The Forum 2020; 18(1): 3–23

John Dinan*

The Institutionalization of State Resistance to Federal Directives in the 21st Century

https://doi.org/10.1515/for-2020-1001

Abstract: State officials have challenged a number of federal policies during the Trump administration. In this article, I chronicle and categorize the tools that states have employed in resisting federal policies and show that states have relied primarily on three tactics: filing lawsuits, declining participation in federal programs, and passing policies inconsistent with federal policies. I also explain why state resistance has become such a prominent feature of U.S. politics. State challenges to federal policies are rooted in part in competing partisan perspectives, whereby members of the minority party at the federal level launch challenges from state offices that they control. State challenges are also grounded in contrasting intergovernmental perspectives, in that state officials who lack meaningful input in the passage of federal policies seek to challenge and shape these polices after they are enacted. In general, state resistance to federal policies during the Trump administration reflects continuity with state activity during other recent administrations and in a way that signals the institutionalization of state resistance to federal directives.

Keywords: Federalism safeguards, partisan polarization, state government

1 Introduction

State government officials have played a prominent role in resisting a number of congressional, executive, and administrative actions during Donald Trump's presidency. State attorneys general have prevailed in lawsuits that forced changes in the president's plan to ban travel to the U.S. from certain countries, blocked inclusion of a citizenship question on the 2020 census, and required the Environmental Protection Agency (EPA) to step up enforcement of certain policies. State legislators have also enacted statutes inconsistent with federal policies and declined to help enforce these policies, resulting in the invalidation or

***Corresponding author: John Dinan**, Wake Forest University, Winston-Salem, USA, e-mail: dinanjj@wfu.edu

modification of policies ranging from sports betting to Internet sales taxation to immigration. My purpose in this article is to analyze state resistance to federal policy directives during the Trump presidency and place these state actions in perspective, with the goal of showing that state challenges to federal policies during the Trump presidency build on a number of actions during the George W. Bush and Barack Obama administrations, even as the frequency and intensity has increased.

The tactics that state officials have relied on to challenge federal directives during the Trump presidency generally follow patterns seen in other recent administrations. Litigation is a key tactic that has been used by state officials throughout the 21st century and has proved effective in challenging congressional statutes, forcing federal agencies to strengthen regulations, and blocking executive and administrative actions. Lawsuits are not the only means by which state officials have challenged federal policies, however. State laws and executive orders have signaled state officials' unwillingness to help enforce certain federal policies. State officials have also enacted measures that are inconsistent with federal directives. On a few occasions, to be sure, states have relied on additional strategies to push back against federal policies, such as forming interstate compacts (Merriman 2019, ch. 3). However, these are the main tactics that states have employed on a widespread basis: filing lawsuits, declining participation in federal programs, and enacting measures inconsistent with federal policies. In each case, states pursuing these tactics during the Trump administration are building on tools previously used with some success during the Obama administration and to some extent during the Bush presidency.

Continuity is also evident in the varied motivations for state officials to challenge federal directives during the 21st century. State challenges to federal directives are in many cases advanced by state officials who are not aligned with the party controlling the presidency, in a situation where the majority party in Washington, D.C. often fails to take account of the interests of the minority party when enacting policies. Although the minority party at the federal level may be powerless to block a number of policies before they are promulgated, members of the minority party are dominant in particular states and well positioned to challenge these policies after they are passed.

State challenges to federal directives are not fueled entirely by partisan considerations. In a number of cases, state officials act on a bipartisan basis to challenge federal directives viewed by Republican and Democratic state officials alike as unduly burdening or constraining state governments. State challenges to federal directives, whether in the Trump administration or other recent administrations, continue to be driven, at times, by a concern that federal officials are insufficiently solicitous of the views and concerns of state officials who are tasked

with implementing federal policies and who have a keen interest in pushing back against federal directives seen as imposing undue burdens or limiting state discretion in problematic ways or setting unrealistic goals for state officials to meet. Scholarly analyses of state challenges to federal directives generally focus on the partisan roots of this state activity; but this state behavior is in a number of cases rooted in these differing intergovernmental perspectives.

Surveying and placing in perspective state challenges to federal directives during the Trump presidency has several benefits. My main purpose is to show that this sort of state activity has become institutionalized in the 21st century. Scholars have long highlighted the many ways that states respond to federal inaction by engaging in policy *innovation* and enacting policies blocked at the federal level; state policy innovation of this kind is an enduring feature of U.S. politics. Less attention has been paid to the ways that states have recently engaged in *resistance*, which can be distinguished from innovation and has made episodic appearances throughout U.S. history but has taken on renewed importance in the 21st century, albeit in a different form than occasionally seen in earlier eras. In recent years, scholars have begun to analyze the strategies that state officials rely on to challenge federal directives in the contemporary era (Bulman-Pozen and Gerken 2009; Dinan 2011, 2013; Gardner 2018; Gerken and Revesz 2017; Merriman 2019; Nolette 2014, 2015, 2017; Nugent 2009). My intent is to show that state challenges to federal directives during the Trump administration are largely continuous with state activity during other 21st century presidential administrations (Di Gioia 2018; Goelzhauser and Konisky 2019; Lin 2018; Nolette and Provost 2018; Rose and Goelzhauser 2018) and likely to continue under both Democratic and Republican presidents.

2 Lawsuits Challenging Congressional Statutes

Lawsuits have been a particularly prominent tactic that state officials have employed to challenge federal directives during the Trump administration and other recent administrations. State attorney general (AG) lawsuits have taken several forms. Occasionally, states challenge the legitimacy of congressional statutes, albeit with limited success. In other cases, which have been successful on several notable occasions, states file lawsuits seeking to require federal agencies to take more aggressive action in promulgating regulations. States have enjoyed the most success when they have filed still another kind of lawsuit, by seeking to block executive or administration actions.

