ARTICLES

FEDERALISM AND THE NEW NATIONAL SECURITY

Ashley S. Deeks & Kristen E. Eichensehr

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FEDERALISM AND THE NEW NATIONAL SECURITY

Ashley S. Deeks[*] *& Kristen E. Eichensehr*[**]

U.S. states traditionally play a minor role in establishing national security policies, which generally fall within the federal government's remit. But the return of great power competition with China and Russia and the accompanying proliferation of threats have spurred states to act on national security concerns. With unprecedented speed, breadth, and frequency, U.S. states have taken it upon themselves to address perceived security concerns with TikTok, purchases of real estate by foreign actors, and foreign-made drones, as well as commercial dealings with Russian firms. Drawing on their police powers, they have enacted security-related laws that sometimes parallel and sometimes go beyond the federal government's actions. We term this phenomenon "entrepreneurial federalism" and explain its unique features.

The increasing frequency and breadth of states' national security–focused actions have set U.S. states and the federal government on a collision course. Private parties have launched a range of legal challenges to state laws, arguing that courts should hold that those laws are preempted based on existing federal statutes or on broader doctrines that disable states from acting in foreign relations. Courts may be tempted to do so, especially because China and Russia are near-peer threats that require careful federal management.

But if the courts adopt broad preemption doctrines in this space, they may inadvertently foreclose two constructive phenomena that can arise from acts of entrepreneurial federalism: useful supplementation by the states of federal efforts to address national security threats and the productive friction that states can introduce into policymaking to improve the quality of U.S. national security policies. Even when there are good reasons for courts to hold that state actions that implicate the U.S. relationship with China or Russia are preempted, judicial decisions that reach that result too readily — or that use a broader form of preemption than necessary — may unintentionally impose longer-term costs on U.S. national security.

This Article documents the rise of states' national security actions, distinguishes them from earlier academic models of federalism, and proposes ways that the courts, Congress, the Executive, and the states can foster a positive role for states while minimizing the downsides that could flow from state actions in the national security space.

INTRODUCTION

The United States has entered a new era of national security, one defined by the return of great power competition with China and

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Russia.[1] Across presidential administrations, the federal government has turned away from the heady rhetoric of globalization and the post-9/11 focus on terrorism.[2] Today it embraces a broader conception of national security that focuses on vulnerabilities that adversaries might exploit in basic utilities, telecommunication networks, real estate purchases, the food supply, consumer electronics, and social media applications.[3] National security concerns now dominate foreign relations,[4] and the federal government is deploying a barrage of economic tools, including export controls, sanctions, and investment restrictions, to manage those concerns.[5]

But the federal government isn't the only actor on the field. Numerous U.S. states have taken it upon themselves to adopt their own measures, ostensibly to address some of these same concerns. States have prohibited state agencies from doing business with Russian-linked companies, attempted to ban TikTok, barred their law enforcement agencies from using Chinese-made drones, and restricted Chinese nationals' ability to purchase real estate.[6] Some of the states' actions parallel federal ones, but others go much further.[7]

The expansion of federal national security actions, coupled with the increasing frequency and breadth of states' security-focused actions, have set U.S. states and the federal government on a collision course.[8] Private parties have already launched a range of legal challenges to state laws, pulling courts into the mix to determine whether, or to what degree, states may act with respect to national security and raising fundamental questions about federal preemption of state laws.[9]

This Article makes three main contributions to academic and policy debates about federalism and national security. First, we argue that states' recent national security–related actions do not fit neatly into leading theories about how the federal government interacts with the states, theories that include dual federalism, cooperative federalism, uncooperative federalism, and overcooperative federalism. Dual federalism envisions separate and exclusive spheres for the federal and state governments.[10] Foreign relations has been described this way — as the sole province of the federal government — but that has never been

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1 *See infra* Part I, pp. 477–95.

2 *See infra* Part I, pp. 477–95.

3 *See infra* Part I, pp. 477–95; Kristen E. Eichensehr & Cathy Hwang, Essay, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 556–60 (2023).

4 *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY 263 (2024) ("In twenty-first-century practice, foreign-relations law has become national security law.").

5 *See infra* section I.A, pp. 479–83.

6 *See infra* section I.B, pp. 484–91.

7 *See infra* section I.B, pp. 484–91.

8 *See infra* section I.C, pp. 491–95.

9 *See infra* section I.C, pp. 491–95.

10 *See infra* p. 496.

totally accurate.[11] States have long taken measures that touch on foreign relations and often act to protect their citizens' security.[12] Yet even extant academic theories that accept that federal and state actions overlap do not fully capture states' recent security-focused actions. Cooperative federalism focuses on instances where the federal government enlists state officials to implement and enforce federal regulatory programs.[13] Uncooperative federalism emphasizes instances where states use the regulatory power that the federal government confers on them to challenge or dissent from federal law.[14] Overcooperative federalism describes cases where states seek to enforce federal law more aggressively than federal officials do.[15] But none of these theories fully encompasses the current situation in which states, acting outside of federal programs, invent a role for themselves by enacting laws that reflect some of the same national security concerns that Congress and the Executive have evinced but that go beyond federal law by imposing broader prohibitions or more stringent requirements or by regulating in an area that the federal government has not.[16] We propose a new descriptor — "entrepreneurial federalism" — to better account for such state actions.[17]

Framing today's state actions as exemplars of entrepreneurial federalism does not resolve whether such actions are permissible as a doctrinal matter or should be permissible as a normative one. This leads to the Article's second contribution. Courts considering states' security-focused actions may be tempted to rely on earlier foreign policy–related preemption cases that broadly disabled states from acting with respect to foreign relations, akin to the dual federalism theory.[18] But we argue that there are underappreciated perils in broad preemption. If courts, in their rush to hold state efforts preempted, adopt broad preemption doctrines, deploy capacious language about the federal government's powers, and take a parsimonious approach to states' security-related actions, they may inadvertently foreclose two constructive phenomena. The first is states' useful supplementation of federal efforts to address national security threats, including through gap-filling statutes or enhanced enforcement of the federal scheme.[19] The second is the productive friction that states can provide when they operate in this space.[20] By this, we mean states' ability to trigger reason-giving by the Executive that improves the quality of decisions, to challenge groupthink, and to

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[11] *See infra* pp. 496–97.
[12] *See infra* pp. 496–97.
[13] *See infra* pp. 497–98.
[14] *See infra* p. 498.
[15] *See infra* pp. 498–99.
[16] *See infra* Part II, pp. 495–502.
[17] *See infra* Part II, pp. 495–502.
[18] *See infra* section III.A, pp. 504–07.
[19] *See infra* section III.B, pp. 507–12.
[20] Ashley Deeks & Kristen E. Eichensehr, *Frictionless Government and Foreign Relations*, 110 VA. L. REV. 1815, 1896 (2024).

reveal underappreciated costs that federal policies may impose on the states.[21]

Our view about the potentially productive contributions by states, especially with respect to security-focused actions, leads to the Article's third contribution: a series of normative recommendations for courts, Congress, the Executive, and states of ways to maximize the benefits of the states' role while using preemption where necessary to protect the federal government's management of key national security priorities. Congress and the Executive may choose to preempt state actions as long as they have the constitutional authority to act in a particular space (as they usually do in national security).[22] Indeed, there are good reasons for courts to hold that at least some of the state actions regarding China and Russia are preempted or otherwise unlawful.[23] However, to preserve states' ability to provide useful supplementation and productive friction in the future, we urge judges to use the narrowest available preemption theory, so as to avoid displacing more state law than is necessary to protect the federal government's national security prerogatives. Broad holdings asserting that states have no role in foreign relations or national security would unduly infringe on states' traditional responsibility to protect their citizens, which is the asserted basis for much recent state activity.[24]

But Congress and the Executive should do their part too. Congress should legislate with greater clarity when it addresses national security issues of interest to the states by including express preemption provisions that disable states from action or antipreemption provisions that permit state action.[25] Congress and the Executive could also file amicus briefs addressing preemption in cases that private litigants have filed challenging states' actions and thereby provide greater clarity for judges about the extent to which the states are interfering problematically with federal regulatory schemes.[26] In addition, executive officials could engage with state leaders, both to educate them about the nature of national security threats and to learn from them about emerging concerns or underappreciated impacts of federal policies on state constituencies.[27] State leaders, too, could articulate more clearly the nature of their security concerns, avoid xenophobic motives and rhetoric, tie their actions more tightly to federal standards, and engage Congress to support antipreemption provisions where useful.[28]

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[21] *See infra* section III.C, pp. 512–17.
[22] *See infra* p. 519.
[23] *See infra* pp. 530–34.
[24] *See infra* pp. 484–85, 520.
[25] *See infra* pp. 534–37.
[26] *See infra* pp. 537–39.
[27] *See infra* pp. 538–39.
[28] *See infra* section IV.D, pp. 540–41.

The Article proceeds as follows. Part I details the federal government's new focus on China and Russia and its increasing reliance on economic tools to achieve its national security goals. It then provides an overview of states' recent security-focused activities and subsequent litigation. Part II defines the concept of "entrepreneurial federalism" to describe states' recent actions and contrasts it with existing theories of federalism. Part III highlights the underappreciated perils of broadly disabling states from acting on national security, namely the loss of states' ability to usefully supplement federal policies or productively add friction to federal decisionmaking. Part IV turns to the normative, addressing how the relevant players can maximize the benefits of the states' roles while protecting well-considered national security policies by using preemption where necessary.

I. THE NEW NATIONAL SECURITY

For the two decades following the 9/11 attacks, the global war on terrorism dominated U.S. national security policy.[29] But the last few years have seen the return of great power politics. Citing China and Russia, the first Trump Administration's *National Security Strategy* announced that "great power competition [has] returned."[30] The Biden Administration's *National Security Strategy* declared that "the post–Cold War era is definitively over and a competition is underway between the major powers to shape what comes next."[31] The second Trump Administration appears set to continue framing China as the foremost threat to the United States;[32] its approach to Russia is less clear as of this writing.[33]

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[29] *See* KOH, *supra* note 4, at 147 ("If the Bush 41–Clinton years had reflected America's first, optimistic look at globalization, the September 11 attacks created a sharp cleft in that vision . . . , taking the United States out of the light and into the shadows of a new age of global pessimism.").

[30] WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 27 (2017) [hereinafter NATIONAL SECURITY STRATEGY 2017], https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf [https://perma.cc/GN6L-RTY6].

[31] WHITE HOUSE, NATIONAL SECURITY STRATEGY 6 (2022) [hereinafter NATIONAL SECURITY STRATEGY 2022], https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf [https://perma.cc/ZDE2-PJXH]; *see also* William J. Burns, *Spycraft and Statecraft: Transforming the CIA for an Age of Competition*, FOREIGN AFFS., Mar./Apr. 2024, at 74, 76, https://www.foreignaffairs.com/united-states/cia-spycraft-and-statecraft-william-burns [https://perma.cc/Z8PW-Z2N6] ("The post–Cold War era came to a definitive end the moment Russia invaded Ukraine in February 2022.").

[32] *See, e.g.*, *Review of the President's FY26 Budget Request for the Department of Defense: Hearing Before the S. Subcomm. on Def., Comm. on Appropriations*, 119th Cong. 3 (2025) (statement of Pete Hegseth, Sec'y, U.S. Dep't of Def.), https://www.appropriations.senate.gov/imo/media/doc/secretary_peter_bhegsethtestimony.pdf [https://perma.cc/CPP7-YM5J] ("Our pacing threat is Communist China.").

[33] *See, e.g.*, Associated Press, *How Trump's Rhetoric About Zelenskyy and Putin Has Evolved, In His Own Words*, PBS NEWS HOUR (Sep. 24, 2025, at 14:00 ET), https://www.pbs.org/

In this new era, the U.S. federal government's conception of national security has expanded in two ways relevant to the federalism questions on which we focus. First, foreign relations has become deeply intertwined with security issues. Foreign relations and national security have long had substantial overlap. Many national security threats originate abroad, so diplomacy and relationships with foreign governments are crucial to managing such threats.[34] But, in the decades following the end of the Cold War, when the United States enjoyed primacy in a unipolar world, U.S. foreign relations focused on issues such as human rights and international trade in addition to national security,[35] and national security concerns centered heavily on non-state actors.[36] Now, national security dominates greater swaths of foreign policy. Security is explicitly the lens through which the United States engages the world, which has led it to unwind some of the very interdependencies it built up during the globalization era.[37]

Second, as both the Trump and Biden Administrations have sought to manage competition with China and Russia while avoiding armed conflicts, they have focused on economic security, declaring that "[e]conomic security is national security."[38] Economic tools of national security, including sanctions, export controls, investment restrictions, and attempts to regulate data flows to China, have taken center stage at the

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newshour/world/how-trumps-rhetoric-about-zelenskyy-and-putin-has-evolved-in-his-own-words [https://perma.cc/7A3F-9PDG] (tracking changes in President Trump's views on the Russian and Ukrainian leaders).

[34] *See, e.g.*, NATIONAL SECURITY STRATEGY 2022, *supra* note 31, at 11 (calling U.S. "alliances and partnerships around the world . . . our most important strategic asset and an indispensable element contributing to international peace and stability").

[35] *See, e.g.*, WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE (2000), https://history.defense.gov/Portals/70/Documents/nss/nss2000.pdf [https://perma.cc/CRU6-AVS2] (listing goals of "enhancing security at home and abroad, promoting prosperity, and promoting democracy and human rights" in addition to "encouraging democratization, open markets, free trade, and sustainable development" (emphasis omitted)).

[36] WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at v (2002), https://2009-2017.state.gov/documents/organization/63562.pdf [https://perma.cc/BP2L-Z7ZY] ("Today, the world's great powers find ourselves on the same side — united by common dangers of terrorist violence and chaos.").

[37] *See, e.g.*, Press Release, U.S. Dep't of the Treasury, Remarks by Secretary of the Treasury Janet L. Yellen on the Biden Administration's Economic Approach Toward the Indo-Pacific (Nov. 2, 2023), https://home.treasury.gov/news/press-releases/jy1872 [https://perma.cc/TY77-QWWU] (noting that because "critical supply chains are too vulnerable to risks," the United States is making domestic investments and engaging in "friendshoring" to "ensure that our country's economic security is not unduly reliant on just one country [that is, China] for many critical inputs").

[38] NATIONAL SECURITY STRATEGY 2017, *supra* note 30, at 17; *accord* WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 15 (2021), https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/NSC-1v2.pdf [https://perma.cc/ZMR9-QDFT]; Administration of Donald J. Trump, *Memorandum on America First Investment Policy*, 2025 DAILY COMP. PRES. DOC. 1 (Feb. 21, 2025), https://www.govinfo.gov/content/pkg/DCPD-202500292/pdf/DCPD-202500292.pdf [https://perma.cc/R9JE-JPNC].

federal level.[39] The turn to economic tools marks an expansion of the sectors that the federal government views as key to national security.[40]

Alongside the federal government's expansions of national security vis-à-vis foreign policy and economic issues, U.S. states have cited security concerns to justify ramping up their own measures regarding China and Russia.[41] Some of the state actions track and support federal measures, but others go beyond them.[42] The expanding scope of federal action on national security, combined with the increasing frequency and breadth of states' actions in the name of security, have set U.S. states and the federal government on a collision course — raising crucial questions about whether and how federal laws and actions should preempt state laws.[43]

This Part briefly describes the federal government's shifting focus to threats posed by China and Russia and the United States's turn to economic tools of national security. It then provides an overview of states' security-focused actions to address threats from those countries and the litigation those actions have already sparked.

A. Federal Actions Addressing China and Russia

The current era in U.S. national security policy solidified toward the end of 2021. The U.S. withdrawal from Afghanistan in August 2021 marked the end of two decades in which the global war on terror dominated U.S. national security conversations.[44] In the months that followed, U.S. officials offered "increasingly urgent warnings"[45] about the full-scale invasion of Ukraine that Russia ultimately launched in February 2022.[46] At the same time, the Biden Administration, like the Trump Administration before it, named China as the biggest long-term challenge to U.S. global leadership. The Biden Administration's *National Security Strategy* warned that China "is the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it."[47]

The federal government's efforts to manage threats from both Russia and China rely heavily on economic tools of national security, bringing new sectors under the ambit of national security. This "national security

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[39] *See infra* section I.A, pp. 479–83.

[40] *See* Eichensehr & Hwang, *supra* note 3, at 556–60.

[41] *See infra* section I.B, pp. 484–91.

[42] *See infra* section I.B, pp. 484–91.

[43] *See infra* section I.C, pp. 491–95.

[44] *See generally U.S. Withdraws from Afghanistan as the Taliban Take Control*, 115 AM. J. INT'L L. 745 (2021) (Kristen E. Eichensehr ed.) (discussing the leadup to and immediate aftermath of the U.S. withdrawal from Afghanistan).

[45] *Russia Invades Ukraine*, 116 AM. J. INT'L L. 595, 598 (2022) (Kristen E. Eichensehr ed.).

[46] *Id.* at 597–604 (describing the leadup to Russia's full-scale invasion of Ukraine).

[47] NATIONAL SECURITY STRATEGY 2022, *supra* note 31, at 23.

creep" has involved repurposing and expanding statutory authorities granted to the executive branch.[48]

With respect to Russia, some of the federal government's actions have focused specifically on technology-based threats. In particular, the federal government gradually ramped up restrictions on Kaspersky Lab (a U.S. subsidiary of a Russian cybersecurity company), as well as on Kaspersky's parent company, due to concerns that its products could enable sharing of sensitive information with the Russian government.[49] The federal government began prohibiting the use of certain Kaspersky products on federal government systems in 2017 and, in 2024, added three Kaspersky entities to the Commerce Department's Entity List — a designation that, in this case, prohibited the companies "from directly or indirectly providing anti-virus software and cybersecurity products or services in the United States or to U.S. persons."[50]

In response to Russia's full-scale invasion of Ukraine, the executive branch dramatically increased its restrictions related to Russia. The United States sanctioned Russian officials, businesses, and elites, and restricted imports from and exports to Russia.[51] The executive branch also froze Russian central bank assets held in U.S. financial institutions[52] and worked with allies to impose a price cap on Russian oil exports.[53] For other measures, the executive branch worked with Congress, which passed statutes suspending normal trade relations with Russia[54] and banning importation of Russian oil into the United States.[55] In April 2024, Congress also granted the President authority to seize Russian assets and use them for the benefit of Ukraine.[56]

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[48] Eichensehr & Hwang, *supra* note 3, at 556–60.

[49] *See* Press Release, Bureau of Indus. & Sec., U.S. Dep't of Com., Commerce Department Prohibits Russian Kaspersky Software for U.S. Customers (June 20, 2024), https://www.bis.gov/press-release/commerce-department-prohibits-russian-kaspersky-software-u.s.-customers [https://perma.cc/U6G7-ZM7N] (detailing history of restrictions on Kaspersky products).

[50] *Id.*; *see also* Final Determination: Case No. ICTS-2021-002, Kaspersky Lab, Inc., 89 Fed. Reg. 52434, 52437 (U.S. Dep't of Com. June 24, 2024).

[51] *See United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures*, 116 AM. J. INT'L L. 614, 615, 618 (2022) (Kristen E. Eichensehr ed.).

[52] Press Release, U.S. Dep't of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth (Feb. 28, 2022), https://home.treasury.gov/news/press-releases/jy0612 [https://perma.cc/F8HC-CTDR].

[53] Elizabeth Rosenberg & Eric Van Nostrand, *The Price Cap on Russian Oil: A Progress Report*, U.S. DEP'T OF THE TREASURY (May 18, 2023), https://home.treasury.gov/news/featured-stories/the-price-cap-on-russian-oil-a-progress-report [https://perma.cc/AA2N-3KY9]; Eric Van Nostrand & Anna Morris, *Phase Two of the Price Cap on Russian Oil: Two Years After Putin's Invasion*, U.S. DEP'T OF THE TREASURY (Feb. 23, 2024), https://home.treasury.gov/news/featured-stories/phase-two-of-the-price-cap-on-russian-oil-two-years-after-putins-invasion [https://perma.cc/E4JV-GFMQ].

[54] Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022) (codified at 19 U.S.C. §§ 2101 note, 2434 note).

[55] Ending Importation of Russian Oil Act, Pub. L. No. 117-109, § 2, 136 Stat. 1154, 1154 (2022) (codified at 22 U.S.C. § 8923 note).

[56] Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, Pub. L. No. 118-50, div. F, §§ 104–105, 138 Stat. 895, 947–52 (2024) (codified at 22 U.S.C. § 9521 note).

The federal government has used an even wider range of economic tools to inhibit China's military and technological advances. Many of the U.S. actions have focused on concerns about Chinese technology and investments in the United States and the potential for the Chinese government to use them for espionage or sabotage.[57] For example, in 2019, Congress banned the Defense Department from buying and using drones containing Chinese components.[58] In the 2024 National Defense Authorization Act,[59] Congress expanded those limits to prohibit the entire federal government from using federal funds to purchase or operate drones that the Federal Acquisition Security Council determines are made by entities domiciled in China (and certain other entities) as of December 2025.[60] In June 2025, President Trump directed the executive branch to accelerate the determinations Congress required.[61] The United States has also limited the use of Chinese-made telecommunications hardware, including hardware made by Huawei, in U.S. networks.[62]

Chinese investments in the United States have drawn the attention of the Committee on Foreign Investment in the United States (CFIUS) — an executive branch interagency committee that screens inbound foreign direct investment for national security concerns.[63] CFIUS has recommended that the President block or order the divestment of several Chinese-linked investments in recent years.[64] The most publicly salient concerns have centered on TikTok. In August 2020, President Trump ordered ByteDance, TikTok's Chinese parent company, to divest itself of the app, driven by concerns that China's

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[57] Deeks & Eichensehr, *supra* note 20, at 1865–67.

[58] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 848, 133 Stat. 1198, 1508 (2019) (codified at 10 U.S.C. § 2302 note); *see also* Press Release, U.S. Dep't of Def., Department Statement on DJI Systems (July 23, 2021), https://www.defense.gov/News/Releases/Release/Article/2706082/department-statement-on-dji-systems [https://perma.cc/L8H9-M6RZ].

[59] Pub. L. No. 118-31, 137 Stat. 136 (2023) (codified in scattered sections of the U.S. Code).

[60] *Id.* §§ 1821–1833 (codified at 41 U.S.C. note prec. § 3901).

