴ DOT's position was that the adoption of mandatory seat belt laws covering a large portion of the population "would meet the 'standards of the Act', and 'carry out the objectives and purposes of the statute,'" and "largely negate the incremental increase in safety to be expected from an automatic protection requirement."²⁵⁵

The pill might also persuade federal agencies like DOT to be more tolerant of state tort suits and other products liability regulations. To be sure, these agencies could not shield all state laws from preemption challenge. As the *Geier* court noted, for example, Congress had expressly preempted state automobile standards that were established through *legislation*, rather than through common law tort actions; it would thus take a congressional amendment to enable state legislatures to assert themselves.²⁵⁶ But DOT could adopt a more state-friendly position in preemption litigation. In *Geier*, for example, the agency had argued as amicus in favor of preemption, and the majority suggested it had given DOT's position "some weight" in reaching its own decision.²⁵⁷ The right poison pill could convince an agency to change its position on preemption and thereby flip the agency's influence to the states' advantage in litigation.

The pill would also be an appealing option for many states. Lowering the speed limit or requiring more motorists to wear seat belts both have costs—if they did not, speed limits would be trending down, not up, and the states would all have tougher, more effective

²⁵³ See *Geier*, 529 U.S. at 881.

²⁵⁴ *Id.* at 880.

²⁵⁵ *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 491 (D.C. Cir. 1986) (Mikva, J., concurring in part and dissenting in part) (quoting Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28,997, 28,999 (1984)).

²⁵⁶ See *Geier*, 529 U.S. at 868.

²⁵⁷ *Id.* at 883.

mandatory seat belt laws.²⁵⁸ But the states might be willing to incur these costs in order to preserve their ability to compensate injured consumers or to impose more aggressive safety standards than those adopted by the federal government.

CONCLUSION

Preemption constitutes the single biggest threat to state regulatory power today, but it need not remain so. This Article proposes a novel way for states to curb this threat by making preemption less palatable for Congress. The proposal, involving the adoption of poison pill legislation, would facilitate a form of intergovernmental bargaining with Congress, allowing the states to “trade” their valuable regulatory services in return for more discretionary regulatory authority. By facilitating such exchanges, the pill would not only preserve more state regulatory power, but it would enhance societal welfare as well, all while respecting the constitutionally ordained structure of preemption decisionmaking.

Although the Article focuses on the use of poison pill legislation to influence Congress’s preemption decisions, the insights generated here could be applied to a broad range of authority disputes both across and within governments. Indeed, the legislation can be thought of as a species of the conditional threat that is surprisingly common throughout the law. Conditional spending provides perhaps the most obvious parallel. Conditional spending involves *Congress* offering the states a grant of federal funds with strings attached.²⁵⁹ Poison pill legislation simply reverses the roles, with the *states* offering Congress a grant of state services with strings attached. But conditional threats have been employed less obviously in sundry other contexts as well. In 2012, for example, Governor Jerry Brown and the California legislature inserted a poison pill like provision into the state’s budget.²⁶⁰ The provision would have automatically triggered deep cuts to education and other municipal services if California voters failed to approve \$6

²⁵⁸ See Elaine S. Povich, *Speed Limits Going Up in Many States*, USA TODAY (July 22, 2013, 1:20 P.M.), <https://perma.cc/R9BJ-TL3E> (reporting trend in state speed limits); *Seat Belt Laws*, *supra* note 249 (reporting that fifteen states do not authorize police to issue a ticket for failure to wear a seat belt unless the motorist commits another traffic offense).

²⁵⁹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207–11 (1987) (upholding conditional spending legislation, but outlining several limitations on Congress’s power to pass such legislation).

²⁶⁰ See CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION VOTER INFORMATION GUIDE 15 (2012).

billion in new taxes in the fall.²⁶¹ The ploy apparently worked; voters approved of Proposition 30, and more than three-quarters of the measure's supporters indicated that the threatened cuts had motivated their decision.²⁶² In a similar episode in 2015, the Kansas legislature passed a measure tying the state courts' annual budget to the fate of another state law limiting the Kansas Supreme Court's administrative authority over lower courts.²⁶³ The budget made clear that a decision invalidating the latter provision would simultaneously render the courts' budget void, leaving the court system's funding in doubt.²⁶⁴

Not all uses of poison pills will necessarily be effective or legitimate, and there is much more to be written about the tactic. For now, however, the poison pill represents an intriguing and promising way to turn at least one threat to states' autonomy into an opportunity.

²⁶¹ See *id.* (warning that if Proposition 30 is rejected, "the 2012-2013 budget plan [passed by the legislature] requires that its spending be reduced by \$6 billion").

²⁶² *Support from Minorities and Young Voters Helps Push Prop. 30 to Victory*, USC DORNSIFE COLLEGE OF LETTERS, ARTS & SCI. (Nov. 18, 2012), <https://perma.cc/8TQT-LFBG> (reporting results of USC Dornsife/Los Angeles Times poll).

²⁶³ Joe Palazzolo, *supra* note 137.

²⁶⁴ *Id.*