Although state AG lawsuits challenging congressional statutes were filed on several occasions in the final decade of the 20th century, these earlier

challenges were less frequent than in the 21st century and targeted laws that were generally at the periphery of party programs rather than central to them (Nolette 2015, 187–188). Unsuccessful lawsuits in the 1990s included efforts by California and other states to challenge the Motor Voter Act of 1993 and South Carolina's challenge to the Drivers' Privacy Protection Act of 1994. States enjoyed more success in challenging several other laws in the 1990s. New York was successful in challenging a provision of the Low-Level Radioactive Waste Policy Amendments Act. States also prevailed in several cases where Congress was held to have improperly abrogated state sovereign immunity in enacting statutes allowing individuals to file damages suits against state governments to enforce intellectual property and anti-discrimination guarantees (Dinan 2014b, 16–7).

States became more active in the 21st century in challenging congressional statutes and began to target the most important laws pushed by various presidents. Along with several other tactics pursued by opponents of the No Child Left Behind Act of 2002 (NCLB), one of George W. Bush's signature domestic policy initiatives, multiple governmental and private plaintiffs filed lawsuits challenging the law (Karch and Rose 2019, ch. 7). However, these legal challenges, including a lawsuit brought by Connecticut, were unsuccessful (*Connecticut v. Spellings*, 549 F.Supp.2d 161 [D. Conn. 2008]).

President Obama's signature policy initiative, the Affordable Care Act of 2010 (ACA), generated numerous legal challenges, including lawsuits filed or joined by 28 states targeting the ACA's individual-mandate and Medicaid-expansion provisions. A Florida lawsuit eventually joined by 25 other states along with the National Federation of Independent Business (NFIB) and several individual plaintiffs, was partly successful. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court upheld the individual mandate but ruled that Congress could not require states to expand eligibility for Medicaid coverage pursuant to the ACA, or at least could not require states to expand Medicaid by threatening them with the loss of all their existing Medicaid funding (Dinan 2018).

In keeping with this pattern of states challenging the signature domestic policy initiatives of 21st century presidents, several states joined forces during the Trump administration in opposing a key provision of the Tax Cuts and Jobs Act of 2017. Among other steps that states have taken to contest or evade the effects of a provision capping state and local tax (SALT) deductions at $10,000, New York, New Jersey, Connecticut, and Maryland filed a lawsuit challenging the constitutionality of this SALT cap. However, a federal district judge in the Southern District of New York rejected this claim in a September 2019 ruling (*New York v. Mnuchin*, No. 18-cv-6427 [S.D. N.Y., Sept. 30, 2019]).

3 Lawsuits Forcing Agencies to Strengthen Regulations

On several occasions prior to the Trump administration, states filed lawsuits seeking to force federal agencies to issue regulations, in what Paul Nolette (2015, 30–31) refers to as "policy-forcing litigation." The leading example in earlier years of successful litigation of this sort came during the Bush administration, when 12 states, along with several cities and other organizations, challenged the EPA's decision not to designate greenhouse gas emissions as an air pollutant covered by the Clean Air Act. After determining that state governments had standing to bring this challenge, the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), concluded that the EPA possessed authority under the Clean Air Act to regulate greenhouse gas emissions and found unpersuasive the EPA's reasons for not issuing regulations.

States have filed a number of policy-forcing lawsuits during the Trump administration, generally with an eye to prodding the EPA to take certain regulatory actions pursuant to the Clean Air Act. For instance, California and 14 other states filed a suit charging the EPA with failing in a timely fashion to follow Clean Air Act requirements by designating certain areas of the country as not having attained anti-smog standards, a designation that would require action to bring these areas into compliance. In a March 2018 ruling that combined this lawsuit with another suit brought by private plaintiffs, a federal district judge in the Northern District of California ordered the EPA to take steps to comply with Clean Air Act requirements in this regard (*In re Ozone Designation Litigation*, 286 F. Supp. 3d 1082 [N.D. Cal. 2018]).

States have also filed lawsuits seeking to require the Interior Department and EPA to end delays in implementing various regulations limiting methane emissions. State AGs, working together with various private plaintiffs, have been particularly successful in forcing the Interior Department to enforce a rule limiting methane emissions from oil and gas drilling on public lands, by securing multiple favorable rulings from federal district judges in the Northern District of California (e.g., *California v. Bureau of Land Management*, 286 F. Supp. 3d 1054 [N.D. Cal. 2018]). States have also filed and won multiple lawsuits requiring the EPA to enforce an Obama-era rule limiting methane emissions from landfills, with eight states joining private plaintiffs to prevail in a May 2019 ruling by a federal district judge in the Northern District of California (*California v. EPA*, no. 18-cv-03237-HSG [N.D. Cal. May 6, 2019]).

Other state lawsuits have successfully targeted efforts by the Trump Education Department to delay regulations of for-profit institutions of higher education. After

Education Secretary Betsy DeVos announced plans to pause implementation of several Obama-era rules with implications for for-profit institutions of higher education, state AGs filed multiple lawsuits challenging the delay. In one case, 19 states and several private plaintiffs were successful in persuading a federal district judge in the D.C. District Court to issue a September 2018 ruling directing the Education Department to cease further delay in enforcing the Borrower Defense Rule, which grants relief from loan debt when college students were defrauded by an institution of higher education. (*Bauer v. DeVos*, 325 F. Supp. 3d 74 [D.D.C. 2018]).

4 Lawsuits Blocking Executive or Administrative Action

The state-filed lawsuits that have attracted the most attention in recent years have targeted executive or agency actions with the goal of overturning or delaying them. During the Obama administration, states enjoyed notable success when filing "policy-blocking" lawsuits of this kind (Lin 2018; Nolette 2015, 31–32;), especially after federal district judges began on a regular basis to issue injunctions blocking enforcement of administrative actions on a nationwide basis (Bray 2017). The pace of these policy-blocking lawsuits accelerated during the Trump administration. Filed at times by state AGs, and at other times by private plaintiffs, and at still other times by states together with private plaintiffs, these lawsuits have proved highly effective in overturning, delaying, or forcing changes in executive and administrative actions. In a number of cases, federal district judges have issued nationwide injunctions effectively blocking Trump administration actions. In one key case taken to the U.S. Supreme Court, the Justices sided with state plaintiffs and effectively prevented the Trump administration from carrying out its preferred policy regarding the 2020 census.