[61] Exec. Order No. 14,307, 90 Fed. Reg. 24727, 24729 (June 11, 2025); *see* Gerrit De Vynck, Warren P. Strobel & Ellen Nakashima, *Trump Orders Could End Chinese Drone Sales in the U.S.*, WASH. POST (June 6, 2025), https://www.washingtonpost.com/technology/2025/05/30/trump-executive-orders-china-drones [https://perma.cc/TQ3Y-E53D].

[62] JILL C. GALLAGHER, CONG. RSCH. SERV., R47012, U.S. RESTRICTIONS ON HUAWEI TECHNOLOGIES: NATIONAL SECURITY, FOREIGN POLICY, AND ECONOMIC INTERESTS 3 (2022), https://www.congress.gov/crs_external_products/R/PDF/R47012/R47012.2.pdf [https://perma.cc/7BPL-UH4K].

[63] *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/E4E6-B7WA].

[64] *See, e.g.*, CATHLEEN D. CIMINO-ISAACS & KAREN M. SUTTER, CONG. RSCH. SERV., IF10177, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1–2 (2025), https://www.congress.gov/crs_external_products/IF/PDF/IF10177/IF10177.38.pdf [https://perma.cc/WP3U-RM4C] (describing the CFIUS process and recent blocked transactions).

government controls TikTok's algorithm and could access U.S. user data.[65] In the following years, CFIUS negotiated — unsuccessfully — with TikTok over how to mitigate those national security risks.[66] Congress also took action, initially prohibiting federal officials from using TikTok on government devices,[67] and in April 2024 enacting the Protecting Americans from Foreign Adversary Controlled Applications Act,[68] which banned TikTok after 270 days unless ByteDance divested from the app.[69] TikTok sued to challenge the law, but lost in the Supreme Court.[70] The Trump Administration declined to enforce the law,[71] and in September 2025, President Trump issued an executive order determining that TikTok had reached a "Framework Agreement" for a qualified divestiture that "resolves . . . national security concerns and complies with the Act."[72]

The federal government has taken other security-focused actions as well. The executive branch has restricted outbound investment into certain industries in China[73] and restricted transfers of "bulk sensitive personal data" of U.S. persons to China.[74] Congress also prohibited data brokers from making sensitive data of U.S. persons available to U.S. adversary countries.[75] In addition to these measures, the federal government has expressed concern about "connected vehicles" that use

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65 *See United States Pursues Regulatory Actions Against TikTok and WeChat over Data Security Concerns*, 115 AM. J. INT'L L. 124, 129 (2021) (Kristen E. Eichensehr ed.) (discussing the divestment order and CFIUS process with respect to TikTok).

66 STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10940, RESTRICTING TIKTOK (PART I): LEGAL HISTORY AND BACKGROUND 3 (2023), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10940/LSB10940.9.pdf [https://perma.cc/G9LZ-A3TN].

67 No TikTok on Government Devices Act, Pub. L. No. 117-328, div. R, 136 Stat. 5258 (2022) (codified at 44 U.S.C. § 3553 note).

68 Pub. L. No. 118-50, div. H, 138 Stat. 955 (2024) (codified at 15 U.S.C. § 9901 note).

69 *Id.* § 2.

70 TikTok Inc. v. Garland, 145 S. Ct. 57, 72 (2025) (per curiam).

71 *See, e.g.*, Jack Goldsmith, *Trump's Continuing Illegal Refusal to Enforce the TikTok Ban*, EXEC. FUNCTIONS (June 19, 2025), https://executivefunctions.substack.com/p/trumps-continuing-illegal-refusal [https://perma.cc/S7JZ-XEF5].

72 Exec. Order No. 14,352, 90 Fed. Reg. 47219, 47220 (Sep. 30, 2025).

73 Exec. Order No. 14,032, 86 Fed. Reg. 30145, 30145 (June 7, 2021); *Outbound Investment Security Program*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/international/outbound-investment-program [https://perma.cc/W4BD-PAHA].

74 Exec. Order No. 14,117, 89 Fed. Reg. 15421, 15423 (Mar. 1, 2024).

75 Protecting Americans' Data from Foreign Adversaries Act of 2024, Pub. L. No. 118-50, div. I, § 2, 138 Stat. 960, 960 (codified at 15 U.S.C. § 9901 & note).

Chinese technology,[76] Chinese hacking of U.S. critical infrastructure,[77] and Chinese purchases of agricultural land.[78]

As these examples illustrate, Congress and the Executive have worked together to expand the scope of federal actions related to national security. Long-standing delegations of authority, such as the International Emergency Economic Powers Act[79] (IEEPA), grant the Executive broad authority to act with respect to national security, including by imposing economic sanctions.[80] But Congress has expanded those authorities still further in recent years. Some actions have been specific to China, as the examples above illustrate. Others have adjusted more generalized framework legislation. In 2018, for example, Congress passed the Foreign Investment Risk Review Modernization Act[81] to broaden CFIUS's jurisdiction to review transactions where foreign persons acquire either interests in U.S. companies that fall short of "control" or certain interests in real estate.[82] The same year, Congress codified and broadened the Executive's authorities over exports in the Export Control Reform Act.[83] The Executive is using all of these authorities and more to manage the security concerns posed by Russia and China.

The landscape of federal actions is growing and crowded. But the federal government isn't the only player on the field. The next section turns to U.S. states' actions with respect to China and Russia.

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[76] *FACT SHEET: Biden-Harris Administration Takes Action to Address Risks of Autos from China and Other Countries of Concern*, WHITE HOUSE (Feb. 29, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/02/29/fact-sheet-biden-harris-administration-takes-action-to-address-risks-of-autos-from-china-and-other-countries-of-concern [https://perma.cc/CXS2-7UVY].

[77] *See, e.g.*, Julian E. Barnes & David E. Sanger, *As China Expands Its Hacking Operations, A Vulnerability Emerges*, N.Y. TIMES (Feb. 22, 2024), https://www.nytimes.com/2024/02/22/us/politics/china-hacking-files-risk.html [https://perma.cc/LUH5-KDRP]; Ellen Nakashima, *Top Senator Calls Salt Typhoon "Worst Telecom Hack in Our Nation's History,"* WASH. POST (Nov. 21, 2024), https://www.washingtonpost.com/national-security/2024/11/21/salt-typhoon-china-hack-telecom [https://perma.cc/7GXS-J3R7]; *National Security Memorandum on Critical Infrastructure Security and Resilience, NSM-22*, WHITE HOUSE (Apr. 30, 2024), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience [https://perma.cc/4RB6-B7DY] (directing the intelligence community to collect and share with federal, state, and local governments and critical infrastructure operators intelligence information regarding risks to critical infrastructure).

[78] Cate Cadell, *U.S. to Ban Chinese Purchases of Farmland, Citing National Security*, WASH. POST (July 8, 2025), https://www.washingtonpost.com/national-security/2025/07/08/us-china-farmland-ban-national-security [https://perma.cc/YK5K-A585]; Kim Chipman, *China Is Buying Up US Farmland, But How Much Isn't Clear*, BLOOMBERG (Jan. 19, 2024, at 16:00 ET), https://www.bloomberg.com/news/articles/2024-01-18/china-is-buying-up-us-farmland-but-just-how-much-isn-t-clear [https://perma.cc/ZX5Q-WVQB].

[79] 50 U.S.C. §§ 1701–1706.

[80] *Id.* § 1702.

[81] Pub. L. No. 115-232, tit. XVII, subtit. A, 132 Stat. 2174 (2018) (codified at 50 U.S.C. §§ 4501 note, 4565 note).

[82] Eichensehr & Hwang, *supra* note 3, at 566–68.

[83] Pub. L. No. 115-232, tit. XVII, subtit. B, 132 Stat. 2208 (2018) (codified in scattered sections of 50 U.S.C.).

B. State-Level Actions Targeting China and Russia

Numerous states have waded into the mix by adopting measures targeted at China and Russia. To be sure, these actions are not the first ones that states have taken in response to the behavior of foreign actors. In past decades, states have adopted policies condemning and trying to change foreign governments' behavior, particularly with respect to human rights. For example, many states adopted sanctions against South Africa in the apartheid era.[84] Massachusetts notably attempted to address Burma's human rights abuses by restricting its government agencies from doing business with companies doing business in Burma.[85] States' recent restrictions on doing business with Russia or Russian entities in the wake of Russia's war of aggression against Ukraine follow in this vein.[86]

States' China-focused actions and efforts to ban Kaspersky products from state government devices are notably different in asserted purpose. In these cases, states are claiming to respond to direct security threats to their citizens and their citizens' data.[87] Unlike past foreign policy–focused actions and responses to Russia's invasion, states' Kaspersky-related and China-focused actions are not aimed at changing the behavior of the foreign government but ostensibly at protecting their citizens from adversaries. This distinction has implications for the preemption analysis we discuss in section IV.A.

The increase in state activity certainly correlates with the return of great power competition and the rise of economic tools of national security to manage that competition, but is there also a causal connection? We suspect that the answer is yes, particularly with respect to China. The causal connection may go something like this: Emphatic and bipartisan messaging from a variety of sources, including the federal government,[88] has focused attention — including that of state leaders — on the perceived serious and wide-ranging threats that the Chinese government poses to the United States, including through goods, services, and investments that may affect states. In response, state leaders have asked what they can do to protect their citizens from these real or perceived threats and have taken action to do so. The bipartisan nature of

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[84] Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 472–74 (1987). By September 1986, nineteen states had enacted antiapartheid legislation directed at South Africa. *Id.*

[85] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366–68 (2000).

[86] For a discussion of state sanctions against Russia, see Julia Spiegel, *Foreign Affairs Federalism: Ukraine and Beyond*, 84 OHIO ST. L.J. 1489, 1492–94 (2024). *See also, e.g.*, N.J. STAT. ANN. § 52:32-60.1 (West 2025) (directing the New Jersey Treasury Department to develop a list of persons engaged in "prohibited activities in Russia or Belarus" and prohibiting state entities from contracting with listed persons); N.Y. Exec. Order No. 14, 44 N.Y. Reg. 125 (Mar. 30, 2022); N.Y. Exec. Order No. 16, 44 N.Y. Reg. (Apr. 20, 2022).

[87] *See infra* notes 98–99 & 114 and accompanying text.

[88] *See* Deeks & Eichensehr, *supra* note 20, at 1863–64 (describing robust bipartisan agreement about taking actions related to China).

concerns about China ensures there is little political risk if state leaders act and potential downside risk if they do not.[89]

In general, states appear to be relying on their traditional police powers to enact these laws.[90] In defending their Russia sanctions, states have pointed to their ability to regulate state procurement,[91] an argument similar to that used by Massachusetts in sanctioning Burma (in a law held preempted by the Supreme Court).[92] Perhaps more compellingly, states have traditionally regulated law enforcement,[93] land use,[94] and consumer protection[95] on the basis of their police powers, and many of the states' recent China-related laws and laws restricting Kaspersky products are plausibly characterized as falling into these buckets.[96] A state's invocation of a traditional power as the basis for its law is not determinative of whether it survives a preemption analysis;[97] nonetheless, the turn from foreign policy–related to security-related rationales for state action is potentially significant when assessing whether federal law should and does preempt state actions, a topic we take up in section IV.A.

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[89] *Cf.* Daniel W. Drezner, Essay, *How Everything Became National Security and National Security Became Everything*, FOREIGN AFFS., Sep./Oct. 2024, at 131–32, https://www.foreignaffairs.com/united-states/how-everything-became-national-security-drezner [https://perma.cc/99GY-GH4M] (arguing that political leaders "hype[]" national security threats because constituents "do not seem to care when" a "national security threat . . . turns out to be overblown" but "remember when an administration downplays a national security concern that metastasizes into a full-blown crisis").

[90] The states' police power is broad and imprecisely bounded. The Supreme Court has declared that "attempt[ing] to define [the police power's] reach or trace its outer limits is fruitless." Berman v. Parker, 348 U.S. 26, 32 (1954). It noted that while "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power, . . . they merely illustrate the scope of the power and do not delimit it." *Id.* (citing Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911)); *see also* Bond v. United States, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good — what we have often called a 'police power.'" (quoting United States v. Lopez, 514 U.S. 549, 567 (1995))).

[91] Kyocera Document Sols. Am., Inc. v. Div. of Admin., 708 F. Supp. 3d 531, 553 (D.N.J. 2023).

[92] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

[93] *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 443–44 (1982) (describing the "law enforcement character of all California 'peace officers'" as an instance of the "sovereign's coercive police powers").

[94] *See Berman*, 348 U.S. at 32 (construing land use regulations as exercises of police power); Siena Corp. v. Mayor of Rockville, 873 F.3d 456, 464 (4th Cir. 2017) (treating municipal land use decisions as uses of state police power); T-Mobile West LLC v. City & County of San Francisco, 438 P.3d 239, 243 (Cal. 2019) ("The 'inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land . . . .'" (quoting City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013))).

[95] Chae v. SLM Corp., 593 F.3d 936, 944 (9th Cir. 2010) ("Contract and consumer protection laws have traditionally been in state law enforcement hands.").

[96] *See, e.g.*, Alario v. Knudsen, 704 F. Supp. 3d 1061, 1073 (D. Mont. 2023) (noting that Montana described its TikTok ban as a "consumer protection law").

[97] *See id.* at 1081 (holding that the Montana law was preempted even though the state invoked a traditional police power).

1. States' Measures Against Russia. — After the federal government began restricting use of Kaspersky products on its systems, some states similarly restricted their own use of Kaspersky products. California, for example, moved quickly after the first federal restrictions in 2017 to prohibit its government agencies' use of Kaspersky tools.[98] Other states took similar actions in the years that followed[99] in advance of the federal government's decision to ban Kaspersky products throughout the United States.[100]

Several states have adopted restrictions on doing business with Russia or Russian entities in response to Russia's war of aggression against Ukraine.[101] New Jersey passed a statute directing its treasury department to develop "a list of persons . . . engage[d] in prohibited activities in Russia or Belarus,"[102] which included "being headquartered in . . . or having [a] principal place of business in Russia or Belarus."[103] Pursuant to the statute: "A company determined to engage in 'prohibited activities' — or found to be under common ownership with a company that engages in 'prohibited activities' — is added to the Prohibited List and may not 'enter into or renew a contract with a [New Jersey] agency . . . .'"[104] The New Jersey "restrictions on Russian-affiliated entities [were] far broader than those imposed by the federal government,"[105] and were set to expire upon revocation of certain federally imposed Russia-related sanctions.[106] New York Governor Kathy Hochul also imposed broad restrictions related to Russia via two executive orders. The first directed New York's "Affected State Entities" to divest from and terminate contracts with Russian entities and entities supporting the Russian government in the invasion of Ukraine "and to

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98 DEP'T OF GEN. SERVS. & CAL. DEP'T OF TECH., BULL. #P-09-17, KASPERSKY ANTI-VIRUS SOFTWARE (2017), https://www.dgs.ca.gov/-/media/Divisions/PD/PTCS/Broadcast-Bulletins/2017/P-Bulletins/P-09-17-Kaspersky-Anti-Virus-Software.pdf [https://perma.cc/5RXQ-UVGK].

99 *See, e.g.*, NEV. DEP'T OF ADMIN., POL'Y DIRECTIVE #AD 2017-07, KASPERSKY LAB SOFTWARE BANNED (2017), https://admin.nv.gov/uploadedFiles/adminnvgov/content/Documents/2017-07%20Agency%20Policy%20Directive%20Kaspersky%20Lab%20Software%20Banned.pdf [https://perma.cc/ANU6-QQ8R] (banning the use of Kaspersky products in Nevada executive branch agencies); Jessica Albert, *Gov. Hogan Orders TikTok Ban for Maryland State Employees Because of Cybersecurity Risk*, CBS NEWS (Dec. 6, 2022, at 23:45 ET), https://www.cbsnews.com/baltimore/news/gov-hogan-directs-tiktok-ban-for-maryland-state-employees-because-of-cybersecurity-risk [https://perma.cc/M35N-8Z5D] (reporting that Maryland banned Kaspersky products on state devices); Press Release, State of New Jersey, Governor Murphy Announces Cybersecurity Directive to Prohibit Use of High-Risk Software on State Devices (Jan. 9, 2023), https://www.nj.gov/governor/news/news/562023/20230109a.shtml [https://perma.cc/DSY7-RLKS] (prohibiting use of Kaspersky products, among others, on state government devices).

100 Press Release, Bureau of Indus. & Sec., *supra* note 49.

101 For a discussion of state sanctions against Russia, see Spiegel, *supra* note 86, at 1492–94.

102 N.J. STAT. ANN. § 52:32-60.1(b) (West 2025).

103 *Id.* § 52:32-60.1(e).

104 Kyocera Document Sols. Am., Inc. v. Div. of Admin., 708 F. Supp. 3d 531, 540 (D.N.J. 2023) (alteration in original) (quoting § 52:32-60.1(a)(1)).

105 *Id.*

106 *Id.* at 541.

refrain from . . . [future] investments" and "new contracts with such entities."[107] The second order directed New York's "Affected State Entities" not to enter or renew contracts "with an entity conducting business operations in Russia," a condition defined broadly.[108] The orders, which reach well beyond federal Russia-related sanctions,[109] will remain in place "until such time as the sanctions imposed by the federal government are no longer in effect."[110]

By contrast, California took a narrower tack. Governor Gavin Newsom issued an executive order directing state agencies to review existing contracts for compliance with federal and state economic sanctions and, if necessary, to terminate contracts with those targeted by sanctions.[111] The order further directs state agencies to notify "contractors and grantees of their obligations to comply with economic sanctions" and to require them to report to the relevant state agency on their compliance with sanctions and "steps they have taken in response to Russia's actions in Ukraine."[112]

2. States' Measures Against China. — States' measures against China or Chinese nationals fit into several broad categories.

First, thirty-nine states have restricted the downloading and use of TikTok on government devices.[113] Like the federal government, states appear motivated by concerns that TikTok harvests personal data and transfers it to the Chinese government.[114] Going further, Arkansas and Indiana have sued TikTok under consumer protection statutes, arguing that the company deceived state consumers about the risk that the Chinese government would access their data.[115] Montana has gone the furthest, purporting to ban access to TikTok within its borders.[116]

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107 N.Y. Exec. Order No. 14, 44 N.Y. Reg. 125 (Mar. 30, 2022).

108 N.Y. Exec. Order No. 16, 44 N.Y. Reg. 79 (Apr. 20, 2022).

109 *State + Local Government Update: New Restrictions on Doing Business in Russia*, MORRISON FOERSTER (Dec. 15, 2022), https://www.mofo.com/resources/insights/221215-state-local-government-update [https://perma.cc/S9XX-7HK6].

110 N.Y. Exec. Order No. 14, 44 N.Y. Reg. 125; N.Y. Exec. Order No. 16, 44 N.Y. Reg. 79.

111 Cal. Exec. Order No. N-6-22, at 2–3 (Mar. 4, 2022).

112 *Id.* at 3.

113 Cailey Gleeson, *These 39 States Already Ban TikTok from Government Devices*, FORBES (Mar. 12, 2024, at 10:34 ET), https://www.forbes.com/sites/caileygleeson/2024/03/12/these-39-states-already-ban-tiktok-from-government-devices [https://perma.cc/4D3Q-KLG9].

114 *See, e.g.*, Brian Fung & Christopher Hickey, *TikTok Access from Government Devices Now Restricted in More than Half of US States*, CNN (Jan. 16, 2023, at 14:48 ET), https://www.cnn.com/2023/01/16/tech/tiktok-state-restrictions [https://perma.cc/QM4L-SN6Q].

115 Arkansas *ex rel.* Griffin v. TikTok Inc., No. 23-cv-01038, 2023 WL 4744903, at *1 (W.D. Ark. July 25, 2023); Indiana v. TikTok, Inc., No. 23-cv-13, 2023 WL 3596360, at *1 (N.D. Ind. May 23, 2023). In the Indiana case, the federal district court judge criticized Indiana's complaint, noting that "more than 90% of the complaint was devoted to irrelevant posturing," before remanding to state court. Indiana v. TikTok, 2023 WL 3596360, at *1, *5. On remand, the state court dismissed Indiana's lawsuit for lack of jurisdiction over TikTok and failure to state a claim under the state's Deceptive Consumer Sales Act. State v. TikTok, Inc., No. 02D03-2212-PL-401, 2023 WL 8481303, at *7 (Ind. Sup. Ct. Nov. 29, 2023).

116 *See infra* note 147 and accompanying text.

The federal government, meanwhile, banned access to TikTok on government devices[117] and adopted a conditional ban on the app unless ByteDance divested by January 19, 2025, though the Trump Administration declined to enforce that ban, and then determined that TikTok is undergoing a qualified divestment that will allow it to remain operational.[118]

Second, "[s]ince 2013, at least 44 states have enacted laws addressing drones."[119] At least some of these statutes, including those in Arkansas, Mississippi, and Tennessee, prohibit state and local actors from buying or using drones made in or by China.[120] These statutes have teeth because DJI, a Chinese company, is the world's largest drone manufacturer,[121] and many state and local police forces currently rely heavily on DJI drones.[122] To a large extent, these drone statutes have federal analogues,[123] and some draw definitions from federal statutes and regulations.[124] Congressional leaders have even urged state and local authorities to implement their own bans on Chinese-made drones. The chair and ranking member of the House Select Committee on Strategic Competition between the United States and the Chinese Communist Party sent a letter to the Board of Supervisors of Virginia's Fairfax County — home to the Central Intelligence Agency and Office of the

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117 *See* No TikTok on Government Devices Act, Pub. L. No. 117-328, div. R, 136 Stat. 5258 (2022) (codified at 44 U.S.C. § 3553 note).

118 *See supra* pp. 481–82.

119 *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 27, 2023), https://www.ncsl.org/transportation/current-unmanned-aircraft-state-law-landscape [https://perma.cc/P6LU-U6SZ].

120 ARK. CODE ANN. § 25-1-129 (2025) (prohibiting state funds from being used to purchase or operate drones made by "[c]overed foreign entit[ies]," defined as entities on the U.S. Entity List, entities domiciled in Russia or China, or entities "[u]nder the influence of or control by" the Russian or Chinese governments); MISS. CODE ANN. § 31-7-67 (2025) (prohibiting agencies from purchasing or operating drones manufactured in China and requiring all government drones to be purchased from domestic manufacturers as of January 1, 2025); TENN. CODE ANN. § 4-56-112 (2025) (prohibiting state agencies from acquiring drones produced by manufacturers banned under § 889 of the 2019 National Defense Authorization Act, which includes companies the Secretary of Defense identifies as being "owned or controlled by, or otherwise connected to" the Chinese government, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1917–19 (codified at note prec. 41 U.S.C. § 3901)).