It is helpful to start by considering the Obama-era origins of policy-blocking lawsuits that resulted in nationwide injunctions regarding immigration, transgender rights, environmental-protection, and worker-protection policies. After the Department of Homeland Security (DHS) issued a November 2014 memo establishing the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), Texas challenged this policy in a lawsuit eventually joined by 25 other states. The DAPA program, it should be noted, is distinct from the Deferred Action for Childhood Arrivals (DACA) program that was also implemented by the Obama administration through executive action, in 2012, but was not challenged by state AGs during Obama's time in office. Whereas DACA grants

protection from deportation and grants temporary work permits for *children* who were brought to the U.S. at an early age and whose presence is not legally authorized, DAPA applies to *parents* of children who are U.S. citizens or otherwise legally authorized to be in the country. Plaintiffs challenging DAPA prevailed at the district court level, when a federal judge in the Southern District of Texas issued a nationwide injunction in 2015 barring further implementation of the program. The U.S. Court of Appeals for the Fifth Circuit then sustained the injunction in a ruling allowed to stand when the U.S. Supreme Court in *U.S. v. Texas*, 136 S. Ct. 2271 (2016), split four-four, at a time when the late Justice Antonin Scalia's seat remained unfilled.

Texas also played a key role in a lawsuit blocking another Obama administration policy, in this case a guidance letter guaranteeing transgender persons access to public school bathrooms consistent with their gender identify. This lawsuit was filed after the U.S. Justice Department and Education Department sent a joint letter in May 2016 to all of the nation's school districts providing guidance on the Obama administration's interpretation of Title IX protections in the context of transgender bathroom access. Out of a concern that state and local governments risked losing federal education funds in the event they were deemed not in compliance with this policy, state AGs filed multiple lawsuits challenging this interpretation of Title IX. In a 2016 ruling, a federal judge for the Northern District of Texas sided with state plaintiffs, which included Texas and a dozen other states, and issued a nation-wide injunction barring enforcement of the policy (*Texas v. U.S.*, 201 F. Supp. 3d 810 [N.D. Tex. 2016]).

State lawsuits were instrumental in blocking several Obama administration environmental policies. After 18 states and various private plaintiffs challenged the actions of the EPA and Army Corps of Engineers in issuing the Waters of the United States (WOTUS) rule pursuant to the Clean Water Act, the U.S. Court of Appeals for the Sixth Circuit issued a 2015 ruling staying its enforcement (*In re EPA*, 803 F.3d 804 ([6th Cir. 2015]). Also in 2015, after the EPA published the final version of a Clean Power Plan that sought to limit carbon emissions pursuant to the Clean Air Act, West Virginia and a coalition of just over half of the states, along with some corporate plaintiffs, filed suit in the U.S. Court of Appeals for the D.C. Circuit. Before the circuit court could even hear arguments in the case, plaintiffs then sought and in 2016 secured a stay from the U.S. Supreme Court barring the EPA from taking further steps to enforce the regulation until the legal challenges were resolved. This effectively prevented enforcement of the Clean Power Plan through the end of the Obama administration (*West Virginia v. EPA*, 136 S. Ct. 1000 [2016]).

States enjoyed a final success challenging Obama administration actions in November 2016, shortly after the presidential election, when a ruling was issued in a case brought by Nevada and 20 other states challenging a U.S. Department of

Labor regulation scheduled to take effect the next month. This Labor Department rule would have expanded significantly the number of workers around the country eligible for overtime pay. However, a federal judge in the Eastern District of Texas found fault with the regulation and issued a nationwide injunction effectively blocking its implementation (*Nevada v. U.S. Department of Labor*, 218 F. Supp. 3d 520 [E.D. Tex. 2016]).

Once Trump became president, Democratic AGs, taking their cue from their Republican counterparts during the Obama presidency, filed similar policy-blocking lawsuits and secured similar nationwide injunctions (Nolette and Provost 2018), albeit at an even greater rate. States played a key role, along with other groups and individuals, in challenging all three versions of Trump's executive orders banning residents of certain countries from entering the U.S. States were among several plaintiffs that filed lawsuits that challenged the initial January 2017 travel ban and proved successful when a federal judge in the Western District of Washington issued a nation-wide injunction, in a ruling upheld by the U.S. Court of Appeals for the Ninth Circuit (*Washington v. Trump*, 847 F.3d 1151 [ninth Cir. 2017]). A revised version of the travel ban in March 2017 generated a second wave of lawsuits, with states again playing a prominent role in bringing these challenges. This second round of litigation led to a federal judge in the District Court of Hawaii issuing a nationwide temporary restraining order and then a preliminary injunction, in a ruling again sustained by the U.S. Court of Appeals for the Ninth Circuit (*Hawaii v. Trump*, No. 17-15589 [9th Cir. 2017]). In this case, the U.S. Supreme Court issued a June 2017 order permitting much of the second travel ban to take effect. After the president issued a third version of the travel ban in September 2017 that differed in some important ways from the first two versions, states and other plaintiffs again filed suit. A federal judge in the District Court of Hawaii again sided with the complainants and enjoined enforcement of the policy. Once again, the U.S. Supreme Court stepped in and allowed this version of the travel ban to take effect while legal challenges were resolved, before finally upholding this latest version in June 2018 (*Trump v. Hawaii*, 138 S. Ct. 2392 [2018]). In short, state lawsuits played a key role in delaying enforcement of the travel ban and forcing the Trump administration to modify its design before it took effect.

States also enjoyed a significant legal victory against the Trump administration when multiple federal district judges blocked DHS officials from ending the DACA program begun by the Obama administration. After Acting DHS Secretary Elaine Duke issued a memo in September 2017 rescinding the DACA policy, numerous states, along with various private plaintiffs, filed multiple lawsuits challenging this policy reversal. Federal district judges in both the Eastern District of New York (in a case featuring a challenge by 16 states) and Northern District of California (in a case featuring a challenge by four states) issued nationwide

injunctions blocking DACA rescission. These claims were appealed to the U.S. Supreme Court, which heard oral arguments in November 2019 (*Department of Homeland Security v. Regents of the University of California*, No. 18-587). As things stand in spring 2020, states and other plaintiffs have succeeded in preventing the DACA rescission from taking effect.

State AG lawsuits have also been filed, and with some success, against Trump administration efforts to reverse Obama administration actions implementing certain provisions of the ACA. States have taken particular aim at a Department of Health and Human Services (HHS) rule in 2017 expanding the religious and moral objections that can be relied on by employers to claim exemptions from providing contraceptive coverage pursuant to ACA requirements. States filed a wave of lawsuits against this HHS rule and enjoyed success in various courts, including the U.S. District Court for the Eastern District of Pennsylvania, where a federal judge has in several rulings sided with Pennsylvania and issued a nation-wide injunction preventing the Trump administration from altering the Obama administration's interpretation of the ACA's contraceptive coverage requirement (e.g., *Pennsylvania v. Trump*, 351 F. Supp. 791 [E.D. Pa. 2019]).

The most important recent success for state-filed lawsuits came when the U.S. Supreme Court effectively blocked the Trump administration from including a citizenship question on the 2020 census. After Commerce Secretary Wilbur Ross announced plans to include such a question, New York and 17 other states, along with various local governments and private plaintiffs, filed lawsuits challenging this decision. In a ruling issued in June 2019, the U.S. Supreme Court did not actually prevent the Commerce Department from asking a citizenship question; rather, the Court determined that the Department's explanation for including the citizenship question was pretextual and essentially offered the Department an opportunity to provide a revised justification. In practice, though, the ruling brought an end to the prospects of including a citizenship question on the 2020 census, because there was not enough time to work through this process and keep on schedule for printing census forms (*Department of Commerce v. New York*, 139 S. Ct. 2551 [2019]).

It is important to stress that this survey of state AG lawsuits and outcomes is illustrative rather than comprehensive. Still other policy-blocking lawsuits have challenged Trump administration actions and proved successful in delaying and in some cases effectively overturning these directives. To be sure, in some cases the Trump administration has responded to these legal judgments by crafting new regulations that are still being litigated and may ultimately take effect. Meanwhile, in still other cases, the Trump administration has lost in lower courts but prevailed in the U.S. Supreme Court, as seen in early 2020 when the Supreme Court lifted lower-court injunctions against a DHS plan to implement a public-charge rule

permitting denial of green cards to immigrants who benefit from various nonemergency welfare programs (*Department of Homeland Security v. New York*, No. 19A875 [Jan. 27, 2020]; *Wolf v. Cook County*, No. 19A905 [Feb. 21, 2020]). Even in these cases, state policy-blocking lawsuits have had important effects in delaying and sometimes modifying federal directives.

5 Declining to Help Implement Federal Policies

State officials have in a number of instances, both during the Trump administration and other recent administrations, pushed back against federal directives by declining to help implement or enforce federal policies when state participation is optional. Sometimes, state officials' decisions not to cooperate with federal officials have no effect on federal policies. However, in some cases, state cooperation is essential to the effective implementation of some federal policies or highly valued for various reasons by federal officials (Dinan 2013, 4–5). In these situations, state officials' non-acquiescence can lead federal officials to modify the policies or allow states more discretion in carrying them out (Bulman-Pozen and Gerken 2009).

During the Bush and Obama administrations, states declined to help implement or enforce a number of federal policies. During the Bush administration, Republican and Democratic state officials declined to comply with directives in the 2005 REAL ID Act requiring states to overhaul their driver's licenses or find their residents unable to use their licenses to board airplanes and enter federal buildings (Regan and Deering 2009; Krajewska 2020). State opposition was so strong and widespread, with state legislatures refusing to comply with the federal requirements and signaling a willingness to accept the consequences, that DHS officials under Bush and then later Obama were led to postpone repeatedly the law's implementation in order to accommodate resistant states (Dinan 2013, 5–6).

State officials' unwillingness to participate in federal programs and with an eye to securing concessions from federal officials continued during the Obama administration, particularly regarding implementation of the ACA. One decision confronting state officials about ACA implementation is whether to operate a state-based health-insurance exchange (marketplace) where individuals can shop for insurance and, depending on their income, can obtain federal subsidies. All but 13 states eventually opted against fully operating their own state exchange, with many states deferring to the federal government to run the exchange (Kaiser Family Foundation 2020). However, federal officials preferred not to take on the task of fully running these exchanges. In the face of states' unwillingness to shoulder full responsibility, federal officials were led to devise an alternative

arrangement, not envisioned by the law, whereby a majority of states have been able to partner with the federal government and share responsibility for operating these exchanges (Dinan 2014a, 404–408). A second decision for state officials is whether to expand Medicaid pursuant to an ACA directive. After the Supreme Court's *NFIB v. Sebelius* decision in 2012 ensured that states could opt out of the ACA's Medicaid expansion without penalty, a number of states opted not to expand Medicaid, with the number of non-participating states currently standing at 14. Meanwhile, several states chose to expand Medicaid, but only after negotiating the terms and conditions with federal officials. In some of these cases, state officials secured waivers allowing them to make rather significant changes in the design of their Medicaid-expansion program and in ways unanticipated by the ACA's drafters, in exchange for agreeing to an expansion that was a critical piece of the Obama administration's signature domestic-policy program (Dinan 2018, 87–90).

In many of these sorts of instances where states opt out of a federal program, state officials are able to decline participation because the relevant federal statute gives states an explicit option of participating or not participating and foregoing federal funds or suffering other penalties (Nicholson-Crotty 2012). In one sense, state officials' decision about whether to participate in these federal programs merely affects the participating or non-participating state, and without any necessary implication for federal officials. However, in another respect – and this was on particular display regarding state decision-making about the ACA's Medicaid expansion – state officials gain leverage by threatening non-participation and thereby are able to extract concessions from federal officials, especially when state participation is critical to the success of an administration's policy agenda (Weissert, Pollack, and Nathan 2017).