121 Nessa Anwar, *World's Largest Drone Maker Is Unfazed — Even if It's Blacklisted by the U.S.*, CNBC (Feb. 7, 2023, at 23:32 ET), https://www.cnbc.com/2023/02/08/worlds-largest-drone-maker-dji-is-unfazed-by-challenges-like-us-blacklist.html [https://perma.cc/5669-PTQA].

122 *See* Zacc Dukowitz, *Despite Calls to Ban DJI Drones, Police Departments Are Still Buying Lots of Them*, UAV COACH (Aug. 30, 2023), https://uavcoach.com/police-dji-2023 [https://perma.cc/E4CH-KBCH].

123 *See supra* p. 481.

124 *See, e.g.*, ARK. CODE ANN. § 25-1-129; TENN. CODE ANN. § 4-56-112.

Director of National Intelligence — urging the county to cease using and procuring Chinese-made drones.[125]

Third, from 2023 to 2024, at least twenty-two states enacted laws regulating foreign ownership of U.S. land or other property.[126] Some of those statutes prohibit non-U.S. citizens domiciled in a "foreign country of concern" (including China and Russia) from acquiring real property within a defined distance from military installations or critical infrastructure or from acquiring agricultural land.[127] At the federal level, CFIUS has jurisdiction to review certain real estate transactions by noncitizens in proximity to national security–related facilities.[128] Federal law does not currently limit the amount of agricultural land that may be foreign owned, though it requires foreign actors to report certain information to the U.S. Department of Agriculture.[129] Several proposals in Congress would enhance those disclosure requirements or prohibit certain foreign actors from investing in the food and agriculture sector,[130] and the Trump Administration has announced plans to ramp up enforcement of the existing requirements and to increase penalties for "late and knowingly false filings."[131]

Finally, states have begun to prohibit their officials from using an open-source, powerful large language model that Chinese company DeepSeek released in January 2025. Both government officials and cybersecurity experts have expressed concern about the risks that

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[125] Letter from John Moolenaar, Chairman, & Raja Krishnamoorthi, Ranking Member, Select Comm. on the Chinese Communist Party, to Jeffrey McKay, Chairman, Fairfax Cnty. Bd. of Supervisors (Sep. 26, 2024), https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/2024-09-25%20Fairfax%20VA%20Drone%20Letter_SCC%20Final_0.pdf [https://perma.cc/SPG2-YURH].

[126] *See* APRIL J. ANDERSON, STEVE P. MULLIGAN & JASON J. HAWKINS, CONG. RSCH. SERV., LSB11013, STATE REGULATION OF FOREIGN OWNERSHIP OF U.S. LAND: JANUARY 2023 TO JULY 2024, at 1 (2024), https://www.congress.gov/crs_external_products/LSB/PDF/LSB11013/LSB11013.2.pdf [https://perma.cc/4NJ7-XZN6]; Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. 255, 285–86; *Federal and State Bills Restricting Property Ownership by Foreign Entities*, COMM. OF 100 (Aug. 20, 2025), https://www.committee100.org/our-work/federal-and-state-bills-prohibiting-property-ownership-by-foreign-individuals-and-entities [https://perma.cc/UBD9-L5SD] (reporting that, since 2021, forty-three states and Congress have collectively considered 414 bills to restrict foreign ownership of real property, with 266 of them including limitations on Chinese nationals).

[127] *See, e.g.*, Act of May 8, 2023, §§ 1, 5–6, 2023 Fla. Laws 596, 598, 602, 604 (codified as amended at FLA. STAT. §§ 287.138, 692.202, 692.203 (2025)).

[128] *See* Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, tit. XVII, subtit. A, 132 Stat. 2174 (2018) (codified at 50 U.S.C. §§ 4501 note, 4565 note).

[129] *See* RENÉE JOHNSON, CONG. RSCH. SERV., R47893, SELECTED RECENT ACTIONS INVOLVING FOREIGN OWNERSHIP AND INVESTMENT IN U.S. FOOD AND AGRICULTURE: IN BRIEF 1–2 (2024), https://www.congress.gov/crs_external_products/R/PDF/R47893/R47893.2.pdf [https://perma.cc/7MTC-45BY].

[130] *Id.* at 1, 3.

[131] USDA, NATIONAL FARM SECURITY ACTION PLAN (2025), https://www.usda.gov/sites/default/files/documents/farm-security-nat-sec.pdf [https://perma.cc/FQC6-R8YY].

DeepSeek's AI tool poses to U.S. data security and individual privacy.[132] In addition to legislative or executive actions in a dozen states that restrict certain government actors from placing DeepSeek on state devices,[133] twenty-one state attorneys general sent a letter to Congress urging it to enact a proposed federal bill entitled "No DeepSeek on Government Devices Act."[134]

This set of state actions suggests that the phenomenon we describe in this section likely will continue to expand as new technologies and, alongside them, new vulnerabilities arise.

At the other end of the spectrum, some states have engaged with China in a more positive way, and those interactions too may raise federal concerns. China has historically courted a range of states and localities,[135] some of which have been amenable to building relationships with foreign governments.[136] For example, California Governor Gavin Newsom took a high-profile trip to China in October 2023, where he met with Chinese President Xi Jinping and Foreign Minister Wang Yi and discussed climate cooperation, fentanyl, human rights, and Taiwan.[137] In January 2024, mayors from cities in Indiana and Mississippi traveled to China to discuss trade and investment opportunities.[138] Various mayors have engaged with China in efforts to obtain pandas for their city zoos, with China often seeking political influence in return.[139]

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[132] *See* Emmet Lyons, *DeepSeek AI Raises National Security Concerns, U.S. Officials Say*, CBS NEWS (Jan. 29, 2025, at 09:03 ET), https://www.cbsnews.com/news/deepseek-ai-raises-national-security-concerns-trump [https://perma.cc/LCC5-CALE].

[133] *See* Joe Panettieri, *DeepSeek: Banned and Permitted in Which Counties? List of Government Actions vs. China-Based AI Software*, SUSTAINABLE TECH PARTNER (May 11, 2025), https://sustainabletechpartner.com/news/deepseek-banned-and-permitted-in-which-counties-list-of-government-actions-vs-china-based-ai-software [https://perma.cc/F344-EYVW].

[134] Letter from Austin Knudsen, Mont. Att'y Gen., et al. to Rep. Mike Johnson, Speaker, U.S. House of Reps., Sen. John Thune, Majority Leader, U.S. Sen., Rep. Hakeem Jeffries, Minority Leader, U.S. House of Reps., Sen. Chuck Schumer, Minority Leader, U.S. Sen. (Mar. 6, 2025), https://www.alabamaag.gov/wp-content/uploads/2025/03/2025.03.06-DeepSeek-Letter-to-Congress_FINAL.pdf [https://perma.cc/3729-CCS5].

[135] Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310, 369 (2023).

[136] *See, e.g.*, Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 994 (2001).

[137] *See* Huizhong Wu, *California Governor's Trip Shows US-China Engagement Is Still Possible on a State Level*, AP NEWS (Oct. 28, 2023, at 02:25 ET), https://apnews.com/article/newsom-china-visit-xi-jinping-22316290e39e078fobb695a250e8658e [https://perma.cc/H89C-M9SH]; Huizhong Wu, *California Gov. Newsom Has Surprise Meeting with China's Leader Xi amid Warm Welcome in Beijing*, AP NEWS (Oct. 25, 2023, at 10:13 ET), https://apnews.com/article/china-visit-gavin-newsom-wang-yi-us-7f2bcb44d9279296f853f1042b298877 [https://perma.cc/4W3C-BMED].

[138] *See* Lily Kuo & Cate Cadell, *Tired of Hostile Washington, China Courts Indiana and Minnesota*, WASH. POST (Jan. 30, 2024), https://www.washingtonpost.com/world/2024/01/30/us-china-relations-beijing-washington [https://perma.cc/MUX7-MWA9].

[139] Mara Hvistendahl, Heather Knight & Vik Jolly, *As China Seeks Influence, It Has a Cuddly Way into City Hall: Pandas*, N.Y. TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/world/asia/china-influence-city-local-government-pandas-intelligence.html [https://perma.cc/JK65-HC55].

And Professor Ryan Scoville has detailed the wide range of international arrangements that China has concluded with states, including numerous commitments involving collaboration on "information technology"[140] and "even 'technology transfer' in . . . strategically sensitive fields such as nanotechnology, aerospace, biotechnology, and semiconductors."[141] Some of these interactions may undercut discrete federal efforts to restrict various interactions and trade with China, sway state leaders to adopt particular policy positions on China-related matters, or interfere more generally with the federal government's management of China policy.

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States have also adopted measures outside these categories. For example, Florida has prohibited state universities from participating in partnerships with universities based in countries of concern (including China, Russia, Iran, and North Korea).[142] Texas has banned its businesses from entering into contracts related to critical infrastructure with companies from a similar list of countries.[143] Arkansas enacted two laws restricting nationals of foreign states that are subject to federal trafficking in arms regulations (including China, Iran, and Cuba) from owning cryptomining operations in the state.[144] And Missouri sued China, alleging that China caused the COVID-19 pandemic, allowed it to spread, and hoarded protective equipment.[145]

The next section discusses recent and ongoing legal challenges to states' actions.

C. Litigation over States' Actions

In the increasingly crowded field of actions targeting China and Russia, litigants are already asking courts to adjudicate the interaction of federal and state policies on Russia and China. Challengers have raised rights-based claims founded on the First Amendment and the Equal Protection Clause, as well as preemption claims that raise fundamental questions about the relationship between the federal government and

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[140] Scoville, *supra* note 135, at 369.

[141] *Id.* at 370 (footnotes omitted).

[142] FLA. STAT. § 288.860 (2025).

[143] Lone Star Infrastructure Protection Act, TEX. BUS. & COM. CODE ANN. §§ 117.001–.004 (West 2025), TEX. GOV'T CODE ANN. §§ 2275.0101–.0103 (West 2025). *See generally* Kristen E. Eichensehr, Essay, *CFIUS Preemption*, 13 HARV. NAT'L SEC. J. 1, 21 (2022) (arguing that CFIUS preempts the Texas statute for transactions within its jurisdiction).

[144] Michael Forsythe & Gabriel J.X. Dance, *Biden Bans Chinese Bitcoin Mine near U.S. Nuclear Missile Base*, N.Y. TIMES (May 13, 2024), https://www.nytimes.com/2024/05/13/us/bitcoin-mine-biden-ban.html [https://perma.cc/3T2Q-JZKQ]; *see also* ARK. CODE ANN. § 14-1-606 (West 2025). A data center that mines cryptocurrency has challenged those laws as violating the U.S. Constitution. Complaint at ¶¶ 43–44, Jones Eagle, LLC v. Ward, No. 24-cv-00990 (E.D. Ark. filed Nov. 13, 2024).

[145] *See* Missouri *ex rel.* Bailey v. People's Republic of China, 769 F. Supp. 3d 877, 882–83 (E.D. Mo. 2025) (ruling for Missouri, *id.* at 882).

the states on security issues. Although courts have previously considered preemption questions arising from states' foreign policy–related actions, the national security aspects of recent state policies and the sheer volume of state actions with respect to China create an opportunity to reconsider the doctrine and identify potential pitfalls that could arise if courts pursue certain approaches to these preemption challenges.[146] This section provides an overview of litigation involving states' anti-China and anti-Russia actions to date.

Perhaps the highest-profile case involving a Chinese company flows from Montana's 2023 effort to ban TikTok in the state, ostensibly due to concerns about the transfer of Montana citizens' data to the People's Republic of China.[147] TikTok and TikTok users sued, arguing, among other claims, that the ban violated the First Amendment, was preempted by federal laws (including the CFIUS-related provisions of the Defense Production Act of 1950[148] and IEEPA), and violated the dormant commerce clause.[149] A federal district court subsequently issued a preliminary injunction against Montana's TikTok ban.[150] The court warned of "the pervasive undertone of anti-Chinese sentiment that permeates the State's case and the instant legislation"[151] and concluded that Montana's ban likely violated the First Amendment and dormant commerce clause and was preempted by the CFIUS statute and the federal foreign affairs power.[152] In holding the statute likely preempted, the district court relied on both field preemption and conflict preemption.[153] As to field preemption, the district court explained that the statute "attempts to establish a foreign policy for Montana,"[154] and thus "intrudes on the federal government's exclusive power to conduct and regulate foreign affairs."[155] The district court also held that the statute likely was preempted under a conflict preemption theory because it "conflicts with the United States' ability to interact with and regulate

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146 *See* Cleveland, *supra* note 136, at 991 ("[D]etermining the extent to which legitimate state activities may impinge on foreign affairs remains difficult.").

147 Act of May 17, 2023, ch. 503, 2023 Mont. Laws 1446, 1446–47.

148 50 U.S.C. § 4565.

149 *See* Complaint for Injunctive and Declaratory Relief at ¶¶ 87–94, 109–26, Alario v. Knudsen, 704 F. Supp. 3d 1061 (D. Mont. 2023) (No. 23-cv-00056); Complaint for Declaratory and Injunctive Relief at ¶¶ 85–128, TikTok Inc. v. Knudsen, No. 23-cv-00061 (D. Mont. filed May 22, 2023).

150 *Alario*, 704 F. Supp. 3d at 1088.

151 *Id.* at 1078.

152 *Id.* at 1073, 1084–86. The court rejected the plaintiffs' argument that IEEPA preempted the Montana law. *Id.* at 1084, 1086.

153 *Id.* at 1081.

154 *Id.* at 1084.

155 *Id.* at 1083 (quoting Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1076 (9th Cir. 2012)).

TikTok" via the then-ongoing CFIUS process.[156] Montana has appealed to the Ninth Circuit.[157]

A Florida law that limits the ability of certain non–U.S. citizens to purchase property in the state also has prompted a legal challenge. Specifically, the law prohibits people who are not U.S. citizens or lawful permanent residents and who are "domiciled in a foreign country of concern," defined to include China, Russia, Iran, North Korea, Cuba, Syria, or "the Venezuelan regime of Nicolás Maduro,"[158] from owning property within ten miles of a military installation or critical infrastructure facility.[159] For those domiciled in China, the law goes further, prohibiting them from owning real property "regardless of its proximity to military installations or critical infrastructure."[160] Four Chinese citizens living in Florida and a real estate brokerage that works with Chinese clients sued state officials, arguing that the law violated the Equal Protection Clause, the federal Fair Housing Act, and the Due Process Clause (on a void-for-vagueness theory) and that the CFIUS process preempted the state law.[161] Although noting that the preemption claim was "closer than the others," the district court denied the plaintiffs' motion for a preliminary injunction, concluding that the Florida statute reflected a focus on security rather than an effort to exert pressure on foreign countries and that states have long regulated land ownership by aliens.[162] On appeal, the Eleventh Circuit granted the plaintiffs' motion for an injunction pending appeal on the ground that the plaintiffs had shown a substantial likelihood of success on their claim that the Florida statute is preempted by the federal statute governing CFIUS review.[163] The Eleventh Circuit held oral argument in April 2024.[164]

Finally, a federal district court held New Jersey's Russia sanctions law preempted, prompting the state to substantially narrow it.[165] New Jersey informed Kyocera Document Solutions America, Inc. (Kyocera) that its contract with the state would not be renewed and that it would

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156 *Id.* at 1085. Courts have dismissed other challenges to state TikTok bans. *See, e.g.*, Coal. for Indep. Tech. Rsch. v. Abbott, 706 F. Supp. 3d 673, 688–89 (W.D. Tex. 2023) (dismissing a First Amendment challenge by academics to Texas's ban on the use of TikTok on state-owned devices and networks).

157 *Alario*, 706 F. Supp. 3d 673, *appeal docketed*, No. 24-34 (9th Cir. Jan. 3, 2024).

158 FLA. STAT. § 692.201 (2025).

159 Yifan Shen v. Simpson, 687 F. Supp. 3d 1219, 1229 (N.D. Fla. 2023) (quoting § 692.203(1)).

160 *Id.* at 1230 (quoting § 692.204(1)(a)(4)).

161 *Id.* at 1229, 1244–46.

162 *Id.* at 1246, 1249–50.

163 Yifan Shen v. Comm'r, No. 23-12737, slip op. at 2–3 (11th Cir. Feb. 1, 2024) (order granting injunction pending appeal); *see supra* note 82 and accompanying text.

164 *See* Oral Argument at 0:04, *Yifan Shen*, No. 23-12737, https://www.ca11.uscourts.gov/oral-argument-recordings?title=23-12737 [https://perma.cc/2YG4-G4JJ].

165 Kyocera Document Sols. Am., Inc. v. Div. of Admin., 708 F. Supp. 3d 531, 537 (D.N.J. 2023); Daniel Han, *New Jersey's Anti-Russia Law Drastically Scaled Back After Court Loss*, POLITICO (Jan. 26, 2024, at 05:00 ET), https://www.politico.com/news/2024/01/26/new-jersey-anti-russia-law-drastically-scaled-back-after-legal-setback-00137848 [https://perma.cc/D55S-HW8M].

be added to the list of entities engaged in "prohibited activities," and Kyocera sued.[166] As the district court explained, Kyocera "does not conduct . . . business of any kind in Russia or Belarus, or with any Russian or Belarussian company," but New Jersey included it on the list because "[w]hile [Kyocera] complies with the federal sanctions regime against Russia, it violates the expansive scope of New Jersey's Russia Act because a distant Russian company, with which [Kyocera] does no business, is nonetheless owned by the same Japanese parent company."[167] After discussing both foreign affairs field preemption and conflict preemption, the district court determined that it need not decide whether the statute would be preempted on a field preemption theory because it clearly conflicted with federal law.[168] The court explained that "[t]he federal sanctions are carefully limited to targeting specific actors and industries that bear responsibility for Russia's aggression towards Ukraine," and that "they do not stretch remotely as far and wide as New Jersey's Russia Act."[169] Moreover, the state statute also "imposes different penalties than those required by federal sanctions."[170]

Given these differences, the district court concluded that the fact that the state sanctions would end upon termination of the federal sanctions did not save the state statute from preemption.[171] It determined that "the country's ability to speak with one voice — both in cooperating with like-minded allies and in pressuring Russia to end its aggression and occupation — is undercut when one state, let alone fifty different states, is able to set its own foreign policy by citing its procurement statutes."[172] The district court enjoined New Jersey from enforcing the statute against Kyocera, but not against all potential plaintiffs.[173] The court noted that "it is theoretically conceivable that some application of the Russia Act — perhaps to a company targeted by federal sanctions, rather than one that falls far outside the outer bound of what the federal regime proscribes — might not create the same constitutional conflict as the law's application here."[174] New Jersey subsequently announced that it would revise its prohibited list to include only those individuals and entities subject to federal Russia-related sanctions as determined by the U.S. Treasury Department.[175]

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166 *Kyocera*, 708 F. Supp. 3d at 536–37.

167 *Id.* at 536.

168 *Id.* at 547. The court also declined to decide whether the statute violated the Foreign Commerce Clause. *Id.* at 544 n.17 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 (2000)).

169 *Id.* at 551.

170 *Id.*

171 *Id.*

172 *Id.* at 553 (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 373 (2008)).

173 *Id.* at 560–61.

174 *Id.* at 560.

175 Han, *supra* note 165.

The next Part explains how states' actions with respect to China and Russia challenge existing accounts of federalism.

II. ENTREPRENEURIAL FEDERALISM

This Part situates states' national security actions alongside several leading theories of federalism. We argue that the states' recent actions do not fit neatly into leading theories, including dual federalism, cooperative federalism, uncooperative federalism, and overcooperative federalism.[176] Instead, states' actions in the national security space are best described by what we call "entrepreneurial federalism."[177]

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[176] This summary of theories of preemption borrows in part from Eichensehr, *supra* note 143, at 10–12. There are other theories of federalism as well, including executive federalism and partisan federalism. *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 971 (2016) (defining "[e]xecutive federalism" as "policymaking through intergovernmental negotiation by executives at different levels of a federal system"); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) ("Partisan federalism . . . involves political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic."). However, we do not focus on executive federalism because its fundamental premise of the dominance of state and federal *executives* in negotiating federalism issues is missing in the national security issues on which we focus. At the federal level, Congress has been very active in passing and amending legislation, *see supra* section I.A, pp. 479–83, and similarly, at the state level, many of the states' actions have been legislative, not (or not just) executive, *see supra* section I.B, pp. 484–91. We also find "partisan federalism" to be a mismatch for the phenomenon on which we focus. At the federal level, the national security–related actions we describe have garnered widespread bipartisan support, *see, e.g.*, Deeks & Eichensehr, *supra* note 20, at 1863–64, and many of the categories of state action have emerged from both Republican and Democratic state governments, *see, e.g.*, Fung & Hickey, *supra* note 114. Although it is generally true that "Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans," Bulman-Pozen, *Partisan Federalism*, *supra*, at 1080, that pattern does not hold for the actions on which we focus.

[177] As part of the academy's consideration of state actions that implicate foreign governments, scholars have written about "foreign affairs federalism," but have used the term less as a theory of federalism than as a general descriptor suggesting that states are and should be permitted to undertake some actions related to foreign affairs. *See, e.g.*, MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY, at xv (2016) (defining "foreign affairs federalism" as "the constitutional allocation of foreign affairs powers between the federal government and the states"); *id.* at xviii (describing as a "myth" the idea "that foreign policy is or should be, with a few minor and inconsequential exceptions, exclusively federal"). Scholars who have written about foreign affairs federalism and theories of federalism have largely subsumed federalism issues related to foreign affairs within the extant theories of federalism discussed in this Part. *See, e.g.*, Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2134 (2017) (book review) ("[M]ost of foreign affairs federalism . . . is now cooperative or uncooperative."); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 188 (2001) (noting that "[d]ual federalism is making its last stand . . . in foreign affairs" and criticizing the Supreme Court for that approach). By contrast, we consider states' security-focused actions as exemplars of a different type of interaction between federal and state actors: "Entrepreneurial federalism" is defined by the nature of the federal-state relationship, rather than by its operation in the field of national security or foreign relations.