In other situations, which have some precursors in prior administrations but are particularly prominent during the Trump presidency, state officials decline to help enforce federal laws in cases where effective enforcement is heavily dependent on state assistance and participation. In adopting marijuana decriminalization measures, at first for medical use and then for recreational use, states are not only removing state penalties for marijuana but are also making clear that state officials will not help enforce federal statutes criminalizing marijuana. Adoption of these state laws therefore has the effect of withdrawing state officials and resources from enforcing marijuana bans and leaving their enforcement solely to federal officials (Young 2020, 88–89). It is largely because federal officials lack the resources to enforce federal marijuana law in states with contrary policies that the Obama Justice Department acquiesced to these facts on the ground and advised U.S. attorneys that it would not be a priority to enforce federal marijuana law against individuals in these states (Kamin 2015). Although the Trump Justice

Department formally withdrew this Obama administration guidance document, this has not brought a meaningful change in the ability of federal officials to enforce federal marijuana law in the face of many states' unwillingness to provide assistance (Adler 2020, 4)

State officials' unwillingness to help enforce federal directives has been on most prominent display during the Trump administration in the growing number of state laws and executive orders limiting state and local officials' ability to cooperate or share certain information with federal Immigration and Customs Enforcement (ICE) officials or detain persons in response to requests from ICE officials. By 2020, 10 states, along with numerous cities and counties, had taken action of some kind to limit state and local participation with federal immigration officials (Center for Immigration Studies 2020). Several California laws go the furthest in this regard and have generally been upheld in federal court (*U.S. v. California*, No. 18-16496 [9th Cir., April 18, 2019]). Other state laws and actions limit state and local cooperation with federal immigration officers to varying degrees (Di Gioia 2018, 72–75). In barring state personnel and resources from being used to help enforce federal immigration law, state officials cannot actually prevent federal officials from enforcing federal immigration policy. If federal officials have sufficient personnel and resources to enforce federal immigration law, they can continue to do so. In practice, federal resources are limited and federal officials lack the means to carry out effective enforcement of immigration law without assistance from state and local officials. By declining to help enforce federal policies in this, and in other areas, states have therefore forced federal officials to modify their approach to implementing federal policies (Dickerson and Kanno-Youngs 2020).

6 Enacting Measures Inconsistent with Federal Policies

State legislatures have on various occasions during the Trump administration and other recent administrations enacted measures that are inconsistent, and occasionally in conflict, with federal directives. Measures of this sort that have been enacted in the 21st century fall well short of classic ordinances of nullification or interposition that were occasionally enacted in the 1790s and at times in the antebellum era and then again in the 1950s. Rather, state legislatures in recent years have focused on enacting measures that are inconsistent with federal directives, but without any understanding that state officials are empowered to declare federal acts null and void (Dinan 2011; Olson, Callaghan, and Karch 2018).

For the most part, state legislators' intent in passing these measures is to generate justiciable controversies that present judges with an opportunity to invalidate federal policies or authorize states to maintain contrary policies.

During the Obama administration, a number of states adopted health care freedom acts stipulating that individuals could forego purchasing health insurance, in the face of an ACA provision mandating that individuals carry health insurance (Cauchi 2018). In passing state laws that were clearly in conflict with the ACA, state legislators were seeking to increase the prospects that federal courts would hear state AG lawsuits challenging the insurance-mandate provision and deem these cases justiciable, in view of the state-federal conflict (Di Gioia 2018, 67–68). Federal district judges in the Eastern District of Virginia and Northern District of Florida who initially heard state lawsuits challenging the ACA took note of these contrary state laws and deemed the cases justiciable in part because of the state-federal conflicts, and in ways that helped advance the controversy through the lower courts to the U.S. Supreme Court, where it turned out that justiciability was achieved on other grounds (Di Gioia 2018, 66–71).

During the Trump administration, passage of state laws inconsistent with federal policies has on several occasions proved successful in generating court rulings that have expanded state policy discretion. Most important, in a 2018 ruling, the U.S. Supreme Court overturned a quarter-century-old congressional statute banning sports betting in all but four states, after New Jersey enacted a 2014 law removing bans on sports betting at casinos and horseracing tracks (Johnson 2014). When New Jersey originally passed this law, it was in direct conflict with the Professional and Amateur Sports Protection Act of 1992 (PASPA). When this conflict between New Jersey law and federal law came before the Supreme Court in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Court concluded that Congress lacked the power to commandeer state legislatures for the purpose of banning sports betting and, therefore the Court invalidated the federal law, leaving New Jersey and other states free to legalize sports betting.

A year later, the U.S. Court of Appeals for the D.C. Circuit stopped short of invalidating a federal policy, in the case the Federal Communication Commission's (FCC) move to end the Obama administration's net neutrality rule, but it limited the FCC's ability to bar states from enacting their own net neutrality policies. The case had its origins in the Obama administration, when the FCC in 2015 promulgated a net neutrality policy regulating Internet service providers. Two years later, when Republican appointees gained control of the commission, the FCC repealed the federal net neutrality policy and preempted states from enacting their own net neutrality policies. States responded in part by filing lawsuits challenging the FCC policy. A half-dozen states also proceeded to enact their own net neutrality policies (Bulman-Pozen 2019, 269). Washington and California passed laws requiring that

all Internet service providers operating in the state abide by net neutrality rules. Several other states enacted more modest laws requiring that Internet service providers contracting with the state government abide by state net neutrality rules (National Conference of State Legislatures 2019). When the D.C. Circuit Court in *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. Oct. 1, 2019) ruled on the legitimacy of the FCC's rescission of the federal net neutrality rule and preemption of state regulations, the court upheld the federal policy but also held that the FCC could not maintain a blanket preemption on state net neutrality policies, thereby allowing states to maintain contrary policies, at least pending further litigation (Reid 2019).