Consider first dual federalism. Dual federalism is characterized by the idea that the federal government and the states operate in separate spheres into which the other government may not intrude.[178] Professor Morton Grodzins famously described this as "layer cake" federalism, with "the institutions and functions of each 'level' [of government] being considered separately."[179] Although dual federalism, or the "separate spheres" concept, generally fell out of fashion in the mid-twentieth century in favor of more nuanced theories that grapple with the interconnectedness of states and the federal government,[180] it has persisted with respect to foreign relations.[181] Its enduring popularity finds support in Founding-era sources, such as James Madison's declaration that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[182] The Supreme Court has also lent support to the idea of federal control over foreign relations, explaining in a 1942 case that "[n]o State can rewrite our foreign policy to conform to its own domestic policies" and that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[183] As foreign relations scholars have noted, however, this account of federal exclusivity in foreign relations is oversimplistic and does not account for state actions that touch on foreign relations.[184] The point applies with even greater force with respect to security. States have always played important roles in ensuring the security of their citizens, though typically

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178 *See* 2 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 502 (7th ed. 1991) ("[D]ual federalism . . . held that the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way as to intrude, even incidentally, upon the sphere of sovereignty reserved to the other."); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (explaining in describing "Dual Federalism" that "[w]ithin their respective spheres the two centers of [state and federal] government are 'sovereign' and hence 'equal'" and that "[t]he relation of the two centers with each other is one of tension rather than collaboration").

179 MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 8 (Daniel J. Elazar ed., 1966).

180 Professor Edward Corwin eulogized the theory in 1950. Corwin, *supra* note 178; *see also* Young, *supra* note 177, at 139 (noting that "'dual federalism[]' died an ignominious death in 1937 or shortly thereafter").

181 *See, e.g.*, Young, *supra* note 177, at 141 ("[D]ual federalism *has* survived in the Court's approach to foreign affairs cases."); *cf.* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 574–80 (2008) (explaining but rejecting the "conventional legal wisdom" of "federal exclusivity," *id.* at 575, with respect to immigration).

182 THE FEDERALIST NO. 42, at 260 (James Madison) (Clinton Rossiter ed., 2003).

183 United States v. Pink, 315 U.S. 203, 233 (1942); *see also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.").

184 *See, e.g.*, KOH, *supra* note 4, at 296 (noting that "[t]raditional judicial views of federalism [that] . . . sought to bar states and localities from participation in foreign affairs" now "seem rigid and anachronistic"); GLENNON & SLOANE, *supra* note 177, at 353 ("[S]tates and cities have emerged as major participants in U.S. foreign affairs."); Galbraith, *supra* note 177, at 2141–51 (describing examples of state actions related to foreign relations).

against local threats.[185] The challenge now is that national security threats from foreign governments can manifest locally, disrupting any neat separation between state and federal spheres.[186]

Acknowledging that the federal government and states do not operate in separate spheres in national security — or put differently, that the national security sphere is not exclusively federal — raises the question of how to conceptualize these federal and state interactions. In discussing other, domestically focused areas of governance, scholars have offered numerous glosses on this issue.

Prominent among these theories is "cooperative federalism," which "envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."[187] This "marble cake"[188] version of federalism "enlists state and local officials in the implementation and enforcement of federal regulatory programs."[189] "[C]lassic cooperative federalism statutes" include the Clean Air Act and Medicaid, where federal law "delegate[s] the implementation of federal programs to states."[190] Although cooperative federalism "creates a co-regulator relationship between state and federal administrators and thereby affords states special access to the federal regulatory process,"[191] it also makes states subordinate to federal policy.[192]

States' current national security–related actions do not fit neatly into a cooperative federalism paradigm because states are not signing onto a federal program and then implementing it. There is some similarity to cooperative federalism in the examples described in section I.B, such as where states have banned drone purchases from Chinese companies, in line with purchasing restrictions the federal government imposed on

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185 *See, e.g.*, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 525 (1991).

186 Although there is a dearth of scholarship about the intersection of national security and state or local actions, one exception is Professor Matthew Waxman's exploration of the cooperation among federal, state, and local actors in counterterrorism. Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012). Think tanks have also begun to focus on federalism and national security. *E.g.*, Press Release, Ctr. for a New Am. Sec., CNAS Launches New Project: "21st Century Federalism and the National Security Implications" (Feb. 7, 2024), https://www.cnas.org/press/press-release/cnas-launches-new-project-21st-century-federalism-and-the-national-security-implications [https://perma.cc/W2X7-KBB4].

187 Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

188 GRODZINS, *supra* note 179, at 8.

189 Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 430 (2013).

190 Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 468 (2014).

191 *Id.*

192 Corwin, *supra* note 178, at 21 (explaining that "'[c]ooperative [f]ederalism' spells further aggrandizement of national power" because "when two cooperate it is the stronger member of the combination who calls the tunes"); Young, *supra* note 189, at 430 ("[C]ooperative federalism places state officials in a subordinate role, implementing programs developed at the national level . . . .").

federal agencies.[193] Colloquially, the states are "cooperating" with the federal program and, as we argue below, perhaps usefully supplementing it by expanding enforcement and compliance resources and causing a decrease in the risks that both the federal and state governments seek to combat.[194] But even in those arguably "cooperative" instances, states are not engaged in classic cooperative federalism because the federal government has not enlisted the states' assistance to share regulatory authority or even to implement the federal programs.

For similar reasons, states' national security–related actions are not examples of "uncooperative federalism." Professors Jessica Bulman-Pozen and Heather Gerken define "uncooperative federalism" as occurring where "states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law."[195] They tout the "underappreciated benefits" of what they call the "power of the servant,"[196] including "that federal-state integration . . . creates more incentives for state governments to check the federal government."[197] Like cooperative federalism, the premise of uncooperative federalism is that states are involved in or implementing a federal regulatory program — the condition that renders them "servants" in Bulman-Pozen and Gerken's telling.[198] But, again, that premise is missing with respect to states' recent national security–related actions. In some areas that we discuss, states may well be acting "uncooperatively" in a colloquial sense and dissenting from federal policy on a variety of issues. Consider Montana's effort to ban TikTok in advance of federal legislation,[199] or Florida's real estate law that prohibits purchases even of single-family homes by Chinese nationals.[200] Both can be construed as dissenting from a federal policy that has not gone as far as the states would like. But because the states are not acting as servants of the federal government in these endeavors, their actions sit outside the classic uncooperative federalism framework.

The closest existing categorization for some of the states' national security–related actions is what Professor Ernest Young calls "overcooperative federalism."[201] Overcooperative federalism captures situations in which states "wish to enforce federal law more aggressively than do federal officials" and are "overzealous" in their enforcement of that

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193 *See supra* notes 119–25 and accompanying text.

194 *See infra* section III.B, pp. 507–12.

195 Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009).

196 *Id.* at 1285.

197 *Id.* at 1291.

198 *Id.* at 1258.

199 *See supra* notes 147–57 and accompanying text.

200 *See supra* notes 158–64 and accompanying text.

201 Young, *supra* note 189, at 446 (emphasis omitted).

law while acting outside a federal program.[202] Young gives several examples, including state officials enforcing federal immigration laws "outside [an] explicit delegation of federal authority" and "without direct federal supervision," state attorneys general "su[ing] to enforce federal law on behalf of their citizens," and state authorities "us[ing] their investigatory powers under state law to bring violations of federal law to light and pressur[ing] federal regulators to act."[203] The last and mildest category of overcooperative federalism captures some of the states' national security–related actions. Consider, for example, California's Russia sanctions regulations, which require state agencies to collect information about contractors' compliance with federal sanctions,[204] or state laws that require their agencies to review certain federal filings about agricultural land purchases and refer suspected noncompliance to state attorneys general.[205] In these instances, there may be overlap between overcooperative federalism and examples we identify of useful supplementation.

However, most of the states' actions do not fit within Young's conception of overcooperative federalism because states are not overenforcing federal law. Rather, states are enacting laws that reflect some of the same national security concerns that Congress and the Executive have evinced — concerns about Russia's war of aggression against Ukraine and about China stealing personally identifiable information, using technological hardware and software to capture U.S. information, and positioning itself to undercut the health and safety of U.S. citizens in the event of a future conflict.[206] But states are going beyond federal law in various ways, issuing broader or different prohibitions or more stringent requirements, and potentially limiting the discretion that federal officials would otherwise have to manage policy toward China and Russia.[207] Although these examples are not states' attempts to enforce federal law overzealously, as Young envisions for overcooperative federalism, they may well be subject to the same legal weaknesses. Notably, one of Young's main examples of overcooperative federalism is Arizona's attempts to enforce federal immigration law "outside [an] explicit delegation of federal authority"[208] — efforts that the Supreme Court held were

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202 *Id.* at 446. At one point in discussing overcooperative federalism, Young asks, "What happens when states exercise the 'power of the servant' to be overzealous, rather than shirking their duty?" *Id.* His reference to the "power of the servant" might suggest that his theory, too, requires states to be acting within a federal program, but his subsequent examples involve instances where states act outside a federal program. *See id.* at 446–47.

203 *Id.* at 447 (emphasis omitted).

204 *See* Cal. Exec. Order No. N-6-22, at 2–3 (Mar. 4, 2022).

205 *See infra* note 255 and accompanying text.

206 *See supra* section I.B, pp. 484–91.

207 *See supra* section I.B, pp. 484–91; *cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 427 (2003) (holding a California state law on Holocaust insurance disclosures preempted because the state "seeks to use an iron fist where the President has consistently chosen kid gloves").

208 Young, *supra* note 189, at 447.

preempted because they intruded on a field reserved to the federal government and served as an obstacle to the federal enforcement scheme.[209]

For both overcooperative federalism and the state actions we discuss, it is worth bearing in mind the warning that the Supreme Court issued while preempting state sanctions in a foreign relations context: "The fact of a common end hardly neutralizes conflicting means . . . ."[210]

Because states' national security–related actions largely do not fit within existing theories of federalism, we propose a new descriptor to capture the phenomenon on which we focus: entrepreneurial federalism. Entrepreneurial federalism occurs when states act in areas traditionally dominated by the federal government — notably, national security and foreign policy — and do so not as part of a federal program or pursuant to federal law.[211] Instead of acting as "servants" for the federal

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[209] Arizona v. United States, 567 U.S. 387, 403, 406, 410 (2012). Although states' police powers were understood to give them some authority to regulate immigration in the nineteenth century, subsequent "pervasive federal regulation" now ensures that most state efforts related to immigration will be preempted by federal law. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1837 & n.20 (1993); *id.* at 1893 (discussing state police powers in the nineteenth century); Rodríguez, *supra* note 181, at 620 ("The fact that the federal government has regulated so comprehensively in the immigration field means that a statutory basis for preemption is not difficult to find . . . ."). The Supreme Court has recognized that some immigration-related matters raise foreign policy and national security issues. *See, e.g.*, Biden v. Texas, 142 S. Ct. 2528, 2541–43 (2022) (interpreting an immigration statute as providing the executive branch with the discretion — not the obligation — to return certain migrants to Mexico in part because doing otherwise would interfere with the Executive's control of foreign policy); Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (acknowledging that certain immigration cases overlap with national security and highlighting the Court's traditional deference to the Executive on foreign affairs and national security). Certain state immigration-related actions are closely akin to the security-focused issues on which we focus. States — particularly along the southern U.S. border — have claimed to independently identify and assess security concerns in ways that conflict with the federal government's assessments. *See, e.g.*, H.R. 2060, 56th Leg., 2d Reg. Sess. (Ariz. 2024) (asserting a range of harms related to immigration across the southern U.S. border and criticizing federal immigration enforcement). Some such state actions may be examples of entrepreneurial federalism and thus subject to the preemption analysis we suggest in section IV.A. For example, in *Arizona v. United States*, the Supreme Court relied on field preemption to invalidate a provision of state law on "alien registration" that created a "state-law penalty for conduct proscribed by federal law." 567 U.S. at 400–03. Our analysis suggests that the Court should have relied on a narrower obstacle preemption theory instead.

[210] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000); *see also Arizona*, 567 U.S. at 406 (holding an Arizona immigration-related law preempted because "[a]lthough [it] attempts to achieve one of the same goals as federal law . . . it involves a conflict in the method of enforcement," and "a '[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy'" (third alteration in original) (quoting Motor Coach Emps. v. Lockridge, 403 U.S. 274, 287 (1971))).

[211] This is in contrast to federal statutes that specifically create a role for states with respect to federal law or programs. *See, e.g.*, 42 U.S.C. § 7410(a)(1) (requiring, as part of the Clean Air Act, that states "adopt and submit to the [EPA] Administrator" implementation plans for air quality standards); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 708–10 (2011) (discussing federal statutes that authorize enforcement by state officials); Weiser, *supra* note 187, at 665 & n.3 (discussing the Telecommunications Act of 1996 as an example of a "'cooperative federalism' regulatory program[] that invite[s] state agencies to implement federal law," *id.* at 665).

government, states act as entrepreneurs, inventing roles for themselves.[212] States have long been associated with innovation in the U.S. federal system as "laboratories" for policy experimentation.[213] But discussions of states as laboratories typically assume that states are acting within traditional areas of state responsibility.[214] Although a "separate spheres" or dual federalism model that views states as entirely disabled from acting on these issues is too simplistic,[215] national security and foreign policy are areas that historically skew heavily *federal*. The innovation in entrepreneurial federalism is that states are adding themselves to a traditionally (though not exclusively) federal arena — and doing so without formal request, invitation, or direction from the federal government. Contrary to cooperative and uncooperative federalism's emphasis on states as federal servants, entrepreneurial federalism emphasizes states' independence from the federal government. Even when states choose to draw on federal standards, regulations, or definitions, they do so not based on participation in a federal program, but based on their own purported powers and legal authorities.

The speed, breadth, and sheer quantity of the states' China-focused actions have made understanding the state-federal relationship on national security increasingly urgent. But the entrepreneurial federalism descriptor has broader utility. It captures, for example, states' earlier foreign policy–focused actions, as well as contemporary state responses to Russia's full-scale invasion of Ukraine. It might also arguably apply to some state measures related to stemming migration across the southern U.S. border, which intersect with issues of foreign policy and

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[212] *See generally* David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283 (2008) (chronicling and largely defending the proliferation of the term "entrepreneur" across a variety of social and political contexts). For another area in which states have acted as entrepreneurs in the national security space, see Ashley Deeks, *Secrecy Surrogates*, 106 VA. L. REV. 1395, 1442–46 (2020) (describing a role for states in providing checks on federal national security practices in the cyber, election, and counterterrorism arenas). States are not the only entities that innovate roles for themselves related to national security: Private companies have engaged in similar entrepreneurial activity outside the auspices of federal programs. *Cf.* Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 507–11 (2017) (arguing that private actors have created quasi-governmental roles for themselves related to cybersecurity without direction from the U.S. government).

[213] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[214] *See* Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2189–90 (2022) (discussing how the "laboratories" idea aligns with a separate spheres vision of federalism that carves out space for states to experiment without federal interference).

[215] *See supra* notes 178–86 and accompanying text.

national security.[216] The key feature of entrepreneurial federalism is the existence of state action with respect to a federally dominated issue, outside the context of a federal program.

Entrepreneurial federalism maintains neutrality in characterizing states' actions as helpful or unhelpful. Like businesses engaged in traditional entrepreneurship, states engaged in entrepreneurial federalism may succeed or fail in achieving their (and the federal government's) goals, and their efforts could be either helpful or counterproductive from a federal perspective. The challenges are how to manage ongoing federal and state interactions — and whether to permit the state actions in the area of traditional federal responsibility at all. Characterizing these state actions as falling within a new category of federalism will, we believe, help alert courts to some important differences between the new state national security actions and the historical foreign relations preemption cases to which judges might naturally analogize.

The remainder of the Article assesses normatively when and why states' recent China- and Russia-related actions may be helpful or, conversely, unhelpful and in need of preemption. The next Part explains why judges may be tempted to preempt states' acts of entrepreneurial federalism in the national security sphere, but highlights some possible benefits of states' entrepreneurship on national security–related issues: namely, instances where state actions can provide useful supplementation of or productive friction to federal policy.

III. THE UNDERAPPRECIATED PERILS OF PREEMPTION

One of the basic features of U.S. constitutional law is the principle that federal law can trump state law.[217] Congress and the Executive acting together can explicitly preempt state law in federal statutes, and, within the Executive's constitutional authority, the executive branch can

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[216] *See supra* note 209 (discussing the interaction among immigration law, foreign policy, and national security). Other examples might arise outside the foreign relations and national security settings. For instance, some state measures to address climate change might constitute acts of entrepreneurial federalism. California's statutory cap-and-trade arrangement with Quebec, CAL. CODE REGS. tit. 17, § 95943 (2025), and California's mandatory climate emissions disclosure law, CAL. HEALTH & SAFETY CODE § 38532, may be two such examples. In the former case, a federal district court upheld California's cap-and-trade arrangement against a preemption challenge by the Trump Administration. *See* United States v. California, No. 19-cv-02142, 2020 WL 4043034, at *5–12 (E.D. Cal. July 17, 2020) (concluding that California's arrangement with Quebec and underlying state law were not preempted on either conflict (obstacle) or field preemption grounds). On California's emissions disclosure law, see Henry Engler, *Companies Need to Integrate Climate Reporting Across Functions to Comply with California's New Law*, THOMSON REUTERS (Oct. 20, 2023), https://www.thomsonreuters.com/en-us/posts/esg/california-climate-reporting-law [https://perma.cc/6LLG-QBAF] (noting that California enacted its disclosure law at the same time that the Securities and Exchange Commission was preparing its own parallel rules, and that California's law goes further than the proposed federal rule by applying to private, as well as public, companies).

[217] *See* U.S. CONST. art. VI, cl. 2.

preempt state laws acting alone.[218] But often federal lawmakers are not explicit about whether or to what extent they intend to displace state law. Courts have therefore developed a family of preemption doctrines to assess whether and when federal statutes, treaties, executive actions, or even "dormant" federal powers preempt state action.[219] Preemption can be legally complicated for courts to address because the doctrines and their relationship to each other are unclear.[220] As Professor Caleb Nelson puts it: "Modern preemption jurisprudence is a muddle."[221]

Add to this muddle the fact that the actions on which this Article focuses are framed by the federal government (and often the states too) as part of national security. Judges often conflate foreign relations and national security[222] and generally grant substantial deference to the executive branch's claims about and management of such issues.[223] This deference, combined with an enduring sense that foreign relations and national security are *national* issues,[224] has led courts in past cases to avoid applying the presumption against preemption of state law that they typically deploy, and instead to sometimes veer toward a presumption *in favor* of preemption of state laws related to foreign relations.[225]

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[218] *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1665 (1997) ("The Constitution's presumptive federal foreign relations lawmakers, Congress and the President, have adequate means to monitor and, when necessary, to override state practices affecting foreign relations.").

[219] *See, e.g.*, CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 280 (8th ed. 2024) (discussing conflict, obstacle, and field preemption); *id.* at 296–99 (discussing dormant preemption).

[220] *See, e.g.*, Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 (2001) ("The Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear."); Paul B. Stephan, *One Voice in Foreign Relations and Federal Common Law*, 60 VA. J. INT'L L. 1, 50 (2019) (arguing that "the Court's jurisprudence provides more noise than information" about "what should count as undue interference" by states with federal authority).

[221] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).

[222] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) ("'[J]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs." (quoting Ziglar v. Abbasi, 582 U.S. 120, 142 (2017))); Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010) (explaining that the Court gives "respect" to the executive branch's assessments because "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess").

[223] *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–63 (2000) (identifying five different categories of deference that courts grant the Executive on foreign relations); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 875–76 (2013) ("Although foreign affairs deference cases do not overlap entirely with national security deference cases, many forms of deference in the foreign affairs taxonomy appear in national security cases as well."); Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 326–32 (2016) (discussing rationales for judicial deference to the U.S. government on foreign relations–related issues).

[224] *See, e.g.*, *supra* notes 3–4 and accompanying text.

[225] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000) (reserving the question of whether a presumption against preemption is appropriate in a case involving federal preemption

But reliance on past foreign policy–related cases to preempt states' security-focused laws and executive actions comes with additional, less appreciated structural and policy costs.[226] This Part argues that state activities that implicate national security can be valuable in at least two ways. First, states can usefully supplement federal national security policies, bolstering federal goals and strengthening the policies' enforcement. Second, states can productively add friction to federal policy in certain circumstances, helping to guard against groupthink, check excessive accretions of power to the executive branch, and reveal the underappreciated economic costs of federal policy borne by states and localities. As a result, judicial decisions that preempt state actions too readily — or that use a broader form of preemption than is necessary — may unintentionally impose longer-term costs on the quality of U.S. national security policies.

A. The Temptation to Find State Laws Preempted

The stage is set for a spate of litigation about state actions aimed at China and, to a lesser extent, Russia. As judges across the country consider these cases, several features of the current situation suggest that they may be tempted to find state actions preempted early, often, and broadly.

First, as Part I made clear, the U.S. government is using a wide variety of economic tools of national security to manage relations with China and Russia. Quite simply, there is a tremendous amount of federal action, from statutes to regulations to executive branch policies governing the new national security, and as a result, the swath of state actions that might be understood to interfere with the federal government's control has broadened commensurately. When the scope of federal actions is combined with the traditional deference that the federal government, and especially the executive branch, receives from courts

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of state sanctions); *see also* Goldsmith, *supra* note 220, at 176–77 (noting "the conventional view that statutory foreign affairs preemption is a simple issue because . . . these statutes carry a powerful presumption of preemption," *id.* at 176, but arguing against a presumption for or against preemption in the context of foreign affairs); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1927–28 (2015) (noting that "[t]he Supreme Court has . . . treated statutory interpretation differently in foreign relations cases that raise federalism issues," including by "suggest[ing] . . . that there is a presumption *in favor* of preemption in the foreign relations context, rather than the usual presumption *against* preemption").

226 Because others have done so extensively, we do not discuss in detail the obvious benefits (from the states' perspective) of being able to articulate and enforce their own policy goals and the way that preemption interferes with those goals. We think that states sometimes have credible claims to protect the physical safety and privacy of their citizens; those claims will be more persuasive and less likely to cause foreign relations problems where the laws are generally applicable, rather than focused on *particular* foreign countries or their nationals.

on national security and foreign policy,[227] the potential breadth of preemption holdings becomes clear.