In focusing on passage of state policies that are inconsistent with federal *statutes* or *regulations*, I largely leave aside for present purposes the various recent occasions when states have passed laws inconsistent with federal *judicial* precedents and with the goal of presenting the U.S. Supreme Court with an opportunity to revisit prior rulings. In the years leading up to and especially during the Trump administration, numerous states have passed laws at variance with Supreme Court precedents regarding the legitimacy of abortion restrictions and for the purpose of getting cases before the Court that might produce rulings expanding states' discretion to limit abortion (Epps 2020). The success of this strategy is still to be determined. However, in another policy area, collection of Internet sales taxes, passage of state policies inconsistent with U.S. Supreme Court precedents has already proved effective. Although Supreme Court rulings had long prevented states from requiring collection of Internet sales taxes unless the seller had a physical presence in the state, South Dakota in 2016 enacted a law taxing Internet sales and requiring the tax to be collected even by remote sellers. In adjudicating this conflict between state law and Supreme Court precedent in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), the Court reversed longstanding precedent and allowed South Dakota and other states to require collection of taxes on all Internet sales.

7 State Resistance as a Product of Clashing Partisan Perspectives

In turning to explain why state resistance actions have become so prominent and are likely to be an enduring feature of U.S. governance, it is important to distinguish two possible sources of state resistance: clashing partisan perspectives and conflicting intergovernmental perspectives. A significant portion of recent state resistance acts can be attributed to the sharply diverging policy priorities and preferences of Republicans and Democrats and the resulting lack of opportunities

for the minority party at the federal level to wield influence in federal policy-making (Bulman-Pozen 2014; Conlan and Posner 2016; Greve 2018). The growing level of partisan polarization and relatively even balance of the national parties in Washington, along with senate rules requiring the support of 60 senators to proceed to a vote on most legislation, make it extraordinarily difficult for Congress to enact significant legislation (Lee 2015; Sinclair 2016). Major legislation is generally enacted in the contemporary era in a limited set of circumstances. On some occasions, such as during a six-month period from July 2009 through January 2010 in Obama's first term, one party controls the presidency and congress and holds 60 seats in the senate, thereby enabling passage of legislation without any support from the minority party. Alternatively, when one party holds the presidency and both houses of congress but falls short of a sixty-vote filibuster-proof senate majority, the majority party can in some cases rely on the budget reconciliation process to enact major policy changes, again without a need to obtain minority-party support.

The relatively few cases of significant congressional lawmaking during the last decade, such as the Affordable Care Act in 2010 and Tax Cuts and Jobs Act in 2017, have generally occurred during a period of unified government where one party enjoyed a filibuster-proof senate majority or relied on the reconciliation process. As a result of increasing partisan polarization in Washington, D.C., members of the minority party are not afforded meaningful input in designing and enacting these policies. Lacking opportunities to wield influence in passing these congressional statutes, the minority party has an interest in challenging them after they are enacted.

State resistance on a number of other occasions is directed not at congressional statutes but rather at executive and administrative actions that have become increasingly important vehicles for policy-making and provide even fewer opportunities for minority-party input. In view of the obstacles to congressional lawmaking, presidents have increasingly turned to achieve their policy goals through other means (Lowande and Milkis 2014; Milkis and Jacobs 2017). Consider recent federal policy-making regarding immigration and climate change, to take some leading examples. At various times during the past dozen years, Congress has considered passing major legislation in these areas; but no major bills have been signed into law in these policy areas during the Obama or Trump administrations. However, the absence of congressional legislation should not be equated with a lack of policy change in these policy areas. The Obama administration relied on executive action and agency rule-making to try to achieve changes in environmental and immigration policy, only to see the Trump administration rely on similar actions to attempt to reverse these policies and implement a very different set of policies (Roberts 2019).

Executive and administrative actions are even more likely than congressional lawmaking to discount the views and concerns of minority party members and, therefore, generate opposition from the minority party after these policies are promulgated (Young 2019, 1908–1910. To be sure, agency rule-making requires a notice-and-comment process that provides formal opportunities for critics' concerns to be expressed (Metzger 2015, 1760–1761). However, there is no guarantee that minority-party views will be taken into account in crafting and finalizing regulations. As a result, the minority party will in many cases have an interest in challenging and shaping these policies after they are issued (Greve 2018, 128–129).

8 State Resistance as a Product of Conflicting Intergovernmental Perspectives

State resistance in recent years is not always grounded in clashes between political parties; these state actions stem at times from contrasting perspectives of federal and state officials. Federal officials tend to enact policies and count on state officials to implement them, but without necessarily providing adequate support and in some cases lacking an awareness of the challenges faced by state officials. Sometimes Congress acts in haste and without considering the full effects of policies on state governments. At other times, congressmembers are preoccupied with advancing substantive policy goals that frequently take precedence over federalism considerations when designing policies. At still other times, congressmembers like to claim credit for solving pressing policy problems and therefore set overly ambitious policy goals and leave state officials to take the blame when they fall short (Derthick 2010, 61–63).

These longstanding concerns about federal policymakers' failure to take account of state official's concerns have intensified in recent decades, because state officials wield less influence in the process of making congressional policy today than in earlier eras (Smith 2008, 329–330). State officials play a reduced role in the process of nominating and electing congressmembers. State officials have also seen their role in policy-making overshadowed by national interest groups that have the financial and other resources to get their views heard and concerns addressed by congressmembers. For these and other reasons, state officials' concerns are not always given sufficient regard in the process of crafting congressional policy, as seen in passage of the No Child Left Behind Act and REAL ID Act, to take several leading examples of federal policies that have generated concerns from state officials on both sides of the political aisle (Dinan 2008, 384, 386).

9 States Governments as Attractive Venues for Resisting Federal Directives

State officials are particularly well positioned to challenge federal policies promulgated without due regard for minority-party views or state governmental concerns, in part because even when one party controls the federal government the other party maintains firm control in a number of state governments (Bulman-Pozen 2012, 500–501). In recent years, Republicans and Democrats are relatively evenly balanced at the federal level, even if one party occasionally gains a modest advantage after a particular election cycle. The situation is quite different at the state level, where it is common for one party to hold the governor's office and both houses of the legislature. At the present time in early 2020, 21 states are under unified Republican control and 15 are under unified Democratic control (National Conference of State Legislatures 2020). States under unified party control are well positioned to launch state legislative responses to policies pushed by the majority party at the federal level. Moreover, the parties are relatively evenly balanced across the 50 states in controlling attorney general offices, which offer another vehicle for state officials to respond to directives emanating from the party in control in Washington, D.C. (Ballotpedia 2020).