Second, the fact that Congress and the Executive have worked together on these expansions may further increase the likelihood and scope of federal preemption of state actions. The Supreme Court has suggested that when executive action falls within Category 1 of Justice Jackson's *Youngstown*[228] framework — that is, when the President is acting with the "express or implied authorization of Congress"[229] — the preemptive force of the federal action may increase.[230] In *Crosby v. National Foreign Trade Council*,[231] the Supreme Court held that federal, statutorily authorized sanctions on Burma preempted a Massachusetts state law that "restrict[ed] the authority of its [state] agencies to purchase goods or services from companies doing business with Burma."[232] Citing *Youngstown*, the Court explained:

> Within the sphere defined by Congress, . . . the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. . . . It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.[233]

The Category 1 nature of executive actions targeting China and Russia sets the stage for federal courts to take a strong preemptive approach.

Third, the resurgence of great power competition as the ordering paradigm for U.S. national security may prompt courts to echo reasoning from earlier eras that emphasized the need for federal government control, free from disruption or hindrance by the states. As Professor Jack Goldsmith explains: "It is no accident that an aggressive regime of statutory foreign affairs preemption received its major impetus . . . in the middle of World War II."[234] He notes that the U.S. "emerge[nce] as

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[227] *See supra* note 223 and accompanying text; *see also* Galbraith, *supra* note 177, at 2160 (suggesting that when "administrative law deals with issues that have transnational dimensions," and "[a]t least where the executive branch is trying to coordinate its regulatory approach with that of other nations," the Executive should receive "a touch of added deference").

[228] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[229] *Id.* at 635 (Jackson, J., concurring).

[230] *See* Kristen E. Eichensehr, *The* Youngstown *Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1309–13 (2021) (discussing the relationship between *Youngstown* categories and preemption).

[231] 530 U.S. 363 (2000).

[232] *Id.* at 366.

[233] *Id.* at 375–76.

[234] Goldsmith, *supra* note 220, at 194. The underlying cases that inform Goldsmith's arguments were ones in which states undertook actions sounding in foreign policy rather than national security. *Id.* at 195 & n.87. It is therefore not certain that the courts today, hearing cases involving states' security-focused laws, will adhere precisely to this reasoning.

a world superpower in a dangerous nuclear world" led to "a general consensus . . . throughout the Cold War[] that . . . these significantly changed circumstances required a much more centralized and flexible constitutional foreign relations apparatus than had previously been the case."[235] The consensus resulted in the Supreme Court encouraging a "presumption in favor of preemption" in the foreign affairs realm "as part of the broader need to establish federal control during the World and Cold Wars."[236] In light of the "everything, everywhere, all at once"[237] nature of U.S. concerns about threats from China and about Russia's ongoing threats to NATO, it is reasonable to assume that courts may reach conclusions similar to those they reached during the Cold War.

Finally, because some of the recent state actions seem to have been motivated by racism or xenophobia,[238] courts may view those actions with added skepticism and find preemption an especially attractive tool. In the Montana TikTok case, for example, the district court warned of "the pervasive undertone of anti-Chinese sentiment that permeates the State's case and the instant legislation" to block TikTok.[239] And in the Eleventh Circuit's grant of an injunction pending appeal against the enforcement of the Florida real estate law, one judge wrote a concurrence concluding that anti-Chinese statements by Florida officials helped "establish that the law is a blanket ban against Chinese noncitizens from purchasing land within the state."[240]

Although these temptations to find preemption are understandable — and we argue below that some of the current state actions merit preemption, including because of their discriminatory underpinnings — overly broad preemption holdings also risk disabling states from acting with respect to national security at all in the future, including when they

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[235] *Id.* at 195.

[236] *Id.* Others argue that *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court's first and only articulation of dormant foreign affairs preemption, was motivated by the Court's concern that state policies could exacerbate Cold War tensions. Peter J. Spiro, Essay, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1242 (1999).

[237] EVERYTHING EVERYWHERE ALL AT ONCE (A24 2022).

[238] *See, e.g.*, Mengchen Zhang, *National Security or Xenophobia? Texas Restricts Chinese Owning and Renting Property*, BBC (Aug. 28, 2025), https://www.bbc.com/news/articles/cgjyqnndvwjo [https://perma.cc/R8A6-QFXJ]; *cf.* Matiangai V.S. Sirleaf, *Confronting the Color Line in National Security*, *in* RACE AND NATIONAL SECURITY 3, 9 (Matiangai V.S. Sirleaf ed., 2023) ("[O]ne of the persistent ways that race manifests in national security law is in the determination of who and what counts as a 'threat.'").

[239] Alario v. Knudsen, 704 F. Supp. 3d 1061, 1078 (D. Mont. 2023).

[240] Yifan Shen v. Comm'r, Fla. Dep't of Agric. & Consumer Servs., No. 23-12737, 2024 U.S. App. LEXIS 2346, at *9 (11th Cir. Feb. 1, 2024) (Abudu, J., concurring).

have proper, nondiscriminatory motives.[241] The next two sections explore in more detail the downsides of disabling states.

B. Useful Supplementation

The first underappreciated peril of preemption is the loss of states' useful supplementation of federal policies. This section identifies various ways in which state laws can supplement federal national security and foreign policy, some of which have escaped comment in the foreign affairs federalism literature. Not every act by a state will necessarily provide each of these benefits, and some state actions will provide none of them. But in a range of cases, state activities can perform these salutary roles.

1. Gap-Filling. — In foreign relations, unlike in most areas of domestic law, federal law is more robust than its state law equivalents. But even Congress lacks the time or appetite to fully regulate in the national security and foreign relations space. State and local laws or regulatory actions can fill in gaps in a federal regime where the federal government has not directed states to act or lacks the constitutional authority to do so, and where the state activity pulls in the same direction as the federal policy. For example, the existing spate of state drone laws operates in a gap: Congress and the President have not attempted to mandate state restrictions on the acquisition and use of Chinese- or Russian-made drones.[242] Indeed, Congress might not want to directly regulate the purchase and use by state law enforcement of such drones, given that most lawmaking related to state policing is done at the state level.[243] Both the federal and state drone restrictions appear motivated by identical security concerns — the ability of the drone manufacturers to collect a wide range of sensitive data and share it with the Chinese or Russian governments[244] — which suggests that the federal government would support and indirectly benefit from these state restrictions.[245]

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[241] *See* Bulman-Pozen & Gerken, *supra* note 195, at 1303 (noting that the idea of "uncooperative federalism underscores the value of state statutes and regulations that occupy the same terrain as federal law" and suggesting that the Supreme Court should "tolerate a degree of conflict between such laws and their federal counterparts").

[242] Congress and the Executive have focused instead on restricting federal agencies and the military from utilizing such technology. *See supra* notes 57–61 and accompanying text.

[243] *See* JARED P. COLE, CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 2 (2016) (noting that, outside of the Constitution, "many of the rules and regulations governing local enforcement and judicial officers derive from state and local laws").

[244] *See, e.g.*, Letter from John Moolenaar & Raja Krishnamoorthi, *supra* note 125 (discussing cybersecurity and privacy concerns motivating both federal and state action restricting use of Chinese-made drones).

[245] *See id.* (containing request from federal lawmakers to local officials to take action against Chinese-made drones).

Or consider the case in which the city of Grand Forks, North Dakota, halted a multimillion-dollar agricultural project involving a Chinese company, which would have constructed a processing plant near a U.S. military base.[246] After CFIUS determined that it lacked jurisdiction over the transaction, the city acted at the urging of the U.S. Air Force, which told North Dakota's senators that "the proposed project presents a significant threat to national security."[247] Upholding state and local laws in these settings can render the effects of federal policy deeper and richer.

2. Bolstered Protection of State Citizens. — In addition to filling in gaps where Congress has not acted or cannot act, state national security–focused laws and policies can directly protect their citizens, often more quickly than Congress can. States generally understand better than the federal government what technology systems their civilian, law enforcement, and election officials are using. They understand how their local utilities work and what vulnerabilities exist. They hear directly from their constituents — including local businesses — about privacy concerns, online scams, and cyberattacks.[248] And it often will be easier for constituents to provide direct feedback to state or local governments about whether and how these laws are working than to provide feedback to federal officials about federal national security laws.[249] We expect that citizens will appreciate the increased responsiveness by governmental actors to their security concerns.[250]

3. Enhanced Enforcement of the Federal Regime. — When states enact and then enforce laws whose content is proximate to, cites to, or even duplicates federal laws, the state actions can enhance compliance with and enforcement of federal law. Especially in the latter two categories, the state laws focus the attention of the state's bureaucracy,

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[246] Justin Betti & Demi Hartl, *Grand Forks City Council Officially Cancels Fufeng Project; Crowd Erupts in Applause*, KFYRTV (Feb. 6, 2023, at 22:24 ET), https://www.kfyrtv.com/2023/02/07/grand-forks-city-council-officially-cancels-fufeng-project [https://perma.cc/BQ2T-Q573].

[247] *Id.*; News Release, John Hoeven, U.S. Sen., Hoeven, Cramer: Air Force Provides Official Position on Fufeng Project in Grand Forks (Jan. 31, 2023), https://www.hoeven.senate.gov/news/news-releases/hoeven-cramer-air-force-provides-official-position-on-fufeng-project-in-grand-forks [https://perma.cc/7NAL-YRFY] (quoting Letter from Andrew P. Hunter, Assistant Sec'y, Dep't of the Air Force, to John Hoeven, U.S. Sen. (Jan. 27, 2023), https://www.hoeven.senate.gov/imo/media/doc/USAIRFORCE-FUFENG-LETTER-HOEVEN.pdf [https://perma.cc/ACT6-QUCS]). CFIUS subsequently updated the federal installations that are covered by the real estate section of the CFIUS regulations. Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 88 Fed. Reg. 57348, 57350 (Aug. 23, 2023) (codified at 31 C.F.R. pt. 802). Had these amendments come earlier, Fufeng's project would have been within CFIUS's jurisdiction. *Id.* at 57352.

[248] *See generally State Consumer Protection Offices*, USAGOV, https://www.usa.gov/state-consumer [https://perma.cc/CUR7-238R] (directory of every state's consumer protection office).

[249] *See* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1315 (1994).

[250] *See* New York v. United States, 505 U.S. 144, 168 (1992) ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

companies doing business in the state, and the state's citizens on the federal rules. For example, after Russia's full-scale invasion of Ukraine, California Governor Gavin Newsom issued an executive order that required state agencies to review their "contracts for commodities, services, and technology to determine whether they comply with" federal and state economic sanctions (and terminate those contracts that do not).[251] Illinois, too, enacted a statute requiring its Investment Policy Board to identify Russian and Belarusian companies that are subject to federal sanctions and include them on a list of companies in which Illinois retirement systems may not invest.[252] As one commentator noted: "These types of state actions, which are consistent with the object and purpose of federal economic sanctions, create a 'sanctions plus' regime that reinforces federal restrictions."[253]

Further, when the state enacts laws that invoke related federal regimes and then enforces its laws, it may assume certain enforcement costs that the federal government would otherwise have to bear. Especially where the level of federal enforcement is being driven not by affirmative policy choices but by a lack of attention or resources, the federal government may find this helpful. Some state laws, for example, restrict foreign investment in their agricultural land; they require their state agricultural departments to review filings that foreign purchasers must make under the federal Agricultural Foreign Investment Disclosure Act of 1978[254] and "refer filings suspected of noncompliance to their state attorney general for investigation."[255] These states are effectively inspecting and enforcing the accuracy of federal reports. In addition to cost savings, the federal government may obtain political benefits from this supplementation: When several states enact laws that largely track the federal policy, they are signaling that they support the federal approach.

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[251] Cal. Exec. Order No. N-6-22, at 2–3 (Mar. 4, 2022); *see also* Fac. Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206, 1207–08 (11th Cir. 2010) (rejecting conflict and dormant preemption challenges to Florida statute that restricted use of state money for travel by state employees to countries on the federal "state sponsors of terror" list).

[252] 40 ILL. COMP. STAT. 5/1-110.16(d), (f-5) (2024); *see also* MD. CODE ANN., STATE PERS. & PENS. § 21-123.3(a)(8)(i), (c) (West 2025) (requiring state pension fund to divest from and not hold "any Russia-restricted investment[s]," *id.* § 21-123.3(c), including in companies identified by the U.S. Treasury Department's Office of Foreign Assets Control as Russian entities in which federal law prohibits investment, *id.* § 21-123.3(a)(8)(i)).

[253] Julia Spiegel, *How States Like California Are Bolstering Federal Sanctions Against Russia*, JUST SEC. (Apr. 5, 2022), https://www.justsecurity.org/80967/how-states-like-california-are-bolstering-federal-sanctions-against-russia [https://perma.cc/E5KP-PRKS]; *see also* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 41 (2007) ("[W]hen laws are built through a multitude of local efforts . . . , the rules inscribed become more entrenched as localities embrace specific precepts and link their civic identity to them in a fashion that sovereigntists should admire.").

[254] Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. §§ 3501–3508).

[255] U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106337, FOREIGN INVESTMENTS IN U.S. AGRICULTURAL LAND 2 n.5 (2024).

Finally, states can urge their localities to follow the same policies that the federal government and states are pursuing, further increasing the breadth of compliance with the federal regime.[256]

4. Motivation and Experimentation. — As other scholars have argued, states can act as first movers, ultimately prompting the federal government to act in a particular area.[257] Introducing new state rules where federal rules do not exist has repeatedly stimulated federal action.[258] For example, in the foreign policy context, states enacted human rights–based sanctions on South Africa, Sudan, and Burma before Congress chose to act, with the state laws clearly playing a role in motivating federal action.[259] Such laws offer models from which Congress and the President can draw if and when they decide to act, consistent with the "laboratories of democracy" idea so often cited as a virtue of federalism.[260] The state laws can reveal efficiencies or inefficiencies, serve as a way to gauge public reactions to such laws, and reveal state sentiments about geopolitical situations.[261]

State actions against TikTok serve as an example here. States such as Florida and Nebraska banned TikTok on some or all state government devices as early as August 2020;[262] Congress only enacted a comparable federal law in December 2022.[263] Some states have issued bans on TikTok alone; others have established prohibited lists that include a broader set of applications from China and Russia.[264] Some have embedded exemptions in the rules; others have not.[265] States also have

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256 Spiegel, *supra* note 253 ("North Carolina's executive order, which requires its state agencies to terminate contracts that provide direct benefits to Russian entities, expressly calls on localities to 'adopt similar policies.'" (quoting N.C. Exec. Order No. 251 (Feb. 28, 2022))).

257 *See, e.g.*, GLENNON & SLOANE, *supra* note 177, at 25; Cleveland, *supra* note 136, at 995.

258 Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1028 (2001) (treating states' role as beneficial because state actions can provide political support to the federal policy and induce federal officials to take up issues that they had not otherwise considered).

259 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 368 (2000); GLENNON & SLOANE, *supra* note 177, at 66–67, 70–71.

260 *See* GLENNON & SLOANE, *supra* note 177, at 346–49 (discussing how Massachusetts's data security law, which implicates foreign relations with its extraterritorial reach, might help with "creative rejuvenation," *id.* at 348, of federal cybersecurity policy by "yielding empirical data on the basis of which the federal government can craft effective national laws," *id.* at 346–47); Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823, 827 (2009) ("Dialogic federalism recognizes that the federal government has the dominant voice in foreign affairs, but it has the option to tolerate, encourage, and even listen to and benefit from other speakers.").

261 *See* Bulman-Pozen & Gerken, *supra* note 195, at 1294 ("In lieu of the necessarily abstract arguments that challengers typically deploy, a state can make its case by putting its ideas into practice, remapping the politics of the possible.").

262 Andrew Adams, *Updated: Where Is TikTok Banned? Tracking State by State*, GOV'T TECH. (Dec. 14, 2022), https://www.govtech.com/biz/data/where-is-tiktok-banned-tracking-the-action-state-by-state [https://perma.cc/K33C-B6MR].

263 No TikTok on Government Devices Act, Pub. L. No. 117-328, div. R, 136 Stat. 5258 (2022) (codified at 44 U.S.C. § 3553 note (Supp. IV 2023)).

264 Adams, *supra* note 262.

265 *Id.*

used different enforcement methods.[266] And the bans have appeared in both Republican- and Democratic-led states.[267] The range of state laws illustrates a laboratory in action.[268] This "motivating" role for states assumes that Congress and the Executive are aware of such state laws, but in cases where a number of states have enacted similar laws, there is good reason to think that the laws will come to federal attention, prompting the federal adoption of the states' approach into federal law or perhaps the federal blessing of divergent state approaches.[269]

5. Compliance with International Law. — State actions can also bolster the strength of the U.S. commitment to an international legal norm.[270] The fact that several economically powerful U.S. states enacted their own sanctions on Russia in the wake of its patent violation of the United Nations Charter sent an even stronger signal about the nation's condemnation of Russia's act of aggression than could the federal response alone. In this case, the states effectively sought to bolster compliance (or condemn a foreign state's noncompliance) with an international legal rule to which the United States is bound.

But in other cases, states have sought to comply with international legal rules to which the United States has not (or not yet) adhered. For instance, Maine and Washington enacted statutes that drew language from the Stockholm Convention on Persistent Organic Pollutants,[271] a treaty that the United States has signed but has not ratified.[272] A range of states enacted sanctions against South Africa to condemn its international human rights–violating apartheid regime well before Congress enacted a federal statute doing the same.[273] A wide range of U.S. states and localities passed, or considered passing, legislation related to the Convention on the Elimination of All Forms of Discrimination Against

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266 *Id.*

267 *Id.*

268 Of course, not all laboratory experiments are desirable or successful. *See supra* notes 147–57 and accompanying text (discussing court losses for states that have attempted to restrict TikTok's operations).

269 *But see* Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337, 349, 351 (2001) (arguing that Congress is "chronically short of reliable information," *id.* at 351, about state activities and may oppose state laws even when aware of them).

270 Cleveland, *supra* note 136, at 1012 (arguing in favor of states helping to honor U.S. human rights obligations); Spiro, *supra* note 236, at 1226–27 (arguing that preserving a role for states can accelerate the incorporation of international law into U.S. law).

271 Stockholm Convention on Persistent Organic Pollutants, May 22–23, 2001, S. TREATY DOC. No. 107-5 (2002).

272 GLENNON & SLOANE, *supra* note 177, at 63.

273 *Id.* at 140–41 (arguing that state and local decisions to decry human rights violations such as those in South Africa "have seldom had a demonstrable negative impact on the achievement of national foreign policy goals and may, to the contrary, actually have enhanced the nation's reputation abroad," *id.* at 140).

Women,[274] which the United States has not ratified,[275] and New York City enacted legislation implementing the Convention on the Elimination of Racial Discrimination,[276] which the United States ratified but declared non-self-executing (and took no steps to implement through new laws).[277] And in a more recent, high-profile case, California entered into a cap-and-trade agreement with Quebec, which a federal court upheld over a challenge by the United States claiming that the California law was preempted by the U.S. withdrawal from the Paris Agreement.[278] These actions bring the behavior of some sub-federal U.S. actors into line with international law in ways that can reduce friction between the United States and foreign partners that have urged the United States to adhere to these rules.

C. Productive Friction

The second underappreciated way in which overly quick or overly broad preemption can impose substantive and structural costs is by eviscerating states' ability to introduce productive friction into the development and execution of U.S. national security policy. Although the executive branch usually prefers to limit the amount of friction around its policy decisions, "frictionlessness" carries with it serious risks.[279] As we have previously argued, when the normal interparty, interbranch, and interagency checks and balances that usually occur during policymaking processes weaken, the result can be "governmental actions that spark or escalate conflict, trigger actions by U.S. adversaries that undercut U.S. security goals, and unlawfully target domestic constituencies perceived to be linked to foreign adversaries."[280] Different actors within and outside of the federal government, including U.S. states, can reintroduce productive friction into frictionless situations by launching litigation, slow-rolling policy implementation, enacting their own laws, or lobbying federal government actors.[281]

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[274] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33; Resnik, *supra* note 253, at 56–57, 57 n.111 (noting that states and localities took steps to embrace the norms in the Convention on the Elimination of All Forms of Discrimination Against Women).

[275] *Ratification of 18 International Human Rights Treaties*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://indicators.ohchr.org [https://perma.cc/NG56-YTNB].

[276] International Convention on the Elimination of All Forms of Racial Discrimination, Sep. 28, 1966, T.I.A.S. No. 94-1120; Resnik, *supra* note 253, at 59–60.

[277] 140 Cong. Rec. S7634 (daily ed. June 24, 1994); Maya K. Watson, *The United States' Hollow Commitment to Eradicating Global Racial Discrimination*, AM. BAR ASS'N (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/us-hollow-commitment-eradicating-global-racial-discrimination [https://perma.cc/2ZC3-6YY2].

[278] United States v. California, No. 19-cv-02142, 2020 WL 4043034, at *7, *12 (E.D. Cal. July 17, 2020).

[279] Deeks & Eichensehr, *supra* note 20, at 1818.

[280] *Id.*

[281] *Id.* at 1887–98.

To date, U.S. states have largely facilitated, not checked, the frictionlessness in U.S. foreign policy toward China and Russia, through acts such as those discussed in section I.B.[282] However, in other situations, state actions implicating national security can, we submit, introduce productive friction into the executive branch's development of national security policy.[283] For example, state laws can force the Executive to consider whether it has struck the right balance between security and economic interests and can improve federal policies by forcing the Executive to give reasons for them. State officials can also engage with their state's congressional representatives to alter or cabin federal executive policymaking. This section identifies specific ways in which state actions can introduce productive friction into federal national security and foreign policy.

1. Forcing Reason-Giving and Avoiding Groupthink. — As we have written in another setting, there is reason to be concerned about situations in which Congress and the Executive operate with robust consensus and little dissent about a particular national security issue.[284] In normal policymaking situations, the system of checks and balances on the federal level can improve the quality of decisionmaking. As we noted: "Policy-makers who bring together a range of interests and perspectives are less likely to produce the kind of tyrannical (or otherwise poorly considered) policies that the Framers feared."[285] When the Executive develops policy in the shadow of possible congressional criticism, litigation, or vigorous contestation among executive agencies, the Executive is more likely to pressure-test that policy for flaws. In contrast, government policymaking that is frictionless — that occurs in the presence of overwhelming consensus about goals and means — can fall prey to groupthink, a "mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."[286] Groupthink leads to inferior policy choices.

State actors have the potential to serve as an external check on federal government action, providing productive friction that can improve federal decisionmaking by forcing the Executive and members of Congress to give reasons for their choices, appraise a broader set of options,

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[282] *See supra* section I.B, pp. 484–91.

[283] Like Bulman-Pozen and Gerken, "we begin with the assumption, common to much federalism scholarship, that it is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system," and we apply this principle even in the national security and foreign affairs setting. Bulman-Pozen & Gerken, *supra* note 195, at 1284.

[284] Deeks & Eichensehr, *supra* note 20, at 1825–37.

[285] *Id.* at 1826.

[286] IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2d ed. 1983).

and ensure that additional (state) interests are taken into account.[287] States — directly or through their representatives in Congress — can prompt Congress to ask questions of the Executive, triggering standard oversight mechanisms such as hearings and congressional letters.

States can also prompt the Executive directly to reconsider its original national security or foreign policy decisions. In 1983, for example, the Governors of New York and New Jersey denied landing clearance for Soviet Foreign Minister Andrei Gromyko's plane at Kennedy Airport in protest of the Soviet shootdown of a Korean Air Lines plane that killed 269 civilians, including 16 New Jersey citizens.[288] The governors cited safety and security reasons, as well as moral reasons and public opprobrium, in their decision to deny clearance.[289] The State Department complained about the governors' decisions but backed down after the White House agreed with the governors.[290] Similarly, state sanctions on Sudan, which led Congress to take up bills to impose federal sanctions on Sudan, forced Congress itself to wrestle directly with and resolve two competing values: the need for the federal government to conduct foreign policy and the states' interest in controlling where they invest their funds.[291] These state actions effectively pressure-tested federal foreign policy.

2. Revealing Underappreciated Costs. — Productive friction can also arise when states respond to federal policies in ways that reflect and reveal the underappreciated economic costs of federal policy that states and localities must bear. The federal government may not always appreciate the costs that its national security decisions impose on states and their citizens. States and localities obviously operate closer to the ground than federal agencies do, and so may be better able to articulate the economic costs of sanctions, export controls, and restrictions on investments, for example.[292] Even if the federal government decides not

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287 Waxman, *supra* note 186, at 331–32 (arguing that participation by state and local institutions in counterterrorism activities can enhance "interlevel policy deliberation and validation," *id.* at 331); Bulman-Pozen & Gerken, *supra* note 195, at 1278–80 (describing ways in which states engaged in "uncooperative behavior[] akin to civil disobedience," *id.* at 1278, in reaction to the USA PATRIOT Act).

288 Margaret S. Pickering, Recent Development, *Decision of New York and New Jersey Governors to Deny Soviet Airplane Clearance to Land, Sept. 1983*, 25 HARV. INT'L L.J. 200, 200–01, 201 n.3 (1984); Robert D. McFadden, *U.S. Says Soviet Downed Korean Airliner; 269 Lost; Reagan Denounces "Wanton" Act*, N.Y. TIMES, Sep. 2, 1983, at A1.

289 Pickering, *supra* note 288, at 201.

290 *Id.*; Robert D. McFadden, *How 2 Governors Reached Decision*, N.Y. TIMES, Sep. 18, 1983, at 19.

291 S. REP. NO. 110-213, at 3–4 (2007); *see also* Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons From Coordination*, 73 MO. L. REV. 1185, 1232 (2008) (describing the "dialectical quality of relevant interactions" about Sudan among state legislatures, interest groups, federal courts, and Congress).

292 *See* Anthony F. Pipa & Max Bouchet, *Partnership Among Cities, States, and the Federal Government: Creating an Office of Subnational Diplomacy at the US Department of State*, BROOKINGS

to change its policy in response to state arguments, the states will have had an opportunity to make their case.[293] This is a more specific argument about how federalism can make government more democratically responsive.[294]

Moreover, when state officials identify costs that federal policies impose on their constituents, they may communicate those concerns privately to federal officials. Such private communications could provide helpful feedback to federal officials without upsetting foreign governments or other audiences and thus introduce fewer complications into U.S. national security or foreign policy than would arise if states publicly disagreed with the federal government.

3. Stimulating Federal Enforcement of Statutes. — As noted in section III.B, where states have incorporated federal law into state laws or regulations, state efforts to enforce compliance with state laws can enhance compliance with federal laws as well. In other cases, however, states may perceive that the federal government has failed to enforce federal law sufficiently and so act in a way that stimulates federal enforcement actions. Though state decisions to do so in the immigration context, for example, have proven very controversial,[295] those concerns may be mitigated when the state action is primarily intended to trigger *Congress's* involvement in the issue. Consider, for example, foreign acquisition of agricultural land. News reports in 2023 found that the federal reporting system for tracking these acquisitions is "lax and enforcement [is] minimal."[296] A surge in state attention to foreign agricultural land purchases is likely to stimulate the U.S. Department of Agriculture to enforce its own existing disclosure and reporting rules more robustly. Indeed, in 2024, Congress asked the Government Accountability Office (GAO) to review the extent to which the USDA's processes enable it to track foreign investments in agricultural land and

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INST. (Feb. 17, 2021), https://www.brookings.edu/articles/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state [https://perma.cc/CP9Y-AE83] ("Local leaders have direct experience in dealing with the tangible implications of global crises as they manifest locally . . . .").

[293] *See* Bulman-Pozen & Gerken, *supra* note 195, at 1287 ("We thus would expect the federal government to respond in some way to a state's challenge. It might override the state, tolerate its position, or adopt the state's preferred policy. The key is that the federal government will be pressured to engage the state's position. And engagement is at least a partial victory for any dissenter."); Young, *supra* note 189, at 443 ("States may also disagree with their federal counterparts not so much because they have some distinctive innovation they wish to try out, but simply because they are closer to the on-the-ground realities of policy implementation.").

[294] Pipa & Bouchet, *supra* note 292; Waxman, *supra* note 186, at 333 (noting that states and localities "provide localized feedback based on contextualized experience and community reactions to federal initiatives, including through dialogue among officials and by validating federal policy with continued or additional local government contributions and support").

[295] *See, e.g.*, *supra* note 209.

[296] Laura Strickler & Nicole Moeder, *Is China Really Buying Up U.S. Farmland? Here's What We Found*, NBC NEWS (Aug. 25, 2023, at 06:30 ET), https://www.nbcnews.com/news/investigations/how-much-us-farmland-china-own-rcna99274 [https://perma.cc/6SS5-9548].

then share the information with CFIUS and the Defense Department.[297] The letter from Congress to the GAO, which triggered the GAO's review of the USDA's work, cited the fact that some states have imposed restrictions on land ownership by foreign citizens or entities.[298] And in July 2025, the USDA announced a "National Farm Security Action Plan," pursuant to which the Department "will aggressively implement reforms" to the foreign acquisition filing process.[299]

4. Checking Federal Executive Power. — Yet another way that states can introduce productive friction is when Congress authorizes states to act with respect to national security and foreign relations issues. Doing so explicitly through an express anti-preemption provision in the relevant federal statute clarifies the permissibility of state regulation.[300] Congress can authorize the states to act under their own steam at the same time that it authorizes the federal Executive to act, effectively requiring the Executive to manage those tensions and allowing the states to serve as a check on executive power.[301] In other words, Congress can use the vertical separation of powers to invigorate the horizontal separation of powers at the federal level. This occurred when Congress enacted statutes imposing federal sanctions on Sudan and South Africa, but explicitly preserving a role for state sanctions over federal executive objections.[302]

While anti-preemption provisions directly empower states, they also serve as a reminder of Congress's power. Congress acts with the President's concurrence or over a President's veto to empower states to act. Doing so can serve a key goal of a federalist system: namely, to diffuse

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297 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 255, at 2, 38.

298 Letter from Congressmembers to Hon. Gene L. Dodaro, Comptroller Gen., U.S. Gov't Accountability Off. (Oct. 1, 2022), https://agriculture.house.gov/uploadedfiles/20221001_gao_foreign-landownership.pdf [https://perma.cc/P79X-W4UP].

299 USDA, *supra* note 131, at 5.

300 BRYAN L. ADKINS, ALEXANDER H. PEPPER & JAY B. SYKES, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 14 (2023), https://www.congress.gov/crs-product/R45825 [https://perma.cc/57TE-J6QC] (discussing anti-preemption provisions).

301 Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 461 (2012); Galbraith, *supra* note 177, at 2154–55 (noting that "Congress [can] empower state and local governments in ways that reduce the President's negotiating power," such as when "Congress's explicit embrace of certain state sanctions" on Iran, *id.* at 2154, "effectively . . . prevented these sanctions from being something the President could agree to waive in the international negotiations with Iran," *id.* at 2155).

302 *See, e.g.*, Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, § 3(a)–(b), 121 Stat. 2516, 2518 (codified at 50 U.S.C. § 1701 note) (reflecting the sense of Congress that state and local governments should be able to divest assets from a foreign actor that poses a financial or reputational risk and authorizing states and localities to do so). Senator Durbin introduced a comparable bill one day after the National Foreign Trade Council won a case striking down Illinois's 2005 Act to End Atrocities and Terrorism in the Sudan. Resnik, *supra* note 253, at 79–80; *see also* Cleveland, *supra* note 136, at 1002 & n.176 (describing Congress's decision to allow "sub-national governments to enforce their South Africa selective purchasing laws on federally-funded transportation projects," *id.* at 1002, notwithstanding a prior Department of Transportation decision to withhold funding from state and local jurisdictions that had enacted selective purchasing laws, *id.* at 1002 n.176).

governmental authority.[303] But the federal government retains a check on states as well. If state laws permitted by an anti-preemption provision prove problematic, the President can attempt to persuade Congress to override those state laws.

D. Acknowledging Costs of State Actions

Sections III.B and C reveal a range of ways in which state and local activity in the national security space could improve federal national security policies. However, in the China and Russia context, some types of friction could be unproductive if they further complicate U.S. relations with those governments, make reasonable federal policies less effective, or inhibit the federal government's ability to calibrate and communicate its policies internationally. Likewise, not all state supplementation is useful: Some forms of supplementation can tip over into unproductive friction. Because there is a robust literature about the generic costs of state involvement in foreign relations,[304] we focus here on costs specific to the new national security.

One area where states are likely to fall short is when they develop policies that are implicitly driven by sensitive intelligence about foreign government activities — intelligence to which states may not be privy. As Part I discussed, the United States is increasingly framing foreign relations in security terms, particularly with respect to China. The federal government will in most circumstances be the best (and sometimes only) source of intelligence about the threats that China poses. When state actions are based on purported security assessments that are outside the state's competence to make (but are within the U.S. intelligence community's competence), it often will be appropriate for courts to favor the federal assessment. States may have unique insight into some national security issues, such as domestic terrorism threats, but those insights will be the exception, not the rule.[305]

As a related matter, states may fall victim to manipulation by foreign states. This is especially possible in the context of Russia and China, which are sophisticated at spying and fostering disinformation and

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[303] *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829–30 (2004) ("[R]obust foreign affairs federalism promotes a cooperative approach to foreign affairs, because the President will need the support of Congress to oust disruptive state laws . . . ."); Ahdieh, *supra* note 291, at 1236 (noting that "intersystemic governance may serve a kind of 'balancing' function").

[304] *See, e.g.*, Stephan, *supra* note 220, at 3 (discussing courts' and scholars' concerns that allowing states to act in foreign relations will confuse other countries, "harm federal policy while favoring parochial local interests" of actors who are not accountable to the nation, and prevent federal courts from controlling the law in this area).

[305] Waxman, *supra* note 186, at 304.

which operate within the United States.[306] U.S. intelligence officials have warned that "China is increasingly looking to wield influence in local governments as its sway in Washington diminishes," including in some cases by using local officials' desire to obtain pandas for U.S. zoos as leverage.[307] The United States has also indicted an aide to New York's governor for accepting "payoffs . . . in exchange for actions that benefited the People's Republic of China and its Communist Party."[308] The risks go beyond individual officials. States might agree, for example, to enter into arrangements with China to cooperate on technology exchanges without fully appreciating how China might manipulate that cooperation for its own nefarious ends. The federal government is attuned to this challenge, issuing a fact sheet entitled "Safeguarding Our Future: Protecting Government and Business Leaders at the U.S. State and Local Level from People's Republic of China (PRC) Influence Operations."[309] Further, foreign "cities" might be a front for a savvy national-level foreign adversary, whereas U.S. mayors and governors may be more naïve and less well briefed on threats.[310]

All of this is to suggest that in at least some of the China- and Russia-related cases that courts will confront, it will be both necessary and desirable to find the state activity at issue preempted or impermissible for other reasons, such as rights violations. The challenge will be striking the right balance between deciding the current set of cases and keeping in mind the longer-term consequences of preempting state actions related to national security.

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[306] *See, e.g.*, NAT'L COUNTERINTELLIGENCE & SEC. CTR., SAFEGUARDING OUR FUTURE: PROTECTING GOVERNMENT AND BUSINESS LEADERS AT THE U.S. STATE AND LOCAL LEVEL FROM PEOPLE'S REPUBLIC OF CHINA (PRC) INFLUENCE OPERATIONS 1 (2022), https://www.dni.gov/files/NCSC/documents/SafeguardingOurFuture/PRC_Subnational_Influence-06-July-2022.pdf [https://perma.cc/SN47-ZEED] (urging state and local leaders to "exercise vigilance, conduct due diligence, and ensure transparency, integrity, and accountability" in order "to guard against potential foreign government exploitation"); Press Release, U.S. Dep't of Just., Two Arrested and 13 Charged in Three Separate Cases for Alleged Participation in Malign Schemes in the United States on Behalf of the Government of the People's Republic of China (Oct. 24, 2022), https://www.justice.gov/opa/pr/two-arrested-and-13-charged-three-separate-cases-alleged-participation-malign-schemes-united [https://perma.cc/BW4V-2MR6] (indicting Chinese intelligence officials for actions in the United States); Press Release, U.S. Dep't of Just., Justice Department Disrupts Covert Russian Government-Sponsored Foreign Malign Influence Operation Targeting Audiences in the United States and Elsewhere (Sep. 4, 2024), https://www.justice.gov/archives/opa/pr/justice-department-disrupts-covert-russian-government-sponsored-foreign-malign-influence [https://perma.cc/EA6H-FNJS] (announcing seizure of internet domains and other measures to disrupt Russian government-sponsored information operations).

[307] Hvistendahl, Knight & Jolly, *supra* note 139.

[308] Hurubie Meko & William K. Rashbaum, *N.Y. Official Charged with Taking Money, Travel and Poultry to Aid China*, N.Y. TIMES (Sep. 5, 2024), https://www.nytimes.com/2024/09/03/nyregion/linda-sun-arrested-hochul.html [https://perma.cc/J7KJ-WPEC].

[309] NAT'L COUNTERINTELLIGENCE & SEC. CTR., *supra* note 306, at 1.

[310] *Id.* at 3–4; *see* Hvistendahl, Knight & Jolly, *supra* note 139 (noting that federal officials traveling to China receive CIA briefings but state and local officials often do not).

IV. BALANCING PREEMPTION, FRICTION, AND SUPPLEMENTATION

Although both foreign policy–related and national security–related actions may be examples of entrepreneurial federalism, falling within that theoretical category does not answer the doctrinal question of whether the actions are preempted or the normative one of whether they should be. Those questions require nuanced consideration of the federal policy and state interests at stake. Simplistic, all-or-nothing approaches are unavailing. States' traditional police powers suggest that the federal government cannot — and should not — preempt all state actions in this space, but neither can states be permitted to do whatever they want, regardless of the nuances of federal policy. The key challenge moving forward is to establish a reasonable middle ground. The goal of this Part is to help the relevant players maximize the benefits of the state and local governments' role while protecting well-considered federal national security and foreign policy approaches by using preemption where necessary. To that end, this Part proposes steps that each federal branch and the states could take to strike a good balance between preserving appropriate federal control over sensitive national security issues (such as the current U.S.-China relationship) and allowing state actors to usefully supplement or introduce important notes of productive friction into federal policies.

A. Courts

As regulated parties and others affected by states' national security–related actions file legal challenges, judges will be asked to resolve difficult questions about the appropriate scope of state action. Congress and the President acting together can expressly preempt state actions in legislation,[311] as can the President acting within his independent constitutional authorities.[312] But in many instances, federal legislation and regulations do not address preemption expressly.[313] The lack of an express preemption provision does not, however, end the preemption

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[311] Arizona v. United States, 567 U.S. 387, 399 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").

[312] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416–17 (2003) (discussing preemption of state law by executive agreements on claims settlement).

[313] *Cf.* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 14–18 (2013) (discussing reasons why Congress has difficulty drafting express preemption clauses).

inquiry.[314] Judges must decide whether federal actions impliedly preempt state acts.[315]

The preemption determination in each case will require a legally and factually specific inquiry. But the arguments above about preserving a role for states suggest judges should consider several more general questions as they approach the state and federal laws at issue and determine whether preemption is warranted.

First, does the state assert that its actions fall within a traditional area of state responsibility?[316] We urge judges to be attuned to possible differences between the legal issues raised by state foreign affairs activities, which are the subject of many of the existing preemption precedents in this area that find little to no role for states,[317] and those raised by the more recent state national security activities, which rest on states' police powers.[318] The line between foreign relations and national security is not a rigid one; nonetheless, states' actions focused on direct security threats to their citizens will generally be distinguishable from ones focused on condemning or attempting to change the behavior of foreign governments.

But a state's invocation of a traditional area of state responsibility is not the end of the matter. Courts should ask a second question: Are the state's actions credibly linked to its asserted traditional area of state responsibility, or is the assertion of a traditional area of state responsibility a pretext for what is actually a state effort to critique a foreign power or otherwise interfere with federal foreign policy? Courts have repeatedly looked behind the asserted state rationales for laws touching on foreign relations and should do the same for national security–related actions.[319]

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[314] *See Crosby*, 530 U.S. at 387–88 ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.").

[315] As noted above, the presumption against preemption is generally understood to apply either weakly or not at all with respect to foreign relations–related cases. *See supra* note 225 and accompanying text; *see also* Meltzer, *supra* note 313, at 52 (noting that the presumption against preemption "seems to be variable, having less force in some areas (for example, matters deemed to touch on federal foreign relations) than others — a variability that some have sharply criticized").

[316] This approach is consistent with suggestions in multiple Supreme Court cases. *See infra* note 365 and accompanying text.

[317] *See, e.g.*, *Garamendi*, 539 U.S. at 401.

[318] *See, e.g.*, Alario v. Knudsen, 704 F. Supp. 3d 1061, 1073 (D. Mont. 2023).

[319] *See, e.g.*, *Garamendi*, 539 U.S. at 425–26 (noting that the California law "effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago" and that "[l]imiting the public disclosure requirement to these policies raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State"); Zschernig v. Miller, 389 U.S. 429, 437 (1968) (explaining that state court decisions implementing an inheritance statute show "that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata"); Movsesian v. Victoria Versicherung AG, 670

Other questions may illuminate the inquiry as well. For example, is the state action geographically neutral, as appropriate? That is, if a given harm could arise from any foreign state but the statute focuses on one or a few foreign states, that might suggest that the statute lacks a credible security purpose or may be impermissibly motivated by discrimination.[320]

Finally, is the state drawing from federal national security statutes or standards? If so, the state statute is more likely to have a genuine security purpose and is less likely to pose an obstacle to the accomplishment of federal objectives.

If a judge undertakes these inquiries and determines that a state action should be preempted, for the reasons explained in Part III, we urge judges to use the narrowest available preemption theory in order to avoid displacing more state law than is necessary to protect the federal government's national security prerogatives.

1. Judicial Choices Among Competing Preemption Doctrines. — The Supreme Court has recognized several different versions of implied preemption, though the divisions between them are not always clear or agreed upon.[321] The first type is conflict preemption, which can occur in either of two ways.[322] First, state laws are preempted when "compliance with both federal and state regulations is a physical impossibility" (impossibility preemption).[323] Second, state law will also be preempted when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (obstacle preemption).[324] In addition, states may be subject to field preemption and thereby "precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[325] Field preemption "can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that

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F.3d 1067, 1075 (9th Cir. 2012) (explaining that "the required inquiry cannot begin and end . . . with the area of law that the state statute addresses," and that "[o]n the contrary, we must look further to determine the 'real purpose of the state law'" (quoting Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964 (9th Cir. 2010))); *cf. Alario*, 704 F. Supp. 3d at 1078 (evaluating the Montana legislature's stated interests and identifying a "pervasive undertone of anti-Chinese sentiment that permeates the State's case and the instant legislation").

320 *Cf. Garamendi*, 539 U.S. at 425–26 (noting that limiting a state statute's provisions to apply only to companies operating in certain countries casts doubt on the state's asserted generally applicable rationale for the statute).

321 *See, e.g.*, Goldsmith, *supra* note 220, at 178 (noting the "incoherence" of the Supreme Court's preemption jurisprudence); Meltzer, *supra* note 313, at 3 (noting that preemption cases are "known for their lack of consistency").

322 Arizona v. United States, 567 U.S. 387, 399 (2012).

323 Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

324 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (alterations in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

325 *Arizona*, 567 U.S. at 399.

the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[326] Finally, the Supreme Court has used "dormant foreign affairs preemption"[327] to find preempted "state action with more than incidental effect on foreign affairs . . . , even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[328]

Faced with specific state actions and federal enactments, judges deciding challenges to states' national security–related actions will often face a choice among multiple theories of preemption. When judges determine that preemption is warranted, we urge them to rule on the narrowest preemption theory available to avoid creating broad precedent disabling states from acting in ways that may provide useful supplementation or productive friction for federal policy.[329] Call it the *presumption against preempting more than necessary*.

What does this mean in practice? Where possible, judges who determine that state law must be preempted should use the theory that displaces the least amount of state law necessary to resolve the conflict with the federal regime. Generally, this will mean that judges should use conflict preemption instead of field preemption or dormant foreign

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[326] *Id.* (alterations in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[327] BRADLEY, DEEKS & GOLDSMITH, *supra* note 219, at 255 (defining "dormant foreign affairs preemption" as "the power of federal courts to preempt state activities related to foreign affairs in the absence of political branch action").