State government action is also an attractive vehicle for responding to federal directives because state officials possess certain advantages over other groups that have an interest in challenging federal policies. States are particularly well positioned to mount effective legal challenges to federal directives, because state AGs enjoy staff and resources that are not always available to other groups and organizations. In many cases, federal directives generate criticism from multiple concerned groups, whether businesses, trade associations, public interest groups, or civil rights groups. In fact, a number of these groups have in recent years filed lawsuits challenging federal directives, sometimes acting independently and sometimes working with state AGs. However, state AGs are in certain respects better positioned than most other groups to file and win these lawsuits, in part because of the staff and resources they can draw on, as well as the coordination that often takes place among state AG offices. Still another advantage possessed by state AGs over other groups in challenging federal policies is that state governments are able to gain standing to bring cases in federal court in some situations where private plaintiffs might face challenges in satisfying justiciability requirements, as a result of the Supreme Court determining in the 2007 *Massachusetts v. EPA* case that states are "entitled to special solicitude" when determining who has standing to sue (Young 2019).

State governments are an attractive launching pad for resisting federal directives for still other reasons that go beyond state AGs' resources and other advantages. State officials possess additional sources of power and leverage that enable them to push back against federal policies and do so more effectively than other groups that also have concerns about these policies. State officials (and local officials) are ideally positioned to decline to help enforce federal directives, as a result of various federalism decisions issued by the U.S. Supreme Court that limit ability federal officials' ability to commandeer state and local officials to carry out federal policies (*New York v. U.S.*, 505 U.S. 144 [1992], *Printz v. U.S.*, 521 U.S. 898 [1997], *Murphy v. NCAA*, 138 S. Ct. 1461 [2018]). Additionally, when it comes to enacting policies inconsistent with federal policies, state legislators (or citizens acting via state initiative processes) are the only officials who can legally enact such policies (Derthick 2001, 39; Bulman-Pozen 2019, 320–321).

10 Conclusion

Several conclusions can be drawn from this analysis of state resistance to federal directives during the Trump presidency. In considering the tools that state officials employ on a regular basis to challenge federal directives, litigation has attracted the most scholarly and public attention, but it is not the only tactic that has been used successfully. State officials also force changes in federal policies by declining to help implement or enforce federal policies in some cases and by adopting measures inconsistent with federal directives in other cases. Insights also emerge when considering the reasons why state resistance has become so prominent in recent years. State resistance is rooted in part in growing partisan polarization and the discounting of minority-party concerns in federal policy-making, especially when policies are made via executive and administrative action. However, states are also challenging federal policies for other reasons, stemming from declining opportunities for state officials to provide meaningful input in passing federal policies and federal officials' failure to take due account of state concerns and perspectives. Because there is no indication in the foreseeable future of a reversal of either of these trends, whether growing partisan polarization or declining influence of state officials in federal policy-making, state resistance is likely to remain a prominent feature of U.S. politics under Republican and Democratic administrations.

References

Adler, J. 2020. "Introduction: Our Federalism on Drugs." In *Marijuana Federalism: Uncle Sam and Mary Jane*, edited by J. Adler, 4–13. Washington, D.C.: Brookings Institution Press.

Ballotpedia. 2020. "Attorney General (State Executive Office)." https://ballotpedia.org/Attorney_General_(state_executive_office).

Bray, S. L. 2017. "Multiple Chancellors: Reforming the National Injunction." *Harvard Law Review* 131 (2): 417–82.

Bulman-Pozen, J. 2012. "Federalism as a Safeguard of the Separation of Powers." *Columbia Law Review* 112 (3): 459–506.

Bulman-Pozen, J. 2014. "Partisan Federalism." *Harvard Law Review* 127: 1077–146.

Bulman-Pozen, J. 2019. "Administrative States: Beyond Presidential Administration." *Texas Law Review* 98 (2): 265–325.

Bulman-Pozen, J., and H. K. Gerken. 2009. "Uncooperative Federalism." *Yale Law Journal* 118: 1256–310.

Cauchi, R. 2018. "State Laws and Actions Challenging Certain Health Reforms." *National Conference of State Legislatures*. Feb. 27. https://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx.

Center for Immigration Studies. 2020. *Map: Sanctuary Cities, Counties, and States*. https://cis.org/Map-Sanctuary-Cities-Counties-and-States.

Conlan, T. J., and P. L. Posner. 2016. "American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's 'New Nationalism'." *Publius: The Journal of Federalism* 46 (3): 281–307.

Derthick, M. 2001. *Keeping the Compound Republic: Essays on American Federalism*. Washington, DC: Brookings Institution Press.

Derthick, M. 2010. "Compensatory Federalism." In *Greenhouse Governance: Addressing Climate Change in America*, edited by B. G. Rabe, 58–72. Washington, DC: Brookings Institution Press.

Di Gioia, I. 2018. "From Liberal States' Rights Litigation to Liberal States' Rights Discourse: A Study of State Oppositional Strategies to the ACA and Federal Immigration Laws." *University of Detroit Mercy Law Review* 96: 55–76.

Dickerson, C., and Z. Kanno-Youngs. 2020. *Border Patrol will Deploy Elite Tactical Agents to Sanctuary Cities*: New York Times. Feb. 14. https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html.

Dinan, J. 2008. "The State of American Federalism, 2007-2008: Resurgent State Influence in the National Policy Process and Continued State Innovation." *Publius: The Journal of Federalism* 38 (3): 381–415.

Dinan, J. 2011. "Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism." *Albany Law Review* 74: 1637–69.

Dinan, J. 2013. *How States Talk Back to Washington and Strengthen American Federalism:*Cato Policy Analysis. No. 744. December 3. https://www.cato.org/publications/policy-analysis/how-states-talk-back-washington-strengthen-american-federalism.

Dinan, J. 2014a. "Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act." *Publius: The Journal of Federalism* 44 (3): 399–425.