[328] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418 (2003) (discussing Zschernig v. Miller, 389 U.S. 429 (1968)). Foreign relations– and national security–related preemption cases also often involve claims based on the dormant foreign commerce clause. *See, e.g.*, *Crosby*, 530 U.S. at 374 n.8 (noting that the court of appeals invalidated a state sanctions statute because it interfered with the federal government's foreign affairs power (a dormant foreign affairs preemption theory), ran afoul of the dormant foreign commerce clause, and was preempted by a federal sanctions statute, and declining to rule on the first two theories). A claim under "the Dormant Foreign Commerce Clause asks whether a state law facially discriminates against foreign commerce or has substantial discriminatory effects," and it "preempts state laws that prevent the federal government from speaking with 'one voice' in foreign relations" — a test that is "functionally similar to dormant foreign affairs preemption." Goldsmith, *supra* note 220, at 203–04. For these reasons, Goldsmith treats dormant foreign commerce clause claims as another version of preemption that, like dormant foreign affairs preemption, "preempt[s] state law in the absence of any congressional legislation of the issue at hand . . . on the basis of a judicial analysis of the effects of state law on the judicially identified U.S. foreign relations interest." *Id.* at 204. We agree that dormant foreign affairs preemption and dormant foreign commerce clause claims are functionally similar; our concerns about the potential breadth of dormant foreign affairs preemption holdings apply equally to dormant foreign commerce clause claims. Both types of claims risk overly broad displacement of state laws and a chilling effect on potentially productive state actions. For an in-depth discussion of the dormant foreign commerce clause, see Michael S. Knoll & Ruth Mason, *The Dormant Foreign Commerce Clause After* Wynne, 39 VA. TAX REV. 357, 370–95 (2020).

[329] *Cf.* Goldsmith, *supra* note 220, at 178 (noting that *Crosby* "decided the preemption issue on the narrowest possible basis, leaving it to political process to work out the scores of other difficult issues about the relationship between state and federal law related to foreign affairs" and that "whatever the Court's motivation, its analysis is a normatively attractive model for all statutory foreign affairs preemption cases"); Rodríguez, *supra* note 181, at 622–25 (urging judges to approach field and conflict preemption in narrow and nuanced ways when they confront preemption challenges to immigration-related state laws).

affairs preemption. Both versions of conflict preemption — impossibility and obstacle preemption — focus on specific federal enactments. Impossibility preemption asks whether it is possible to comply with both federal and state law, and if not, the state law gives way to the federal law.[330] Obstacle preemption similarly requires judges to carefully consider the particular federal enactment at issue.[331] The Supreme Court has explained that "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[332] In *Crosby*, the Supreme Court identified three specific provisions of the federal Burma sanctions law that a Massachusetts sanctions law undermined, namely the federal law's "delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma."[333]

In contrast to conflict preemption's focus on the language and effects of specific federal enactments — and thus its relatively narrow displacement of state law — field preemption relies on often broad extrapolations from federal enactments. Field preemption infers from these enactments that the federal interest in an issue is "so dominant" or federal regulation "so pervasive" as to leave no space for state regulation.[334] Field preemption, therefore, tends to be broader than conflict preemption by nature.[335] The possible breadth might be further expanded when judges must define the field that is preempted. Defining the field of federal regulation to be, for example, "national security" or "foreign relations" would disable states from a vast number of potential actions — including ones that do not conflict with or pose an obstacle to the goals of federal law. Even somewhat more constrained definitions of the federal field, such as "economic sanctions policy," "export controls," or "China policy," would stretch far more broadly than a conflict

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330 *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

331 *See* Goldsmith, *supra* note 220, at 206–07 (explaining that obstacle preemption "trumps only that state law inconsistent with a specific, identified federal law," though "the conclusion of preemption is based on inferences of congressional purpose and federal interest that cannot always be deduced" solely from the statutory text, *id.* at 207).

332 *Crosby*, 530 U.S. at 373.

333 *Id.* at 373–74.

334 Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

335 Goldsmith, *supra* note 220, at 214 (noting that "field preemption tends to sweep more broadly than obstacle preemption"). It is theoretically possible that a field could be defined very tightly — call it "garden patch preemption" — making it narrower than obstacle preemption in a particular case. But we focus here on the typical situation where field preemption is broader.

preemption holding that rests on the displacement effect of a specific federal statute based on statutory text.[336]

Dormant foreign affairs preemption risks reaching even more broadly. This theory of preemption rests not on a court's assessment of the scope of particular federal enactments or even the cluster of federal enactments that might be construed as a preemptive field, but rather extrapolates from the Constitution's general assignment of foreign affairs powers to the federal government.[337] It rests on displacing state law based on potential federal action that has not occurred.[338] It is not clear that courts should ever apply this version of the doctrine to state laws that rely on states' traditional police powers, even if state actions also implicate national security. After all, the Constitution itself envisions a greater role for states in defending the United States than in engaging in foreign policymaking.[339] Reliance on dormant foreign affairs preemption risks proactively disabling states from addressing any number of national security– or foreign affairs–related issues — even when there is no conflict with federal enactments or simply no federal enactments. Doing so could severely hamper states' ability to provide useful supplementation to federal policy in the future or to foster productive friction.

While prudential considerations support the preference that we urge for conflict preemption over field preemption or dormant foreign affairs preemption, the choice of the narrower theory may also be required by principles of constitutional avoidance in some cases.[340] Avoidance principles may come into play in either of two ways: first, where preemption rests solely on the Constitution itself, or second, where preemption is statutory but nonetheless raises constitutional questions.

As to the first possibility, both dormant foreign affairs preemption and at least one version of field preemption rely on the Constitution's direct preemptive effect. As explained above, dormant foreign affairs preemption rests on a court's assessment that, even absent a federal enactment, state action impermissibly intrudes into the foreign affairs

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336 *Cf.* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2105 (2000) (noting that, in a field preemption analysis, "[i]nterstitial state laws complementary to the federal scheme are displaced where Congress has — implicitly — marked the regulatory area as its own").

337 *See* Goldsmith, *supra* note 220, at 203.

338 Notably, the Supreme Court in *Zschernig* held a state law preempted on a dormant foreign affairs theory despite the Executive's objection. Zschernig v. Miller, 389 U.S. 429, 434, 441 (1968).

339 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 16 (reserving to the states the power to train militias); *id.* § 10, cl. 3 (reserving to the states the power to engage in war if invaded or in "imminent Danger").

340 *Cf.* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 257 (2012) ("It is only in the last few years that preemption cases have been considered constitutional cases at all. Although a preempted state law is technically unconstitutional under the Supremacy Clause, the cases are generally exercises in statutory construction."). *But see* Goldsmith, *supra* note 220, at 220 (arguing in discussing the Court's opinion in *Crosby* that "[n]othing in the doctrine of constitutional avoidance would have led the Court to choose obstacle over field preemption, or the self-consciously narrow form of obstacle preemption the Court embraced").

domain, which the Constitution assigns to the federal government.[341] Notably, dormant foreign affairs preemption shares similarities with the "so dominant" version of field preemption that assesses whether the federal government's interest in a field is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[342] Both theories depend on an assessment of the scope of the federal government's sphere of constitutional responsibility.

As Justice Brandeis explained, constitutional avoidance counsels that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[343] Constitutional avoidance then might counsel judges to avoid a ruling that uses dormant foreign affairs preemption or a "so dominant" field preemption theory in favor of a narrower holding that uses conflict preemption — a statutory holding.[344]

As to the second possibility, a related avoidance principle — the so-called modern avoidance canon of statutory interpretation — could similarly counsel judges to rely on narrower conflict preemption principles instead of field preemption. Pursuant to this canon, when courts interpret a federal statute, "the presence of a serious constitutional *doubt* or *question* about one possible construction of a statute is a sufficient reason to adopt a different construction, so long as that alternative construction is 'fairly possible.'"[345] Consider a case in which a federal court

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341 *See* Goldsmith, *supra* note 220, at 203 (referring to dormant foreign affairs preemption as a "structural constitutional doctrine" whereby courts "preempt state law on their own authority in the absence of any federal enacted law").

342 Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). In fact, the Supreme Court has described dormant foreign affairs preemption as a type of field preemption. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 & n.11 (2003) (discussing the Supreme Court's decision in *Zschernig* as an example of field preemption).

343 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

344 The Supreme Court in *Crosby* suggested that it followed something like this approach, noting in a footnote that "[b]ecause our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000) (citation omitted) (citing *Ashwander*, 297 U.S. at 346–47 (Brandeis, J., concurring)); *see* Edward T. Swaine, Comment, Crosby *as Foreign Relations Law*, 41 VA. J. INT'L L. 481, 504–05 (2001) (referring to the Court's "terse invocation of Justice Brandeis's famous caution in *Ashwander v. TVA*[, 297 U.S. 288 (1936),] against unnecessarily resolving constitutional questions" as "*Crosby*'s crux"). Given the plethora of federal actions related to China and Russia, *see supra* Part I, pp. 477–95, judges are more likely to face a choice between field preemption and conflict preemption, rather than between dormant foreign affairs preemption and conflict preemption. The federal government has not been "dormant" in this sphere.

345 JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 387 (4th ed. 2021) (quoting *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring)); *see Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised,

confronts a plaintiff's claim that a state action should be displaced by a federal statute on the grounds both that the state action is an obstacle to the accomplishment of the federal statute's goals and that the federal statute preempts the entire field of state action. The court considers both claims well-founded, but if it issues a field preemption holding, the holding will displace a larger swath of state regulation, including regulations that arguably fall within traditional areas of state responsibility. In that case, the modern avoidance canon could come into play: If the judge determines that using a field preemption theory to displace a broad array of state action within the state's traditional areas of responsibility would raise constitutional doubts, then the canon counsels that the judge should choose the other permissible interpretation — here, the one focused on conflict or obstacle preemption that displaces less state action. Such an approach would also resonate with the Supreme Court's jurisprudence on the so-called federalism canon, where the Court has required a clear statement by Congress before finding a significant congressional intrusion into areas of traditional state responsibility or a major adjustment to the federal-state balance of power.[346]

Notably, our normative reasons for arguing in favor of judges using the narrowest available preemption doctrine differ from those animating the recent critiques of implied preemption doctrines from some textualists. In a series of opinions, Justice Thomas in particular has emerged as a staunch critic of implied preemption, emphasizing that "[p]reemption must turn on whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text."[347] He has taken particular aim at obstacle preemption, arguing "that this brand of the Court's pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law," which "leads to decisions giving improperly broad pre-emptive effect to judicially manufactured

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it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))).

346 *See* Bond v. United States, 572 U.S. 844, 858 (2014) (discussing "the well-established principle that '"it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides"' the 'usual constitutional balance of federal and state powers'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))); MANNING & STEPHENSON, *supra* note 345, at 425 (noting that it "is widely believed[] that *Gregory* recognized and applied a clear statement rule meant to protect state sovereignty and autonomy, even when there is no serious constitutional question — much less any actual constitutional violation — lurking in the background").

347 Wyeth v. Levine, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in the judgment); *see* Meltzer, *supra* note 313, at 35 (describing "four key elements to Justice Thomas's" obstacle preemption objections, stemming in part from his commitments to textualism and views about the allocation of authority between the federal government and the states); *see also* Nelson, *supra* note 221, at 230 & n.22 (compiling sources critiquing field preemption); KENNETH STARR ET AL., A.B.A., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE 34 (1991) (critiquing obstacle and field preemption on the ground that they "are in tension with the Court's repeated requirement of clear *legislative* intent to preempt").

policies, rather than to the statutory text enacted by Congress pursuant to the Constitution and the agency actions authorized thereby."[348]

While we too would prefer greater clarity in congressional enactments about Congress's preemptive intent (or lack thereof),[349] in some cases, finding state laws preempted based on obstacle preemption will be necessary and appropriate to avoid impermissible state interference with federal policies. The Supreme Court's decision in *Crosby* is an example. Massachusetts's Burma sanctions law interfered in several specific ways with the discretion that Congress intended the President to have in managing federal policy toward Burma, and so posed an obstacle to federal policy.[350] Implied preemption has its place, including with respect to certain state laws related to national security and foreign relations. But for the theoretical and functionalist reasons highlighted in Part III, courts that hold state laws preempted should do so on the narrowest available theory of preemption.

Our view is similar to what Goldsmith has termed "minimalist statutory foreign affairs preemption,"[351] though our approach also has some salient differences from his. He defines "'minimalism' in the statutory foreign affairs preemption context" as having two elements: "First, courts should eliminate from their bag of interpretive sources any independent judicial consideration of the foreign relations consequences of preemption. Second, courts should make the decision to preempt on the narrowest possible ground . . . ."[352] In practice, this means, per Goldsmith, that courts should prefer "statutory over dormant preemption" and "express and conflict," that is, impossibility, "preemption over obstacle and field preemption."[353] Goldsmith is careful to note that obstacle and field preemption remain permissible in his view, but that courts employing them must avoid "recourse to judicially created purposes and interests," and instead "trace the federal foreign relations purposes and

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[348] *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring in the judgment).

[349] *See infra* section IV.B, pp. 534–38.

[350] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000). Justice Thomas has suggested, based on arguments made by Professor Caleb Nelson, that he might broaden the impossibility version of conflict preemption to include not just instances where complying with both federal and state law is actually impossible, but also instances where there is a "logical[ ]contradiction" between federal and state law — that is, where "federal law gives an individual the right to engage in certain behavior that state law prohibits" and "an individual could comply with both by electing to refrain from the covered behavior." *Wyeth*, 555 U.S. at 590 (Thomas, J., concurring in the judgment) (citing Nelson, *supra* note 221, at 260–61). Professor Daniel Meltzer has pointed to *Crosby* as an example of an obstacle preemption case that "can be reframed as involving a logical contradiction," Meltzer, *supra* note 313, at 36–37, and further notes that "the 'logical contradiction' test is unlikely to prevent judges from smuggling in subterranean value judgments," which Justice Thomas claims to seek to avoid, *id.* at 34–35.

[351] Goldsmith, *supra* note 220, at 177.

[352] *Id.* at 208.

[353] *Id.* at 213.

interests harmed by state law to political branch and not judicial choices."[354]

While we strongly agree with Goldsmith's second element — that courts should decide preemption cases on the narrowest ground possible — we come to it for a different reason. Whereas Goldsmith argues for narrower theories of preemption because broader ones "invite recourse to [the] judicially created purposes and interests" he disclaims,[355] we argue for narrower theories of preemption in order to further the normative goal of preserving space for states to act on security-related issues. We are less committed than Goldsmith to requiring judges to "eschew independent judicial foreign policy analysis."[356] If such analysis leads a judge to a narrower preemption holding — to finding an obstacle instead of a field — we would support such analysis.

To be sure, Congress and the President ideally would not put judges in a position where they must engage in independent foreign policy or national security analysis. They could act clearly at the outset to address preemption in federal enactments. However, as Professor Daniel Meltzer persuasively argues, achieving clear legislative guidance on preemption is often difficult,[357] which means that "judicial decisionmaking that involves some policymaking discretion is inevitable and also necessary to serve other important goals — here, the sensible integration of federal and state laws."[358] In the alternative, the lack of ex ante guidance from Congress in legislation might be partially remedied by congressional or executive branch filings in court, allowing the political branches' national security or foreign policy analysis to provide context that judges might otherwise be tempted to generate themselves. The next sections urge Congress and the Executive to file amicus briefs for precisely this reason.[359]

Where Congress, the Executive, or both do file briefs in such cases, courts will need to decide how much weight to give those branches' views and how to factor those views against those of the state. We believe that the best approach is for courts to give the views of all three sets of actors respectful consideration akin to *Skidmore*[360] deference. That is, the weight that courts give to each actor's expressed views should depend on the thoroughness evident in their explanations for why the state actions do or do not interfere with federal policy, on the

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354 *Id.*

355 *Id.*

356 *Id.*

357 Meltzer, *supra* note 313, at 15–19 (discussing reasons why it is difficult for Congress to give clear guidance on preemption).

358 *Id.* at 43; *cf.* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 729 (2008) ("[T]he key question in most preemption cases entails a discretionary judgment about the permissible degree of tension between federal and state law, a question that typically cannot be answered using the tools of statutory interpretation.").

359 *See infra* sections IV.B–C, pp. 534–40.

360 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

consistency of the arguments with the state or federal actor's "earlier and later pronouncements," and on other factors that give the views the "power to persuade."[361] As a general matter, arguments by federal actors that point to concrete foreign policy or national security harms caused by state action should warrant greater weight than more generic or theoretical claims of possible harm. In short, a court should treat any assertions by the Executive, Congress, or the state as helpful inputs into its analysis but not automatically treat any one actor's assertion as determinative.[362]

In the absence of ex ante statutory provisions or later filings in courts by the political branches, we are more willing than Goldsmith is to recognize the need for courts to assess national security or foreign relations consequences of state actions in particular cases and the legitimacy of obstacle preemption, in particular, in the service of the normative goal of narrow preemption. In other words, as between a broad field preemption holding tied to ostensible congressional indications of a pervasive or dominant federal interest and a narrower obstacle preemption holding based on judicial assessment of state interference with a particular federal policy, we would choose the latter.

We also think that there is support in existing doctrine for a somewhat more modest approach to preemption when it comes to national security issues, compared to foreign relations issues. The reason for this comes down to the basis for states' actions. The security-focused state actions have rested on states' police powers, which is an area of traditional state responsibility.[363] When states act within such areas, courts have sometimes viewed the federalism issue differently, giving more weight to state interests. For instance, in *American Insurance Ass'n v. Garamendi*,[364] the Supreme Court noted:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. Where, however, a State has acted within . . . its "traditional competence," but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.[365]

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[361] *Id.* at 140.

[362] For discussion of how courts should approach disagreement in briefs filed by the Executive and Congress, see *infra* note 394.

[363] *See supra* p. 485.

[364] 539 U.S. 396 (2003).

[365] *Id.* at 419 n.11 (citations omitted) (quoting Zschernig v. Miller, 389 U.S. 429, 459 (1968) (Harlan, J., concurring in the result)). In his *Zschernig* concurrence, cited in *Garamendi*, Justice Harlan

Consistent with this approach, courts may wish to be more judicious in defining the preemptive scope of federal action that intersects with state actions in traditional areas of state regulation, particularly states' police powers.

To be clear, our argument is not anti-preemption. In many circumstances discussed in this Article, we think state statutes should be deemed preempted or otherwise held invalid.[366] But courts should be mindful in *how* they preempt in order to avoid unintended consequences, particularly disabling states from acting with respect to foreign policy and national security in ways that provide useful supplementation or productive friction to federal policy.[367]

Two concrete examples illustrate this point. First, in the New Jersey Russia sanctions case discussed above, the district court considering a challenge to New Jersey's Russia sanctions law faced several possible theories for invalidating the state law, including obstacle preemption, field preemption, dormant foreign affairs preemption, and the Foreign Commerce Clause.[368] Drawing on the Supreme Court's *Crosby* decision, the court — correctly in our view — decided the case based on obstacle preemption, finding a clear conflict between the state and federal sanctions regimes and avoiding ruling on broader theories.[369] The district court focused on specific ways in which the New Jersey law differed

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noted, "[p]rior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." *Zschernig*, 389 U.S. at 458–59. In 1986, the Justice Department's Office of Legal Counsel wrote an opinion that read *Zschernig* and *Clark v. Allen*, 331 U.S. 503 (1947), to suggest that the Supreme Court would "balance the degree to which the statute intrudes on foreign affairs against the degree to which the exercise of the state power falls within traditional state powers." Constitutionality of S. Afr. Divestment Statutes Enacted by State and Loc. Gov'ts, 10 Op. O.L.C. 49, 62 (1986). The Supreme Court has also suggested the converse of this point, explaining that when a conflict between state and federal law involves "an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.'" Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Many of the state "security" statutes we discuss in this Article regulate areas that traditionally fall within state powers and are not *uniquely* of federal interest. *See supra* notes 90–96 and accompanying text.

366 *See infra* notes 375–80 and accompanying text.

367 We do not expect that courts would specifically invoke these unintended consequences as part of their rulings, but we think that judges who are attuned to the consequences of their decisions reasonably might take these consequences into account. *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2355 (2006) (noting that "it is hard to imagine courts expressly making legal doctrine turn on the partisan configuration of government (though it is easier to imagine them doing so *sub rosa*)").

368 Kyocera Document Sols. Am., Inc. v. Div. of Admin., 708 F. Supp. 3d 531, 544–47, 544 n.17, 545 n.18 (D.N.J. 2023).

369 *Id.* at 544 n.17 (declining to reach the plaintiff's Foreign Commerce Clause claim); *id.* at 547 (explaining that the obstacle preemption holding rendered it unnecessary to decide on the plaintiff's field preemption or *Zschernig* claims); *see also* Goldsmith, *supra* note 220, at 215–17 (praising *Crosby* along similar lines).

from and thus served as an obstacle to the federal Russia sanctions regime, including the ways that "federal sanctions are tailored to those actors" that "support[] Russia's ability to sustain its invasion," a "nuance . . . absent from" the state law.[370]

By contrast, in the case involving Montana's TikTok ban, the district court ruled on *both* obstacle preemption and field preemption.[371] As to obstacle preemption (which the court referred to as conflict preemption), the court concluded that the Montana law conflicted with the Defense Production Act and specifically the ongoing negotiations pursuant to that statute between CFIUS and ByteDance.[372] In addition to this narrow obstacle preemption holding, however, the court also found the statute preempted based on a field preemption theory, citing *Zschernig v. Miller*[373] and declaring the state ban preempted because it "intrude[d] on the federal government's exclusive power to conduct and regulate foreign affairs."[374] This field preemption holding — and broad statement of the relevant field — was unnecessary and exemplifies the types of broad holdings that we worry could unduly disable states from acting in ways that provide useful supplementation and productive friction with respect to foreign relations and especially national security going forward.

Our caution to courts to avoid deciding more or broader preemption claims than necessary applies particularly to circuit courts and to the Supreme Court. Their decisions bind lower court judges and provide important precedential guidance to judges and states about how much (or how little) room states have to act, and choosing among different theories sufficient to dispose of a case is also routine for these courts. We recognize that district court judges, by contrast, may be tempted to decide all issues before them to streamline appellate review. There are, however, countervailing costs to issuing preemption holdings that are broader than necessary to dispose of a case. Such holdings may overly chill state actions, serve as persuasive authority in other courts and other cases, and can be narrowed only if the losing party appeals. Therefore, we would urge even district court judges who find state action preempted to consider relying on only the narrowest preemption theory necessary to decide the case.

2. The Choice Between Competing Preemption and Rights Claims. — Many of the cases challenging states' actions related to national security and foreign relations involve not just preemption claims, but also claims based on constitutional rights. Cases involve, for

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370 *Kyocera*, 708 F. Supp. 3d at 550.

371 Alario v. Knudsen, 704 F. Supp. 3d 1061, 1081 (D. Mont. 2023).

372 *Id.* at 1085.

373 389 U.S. 429 (1968).