Dinan, J. 2014b. "Relations Between State and National Governments." In *Oxford Handbook of State and Local Government*, edited by D. Haider-Markel, 7–26. New York: Oxford University Press.

Dinan, J. 2018. "The Supreme Court and the Affordable Care Act: The Consequences of the *NFIB v. Sebelius* decision for Health Care Policy." In *Controversies in American Federalism and Public Policy*, edited by C. P. Banks, 75–92. New York: Routledge.

Epps, G. 2020. *America may be Nearing the End of the Roe Era*: The Atlantic. February 13, https://www.theatlantic.com/ideas/archive/2020/02/supreme-court-abortion/606475/.

Gardner, J. A. 2018. "The Theory and Practice of Contestatory Federalism." *William and Mary Law Review* 60: 507–88.

Gerken, H. K., and J. Revesz. 2017. "Progressive Federalism: A User's Guide." *Democracy: A Journal of Ideas 44*: https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/.

Goelzhauser, G., and D. M. Konisky. 2019. "The State of American Federalism, 2018-2019: Litigation, Partisan Polarization, and the Administrative Presidency." *Publius: The Journal of Federalism* 49 (3): 379–406.

Greve, M. S. 2018. "Federalism in a Polarized Era." In *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*, edited by Z. Courser, E. Helland, and K. P. Miller, 119–36. Lawrence: University Press of Kansas.

Johnson, B. 2014. *Christie Signs Law Allowing Sports Betting in N.J.*: NJ.com. October 17. https://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html.

Kaiser Family Foundation. 2020. *State Insurance Marketplace Types*, 2020. https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types.

Kamin, S. 2015. "The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization." *Publius: The Journal of Federalism* 45 (3): 427–51.

Karch, A., and S. Rose. 2019. *Responsive States: Federalism and American Public Policy*. New York: Cambridge University Press.

Krajewska, M.. 2020. "Implementing the REAL ID Act: Intergovernmental Conflict and Cooperation in Homeland Security Policy."*Publius: The Journal of Federalism*. Advance Access, https:/doi.org/10.1093/publius/pjaa010.

Lee, F. E. 2015. "How Party Polarization Affects Governance." *Annual Review of Political Science* 18: 261–82.

Lin, E. 2018. "States Suing the Federal Government: Protecting Liberty or Playing Politics?." *University of Richmond Law Review* 52: 633–52.

Lowande, K. S, and S. M. Milkis. 2014. "'We Can't Wait': Barack Obama, Partisan Polarization and the Administrative Presidency." *The Forum* 12 (1): 3–27.

Merriman, B. 2019. *Conservative Innovators: How States are Challenging Federal Power*. Chicago: University of Chicago Press.

Metzger, G. E. 2015. "Agencies, Polarization, and the States." *Columbia Law Review* 115 (7): 1739–87.

Milkis, S. M., and N. Jacobs. 2017. "'I Alone Can Fix It': Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship." *The Forum* 15 (3): 583–613.

National Conference of State Legislatures. 2019. *Net Neutrality 2019 Legislation*. Oct. 1. https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2019-legislation.aspx.

National Conference of State Legislatures. 2020. *Post Election 2019 State & Legislative Partisan Composition*. Jan. 20. https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2019_Post-Election%20Nov%2022nd.pdf.

Nicholson-Crotty, S. 2012. "Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States," *Publius: The Journal of Federalism* 42 (3): 449–66.

Nolette, P. 2014. "State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics." *Publius: The Journal of Federalism* 44 (3): 451–74.

Nolette, P. 2015. *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*. Lawrence: University Press of Kansas.

Nolette, P. 2017. "The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization." *Publius: The Journal of Federalism* 47 (3): 342–77.

Nolette, P., and C. Provost. 2018. "Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations." *Publius: The Journal of Federalism* 48 (3): 469–94.

Nugent, J. D. 2009. *Safeguarding Federalism: How States Protect their Interests in National Policymaking*. Norman: University of Oklahoma Press.

Olson, A., T. Callaghan, and A. Karch. 2018. "Return of the 'Rightful Remedy': Partisan Federalism, Resource Availability, and Nullification Legislation in the American States." *Publius: The Journal of Federalism* 48 (3): 495–522.

Regan, P. M., and C. J. Deering. 2009. "State Opposition to REAL ID." *Publius: The Journal of Federalism* 39 (3): 476–505.

Reid, J. 2019. *State Net Neutrality Laws Get Green Light in Court Ruling*: Bloomberg Law. Oct. 1. https://news.bloomberglaw.com/tech-and-telecom-law/d-c-circuit-says-states-can-enact-own-net-neutrality-laws.

Roberts, R. 2019. "The Judicial Response to the Presidential Polarization of the Administrative State." *American Review of Public Administration* 49 (1): 3–20.

Rose, S., and G. Goelzhauser. 2018. "The State of American Federalism, 2017-2018: Unilateral Executive Action, Regulatory Rollback, and State Resistance." *Publius: The Journal of Federalism* 48 (3): 319–44.

Sinclair, B. 2016. "Partisan Polarization and Congressional Policy Making." In *Congress and Policy Making in the 21st Century*, edited by J. A. Jenkins, and E. M. Patashnik, 48–72. New York: Cambridge University Press.

Smith, T. E. 2008. "Intergovernmental Lobbying: How Opportunistic Actors Create a Less Structured and Balanced Federal System." In *Intergovernmental Management for the 21st Century*, edited by T. J. Conlan, and P. L. Posner, 300–37. Washington, DC: Brookings Institution Press.

Weissert, C. S., B. Pollack, and R. P. Nathan. 2017. "Intergovernmental Negotiation in Medicaid: Arkansas and the Premium Assistance Waiver," *Publius: The Journal of Federalism* 47 (3): 445–66.

Young, E. A. 2019. "State Standing and Cooperative Federalism." *Notre Dame Law Review* 94 (5): 1893–925.

Young, E. A. 2020. "The Smoke Next Time: Nullification, Commandeering, and the Future of Marijuana Regulation." In *Marijuana Federalism: Uncle Sam and Mary Jane*, edited by J. Adler, 85–102. Washington, DC: Brookings Institution Press.