374 *Alario*, 704 F. Supp. 3d at 1083 (quoting Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1076 (9th Cir. 2012) (en banc)). Lest we be too hard on the district court for this choice, it bears mentioning that the district judge relied on Ninth Circuit precedent. *Id.*

example, claims that state actions violate the First Amendment, the Equal Protection Clause, and the Due Process Clause.[375] What do our arguments in Part III have to say about a court's choice between preemption claims and these rights-based constitutional claims?

While recognizing that there are numerous competing values at stake in these cases, our normative worry about broadly disabling states from action is more likely to manifest with preemption holdings — particularly broad structural holdings that directly address the permissible scope of state action, for example, in an entire field. In general, therefore, we would urge courts to rule on alternative, rights-based constitutional grounds rather than on broad preemption theories, particularly in cases where courts lack clear guidance from the federal political branches about whether the state action impermissibly interferes with federal policy. Situations where such a constitutional rights–based ruling is appropriate might be summarized as a *canon of comparatively easy questions*: If a court is faced with making a constitutional preemption holding — that is, one based on dormant foreign affairs preemption or the "so dominant" version of field preemption — then the court should consider ruling on the alternative rights-based constitutional ground, if available, especially if such a holding is comparatively easy to reach.

It is easy to imagine a case where a court faces a state law that clearly unconstitutionally discriminates against a protected class of persons, making an equal protection holding a clear path toward resolving the claim, while the accompanying field preemption arguments raise complicated constitutional questions about displacing state action in an area of traditional state regulation. The preemption issue may raise a question of first impression, with implications likely to reverberate in other contexts and cases, whereas the constitutional question requires only application of settled law to particular facts. In such a case, the canon of comparatively easy questions would counsel the judge to rule on the equal protection ground, leaving the more complicated (and, for our purposes, potentially more structurally disruptive) preemption question for another case.[376]

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[375] *See supra* section I.C, pp. 491–95 (discussing such claims in litigation against states); *cf.* Goldsmith, *supra* note 218, at 1638 ("Many of these state 'foreign relations' activities feature an element of discrimination against foreign actors that might implicate the Equal Protection Clause and related antidiscrimination provisions.").

[376] For discussion of the virtues of judicial minimalism, see generally, for example, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Sunstein later raised questions about judicial minimalism in general, but defended minimalism in cases involving "the 'frontiers' questions in constitutional law," when the Supreme Court may be uncertain of the correct answer and "seeks to retain room for democratic debate and experimentation" and "ensure that decisions are made by the democratically preferred institution of government." Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1914–16 (2006).

Arguably, the Supreme Court already practices something like the canon of comparatively easy questions in other circumstances, though without giving the principle a name. In numerous types of cases, the Court leaves choices about the order in which to decide issues (and thus often the choice of *whether* to rule on an issue at all) to the discretion of lower courts.[377]

Our proposed canon of comparatively easy questions is helpful and uncontroversial when used to choose between comparable questions — constitutional theory versus constitutional theory, or statutory claim versus statutory claim. But it comes into tension with other canons when applied across categories — for example, when a judge faces a choice between an easy constitutional holding and a difficult statutory preemption holding. There, it would run up against constitutional avoidance, which directs courts to consider statutory questions before constitutional ones.[378] Notably, despite the principle of constitutional avoidance, some Justices have embraced the idea that when constitutional questions are easy and statutory questions are hard, judges have discretion to decide the easy constitutional questions first.[379] For judges sympathetic to this approach, the canon of comparatively easy questions may have utility even in cases raising statutory preemption claims and constitutional rights–based claims.

Deciding rights-based constitutional claims in cases challenging states' national security– and foreign relations–related actions may have another benefit as well. In cases where the plaintiffs claim violations of their fundamental constitutional rights to due process, equal protection,

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Avoidance of the preemption questions in the "frontier" cases on which we focus would serve the goals of preserving room for democratic debate and state experimentation, while allowing the political branches to act to expressly preempt state actions if they so choose.

[377] *See, e.g.*, RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337–38, 338 n.5 (2016) (setting out a two-step inquiry for the presumption against extraterritoriality, but noting that courts may begin with either step of the inquiry); Pearson v. Callahan, 555 U.S. 223, 227, 242 (2009) (abandoning the Saucier v. Katz, 533 U.S. 194 (2001), requirement that courts considering qualified immunity claims determine whether the plaintiff has alleged a constitutional violation before determining whether the right at issue was clearly established at the time of the violation and instead allowing judges "to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case," *Pearson*, 555 U.S. at 242); Strickland v. Washington, 466 U.S. 668, 697 (1984) ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one."); *see also* Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 21–22 (2023) (dismissing as moot a case in which the respondent had argued that "mootness is easy and standing is hard," *id.* at 21, and declining to rule on standing).

[378] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[379] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2433–34 (2018) (Sotomayor, J., dissenting) ("Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a 'prudential rule of avoiding constitutional questions.' But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one." (citation omitted) (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993))).

or free expression, there may be symbolic value to vindicating a rights-based injury with a rights-based ruling, rather than a ruling based on constitutional structure and principles of federalism. Plaintiffs who have suffered discriminatory treatment at the hands of states may derive more solace from a vindication of that view by a federal court than they would from a decision resting on, for example, a determination that the state law is an obstacle to federal policy.

Admittedly, there is a cost when courts decide constitutional questions: It is often impossible for Congress to override those decisions.[380] Nevertheless, when courts confront a constitutional rights challenge that is comparatively easy to decide as compared to the preemption challenge, we think that the benefit of deciding the constitutional issue often will outweigh the cost.

As an example of the approach we suggest, consider a state law that restricts real estate purchases by nationals of a particular foreign country with no exceptions and is based on a legislative record riddled with discriminatory statements indicative of animus. In this (admittedly extreme) case, plaintiffs might sue to challenge the law on the grounds that it is preempted by the federal CFIUS regulations related to real estate, is preempted by the federal government's control over the field of foreign relations, and violates equal protection. In this case, our approach suggests that the district court judge should first consider the statutorily based obstacle preemption claim, and if the state law is an obstacle to the federal regulations, then stop there. However, if the judge proceeds beyond the statutorily based obstacle preemption claim, she should next rule on the equal protection claim, which should produce a comparatively narrow holding that applies existing law to particular facts. She should avoid pronouncing an entire field — whether foreign relations or national security — to be federally controlled and outside states' prerogatives all of the time.

B. Congress

Although the judiciary is the branch most obviously positioned to affect whether it will deem a state law preempted and, if so, under which preemption doctrine, the political branches can affect the outcome of these cases as well. Most obviously, Congress can legislate with clarity when it addresses national security–related issues of interest to the

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[380] In practice, preemption decisions are little different. Meltzer, *supra* note 313, at 18 ("Supreme Court preemption decisions . . . are virtually never overridden by congressional enactments."); *see also* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612 (2007) ("Congress almost never overrides the Supreme Court's preemption decisions."); Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 165, 181 (2011) ("[T]he distribution of agenda-setting authority among various committees and party leaders within and outside of Congress can effectively thwart attempts to override judicial decisions, even when a majority of members would favor such actions.").

states, including by adopting provisions that either expressly preempt or expressly authorize state action.[381]

Congress's inclusion of an express preemption provision provides a clear signal of congressional intent, which the Supreme Court calls the "ultimate touchstone" of its preemption analysis.[382] Even if an express preemption provision leaves virtually no room for states to usefully supplement national security policy or introduce productive friction, courts should enforce that provision. Inclusion of an express preemption provision — particularly one adopted after states have acted and put Congress on notice of their plans — shows that the federal political branches have considered and rejected state action. Congress might determine, for example, that state action interferes with the discretion that it wants the executive branch to have to manage policy, that inconsistent state legislation is too onerous for businesses, or that state action is causing a counterproductive national security or foreign relations controversy. Once the federal political branches have determined that state action is not useful or productive, courts should enforce the resulting express preemption provision.[383]

Alternatively, Congress can affirmatively authorize states to act in a specified area affecting national security by including a so-called anti-preemption provision.[384] Congress has done this before in certain foreign relations–related statutes. For example, the Sudan Accountability and Divestment Act of 2007[385] mandated that each federal agency ensure that its procurement contracts required the contractor to certify that it "d[id] not conduct [certain] business operations in Sudan,"[386] while also expressly permitting states and localities to divest from particular businesses in Sudan.[387] The Act contained an express anti-preemption clause stating that a "measure of a State or local government

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[381] For a detailed proposal about how Congress might legislate preemption rules, see Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 95–98 (2016).

[382] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

[383] Notably, Supreme Court Justices have disagreed over whether the presumption against preemption applies to interpreting express preemption provisions, and we take no position on that debate. *See* MANNING & STEPHENSON, *supra* note 345, at 453–56 (describing the debates and noting "that the doctrine on this point is still contested," *id.* at 456).

[384] ADKINS, PEPPER & SYKES, *supra* note 300, at 13–14 (discussing "anti-preemption provisions" as a type of savings clause that "make[s] clear that federal law does not preempt certain categories of state law").

[385] Pub. L. No. 110-174, 121 Stat. 2516.

[386] *Id.* § 6(a), 121 Stat. at 2520.

[387] *Id.* §§ 3(b), 3(d)(1), 121 Stat. at 2518 (authorizing states and local governments to divest from, and prohibit government investment in, persons conducting business operations in Sudan that produce power, oil, minerals, or military equipment, subject to certain procedural requirements). For a related example outside of foreign affairs, see the Controlled Substances Act, 21 U.S.C. § 812 (2000), which states that its provisions shall not be construed as a congressional effort "to occupy the field . . . to the exclusion of any State law on the same subject matter" unless state and federal law are in such conflict "that the two cannot consistently stand together." *Id.* § 903.

authorized under" the permissive clause was "not preempted by any Federal law or regulation."[388] At the same time, Congress ensured that the Executive would be aware of a state or local divestment by requiring the state or local government to notify the Attorney General of its divestment measure within thirty days.[389]

Although express preemption or anti-preemption provisions are the most compelling ways to eliminate doubt about Congress's intent, it is often hard for Congress to pass federal legislation, let alone enact preemption clauses.[390] As Meltzer explains, it can be difficult for Congress to draft preemption-related clauses, including because Congress may be unaware of state and local laws that might intersect with a federal regime, because it may be hard to envision how such laws might interact, or because state and local laws can change after enactment of federal law.[391]

While we do not discount these challenges, we think they are comparatively less acute with respect to the state laws on which we focus. First, as described above, many state laws now exist with respect to drones, TikTok, sanctions, and foreign ownership of land;[392] future state laws may be similar to those already enacted. The proliferation of these various categories of state laws can help Congress to envision the state laws (both present and future) that a federal statute would preempt and to assess whether preemption is warranted. Second, these state laws are of relatively high salience: Because of their intersection with national security and foreign relations and because of efforts by states and litigants to draw attention to the laws, these are not the sorts of state actions that fly under the congressional radar. Thus, even if Congress cannot legislate about preemption with perfect clarity or foresight, it can make at least incremental progress in clarifying its preemptive intent and thus providing greater guidance to courts — and to states — about the scope it wishes to preserve for state action.[393]

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388 Pub. L. No. 110-174, § 3(g), 121 Stat. 2516, 2519 (2007).

389 *Id.* § 3(c); *see also* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 202, 124 Stat. 1312, 1342–43 (permitting state and local governments to divest from persons that have certain investments in Iran's energy sector, provided that the state or local government provides written notice to the U.S. attorney general).

390 *See* Meltzer, *supra* note 313, at 19 (discussing challenges of legislative drafting in general and with respect to preemption provisions).

391 *Id.* at 15–19.

392 *See supra* section I.B, pp. 484–91.

393 *Cf.* Meltzer, *supra* note 313, at 19 (arguing "that there are serious limits to what can realistically be expected by way of congressional specification and legislative foresight" in drafting preemption clauses, but nonetheless clarifying that he "do[es] not mean to suggest that all of these shortcomings of legislative drafting are inevitable or that Congress could not possibly have provided greater clarity or sown less confusion and contradiction about the preemptive effect of particular statutes"). The courts have also adapted to Congress's lack of express statutory language about preemption by recognizing implied preemption doctrines. *Cf.* Crosby v. Nat'l Foreign Trade

There are at least two other steps that Congress might consider. First, Congress itself, or a relevant subset of members of Congress, should consider filing amicus briefs with courts that are hearing national security– or foreign affairs–related preemption cases. Particularly in instances where Congress has *not* expressly addressed preemption in a federal statute, amicus participation by Congress could provide courts with useful information from at least one federal political branch about whether states' actions are disruptive or, conversely, helpful.[394] Individual members and groups of members file amicus briefs with some regularity,[395] and both houses have procedures for authorizing the filing of institutional briefs on their behalf.[396] Where members or committees believe that a particular state law contributes positively or negatively to U.S. national security, articulating that perspective in a brief could help a court decide how broadly or narrowly to preempt state law, if at all.[397] Notably, in a range of cases in the D.C. Circuit, panels have drawn on congressional amicus briefs (as have judges writing in concurrence and dissent).[398] Normatively, we think that courts should take into account congressional briefs — especially ones filed bicamerally or by full

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Council, 530 U.S. 363, 387–88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . . .").

394 We make a similar recommendation below for the executive branch to file amicus briefs. *See infra* section IV.C, pp. 538–40. Interesting cases could arise, of course, if Congress and the executive branch disagree in these briefs. We do not believe that either branch's view should be automatically determinative, *see supra* pp. 528–29, and the fact of disagreement between the branches may be a reason for courts to construe the preemptive scope of federal law narrowly, *see* Eichensehr, *supra* note 230, at 1309–13 (discussing the Supreme Court's suggestion that agreement between Congress and the President increases the likelihood or scope of preemption and suggesting that disagreement between the branches should perhaps provoke the opposite judicial approach).

395 *See* TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 42 n.345 (2023), https://crsreports.congress.gov/product/pdf/R/R45442 [https://perma.cc/Z5BN-KJEX] (collecting examples). *But see* Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as* Amici Curiae, 29 LEGIS. STUD. Q. 591, 592 (2004) (concluding based on prior empirical study that briefs filed by individual members do not influence courts and introducing other reasons why legislators file such briefs).

396 Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 943–44 (2012) (describing the procedures in place in the Senate and the House). *See generally* Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RSRV. L. REV. 933 (2015) (collecting and assessing a large number of both individual and institutional congressional amicus briefs).

397 In recent years, scholars have urged Congress to take a more active role in litigation more generally and have proposed specific reforms to that end. *See, e.g.*, Frost, *supra* note 396, at 948–68 (arguing for Congress to engage in litigation and proposing reforms); Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 89–93 (2021) (arguing that Congress should have standing to sue to challenge executive branch actions that infringe on Congress's prerogatives).

398 *See, e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 699, 703–04 (D.C. Cir. 2016); Zivotofsky v. Sec'y of State, 725 F.3d 197, 223 (D.C. Cir. 2013) (Tatel, J., concurring), *aff'd sub nom.*, Zivotofsky v. Kerry, 576 U.S. 1 (2015).

committees or an entire house — particularly when the briefs clarify congressional intent to preempt (or not).

Second, members of Congress, especially those on the foreign relations, armed services, homeland security, commerce, and finance committees, should seek to engage with their states (in a bidirectional way) to facilitate states' information exchanges with the Executive and provide informal reactions to state measures that would implicate national security or foreign relations issues. That engagement could help sensitize states to preemption issues of which they may not be aware, while also sensitizing the federal political branches to state plans and concerns.[399]

C. The Executive

As a preliminary matter, one might wonder whether and, if so, why the Executive would want to preserve any room for states in this space, given that it has a variety of tools with which to ensure federal preeminence. But we think that Part III demonstrates why giving states some range of motion can actually enhance the quality of federal policies and make those policies more effective. To that end, this section proposes steps that the Executive could take to ensure that states can usefully supplement federal policies, as they have done in the drone setting, and provide some productive friction by, for example, prompting the Executive to avoid groupthink and to give reasons for its approach.[400]

One important initial step the Executive could take would be to educate the states about federal technology policies and regulations as applied not only to China and Russia but also to the full range of U.S. adversaries. Such efforts could include, for example, educating state legislators, regulators, and governors about how state technology-transfer agreements could contravene federal policies.[401] It might also include education about IEEPA, CFIUS, the Entity List, and export control statutes. Ensuring that states understand these tools would make it more likely that they will draw from the federal programs in their own laws in ways that advance, rather than interfere with, federal policy and potentially enhance the enforcement of both state and federal policies.[402] These steps could strengthen the useful supplementation described in Part III. At the same time, the Executive should consider ways to minimize harmful friction and reduce possible adverse impacts on national security. As part of this educational outreach, then, the Executive should also provide security briefings to state actors about

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399 *Cf.* Eichensehr, *supra* note 143, at 21–24 (suggesting ways to incorporate state input into the CFIUS process).

400 *See* Deeks & Eichensehr, *supra* note 20, at 1881–85.

401 *See* Scoville, *supra* note 135, at 369–70 (discussing states' technology-transfer agreements with China "in areas that implicate national security," *id.* at 369).

402 For a discussion of how federal agencies cultivate and influence state legislative power, see generally Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802 (2024).

malign influences, as well as technological and cyber threats, to minimize the likelihood that states fall victim to manipulation in their engagements with adversarial governments and other actors who clandestinely work for such governments.[403]

Beyond unidirectional information and intelligence sharing with states, the Executive could establish a more iterative arrangement, such as a federal-state working group on sanctions, export controls, and investment reviews.[404] This group could serve as a standing forum in which to educate state officials along the lines just discussed, but it also could serve as a setting in which the federal government could receive information about the impact on state populations of the federal use of economic tools of national security. Federal and state actors could also discuss the ways in which states are imposing and implementing their own sanctions and develop methods to operationally enforce their regimes in complementary ways. Finally, states could challenge federal officials to justify their policies (thus helping to reduce federal groupthink) and could provide early warnings to federal officials about state dissatisfaction with levels of federal regulation or enforcement. One possible model here is the type of state, local, tribal, and territorial working group set up by the Cybersecurity and Infrastructure Security Agency to share cyber-related information between federal and state partners and to provide local perspectives on federal guidelines.[405]

Finally, in an effort to minimize genuinely harmful friction from state actions, the Executive could be clearer about which types of state laws it views as adversely affecting U.S. national security or foreign policy. It could then signal that it will potentially sue state actors or join private litigation seeking to preempt a state law if the law crosses that line.[406] The Executive could issue a general policy statement to this effect or file statements of interest or amicus briefs in particular cases, arguing that the court should hold that a state law is preempted. The United States filed a statement of interest in support of the plaintiffs in the case challenging Florida's real estate law, but it addressed only equal protection and Fair Housing Act issues, not preemption.[407] Notably, the district court in the Florida real estate case drew a negative inference from the

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[403] *See* Hvistendahl, Knight & Jolly, *supra* note 139 (noting the lack of intelligence community briefings for state and local officials).

[404] *Cf.* Waxman, *supra* note 186, at 333–35 (discussing federal-state collaboration on terrorism-related issues).

[405] *State, Local, Tribal & Territorial Cyber Information Sharing Program*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/resources-tools/programs/state-local-tribal-territorial-cyber-information-sharing-program [https://perma.cc/2Y7G-6P8U].

[406] *See, e.g.*, Goldsmith, *supra* note 218, at 1684–85 (discussing ways the President can affect states' foreign relations–related activities, including filing amicus briefs).

[407] *See* Statement of Interest of the United States in Support of Plaintiffs' Motion for Preliminary Injunction at 1–2, Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 23-cv-208), Dkt. No. 54, https://www.justice.gov/crt/media/1303041/dl [https://perma.cc/P46N-BRCT].

United States's failure to comment on the preemption claims.[408] The United States did not file in the Montana TikTok case. This choice obviously left the district court with less guidance about whether the Executive viewed Montana's law as significantly harming its ability to manage relations with China or negotiate with TikTok.

D. States

There are a number of steps that the states themselves could take to avoid interfering with federal policy in detrimental ways and to enhance the likelihood that courts will uphold their laws. First, substantively, state legislators could clearly articulate the connection between the law at issue and the state's traditional powers and responsibilities.[409] The less clear it is why a particular state has a reason to legislate in the vicinity of a national security or foreign policy issue, the less likely it is that a court will (and should) uphold the state law.[410] States should ensure that their laws are not based on xenophobic or otherwise discriminatory motives. The inflammatory anti-China (or, more generally, xenophobic) rhetoric that some states have employed to date has raised serious questions on that score.[411]

A second way that a state could minimize the chance that the federal government would challenge a state law is by including a termination clause that defers to a federal determination about whether the state law is harmful to national security or foreign relations. At least two states have attempted to include clauses like this.[412] Minnesota enacted a law requiring its Board of Investment to sell its direct holdings in securities

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408 *Shen*, 687 F. Supp. 3d at 1250 n.17 ("One would think that if Florida's law stood as a complete obstacle to the full implementation of federal law, the United States would have said so in that filing.").

409 For an argument that states have a responsibility to be sensitive to the constitutional allocation of power in this area, see Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 831 (1989) ("Absent flagrant abuse or clear need, it is unlikely for a variety of reasons that Congress, the Executive or the courts will intervene to this end. Consequently, state and local governments should be aware of, and sensitive to, the important constitutional issues and foreign relations concerns involved, and act responsibly.").

410 *See supra* section IV.A, pp. 519–34.

411 For example, the Montana TikTok bill describes China as "an adversary of the United States," *see* S.B. 419, 68th Leg., Reg. Sess. (Mont. 2023), and in Indiana's consumer protection case against TikTok, the State described the company as "a Chinese Trojan Horse unleashed on unsuspecting American consumers who have been misled by the company's false representations about the content on its platform," Complaint ¶ 1, Indiana v. TikTok, Inc., No. 23-cv-13, 2023 WL 3596360 (N.D. Ind. May 23, 2023). When Florida Governor Ron DeSantis signed S.B. 264, he spoke of "the malign influence of the Chinese Communist Party in the state of Florida." Kimmy Yam, *How DeSantis' Ban on Chinese Homeownership Has Affected Buyers and Real Estate Agents 3 Months In*, NBC NEWS (Oct. 17, 2023, at 14:46 ET), https://www.nbcnews.com/news/asian-america/desantis-ban-chinese-homeownership-impacted-buyers-real-estate-agents-rcna119027 [https://perma.cc/2LGG-KD6D].

412 *See* MINN. STAT. § 11A.245 subdivs. 2, 5, 9 (2022); 72 PA. STAT. AND CONS. STAT. § 3838.6 (West 2025).

issued by Russia, Belarus, and their companies.[413] That law states that it will "cease[] to be operative if the President of the United States determines and certifies that state legislation similar to this section interferes with the conduct of United States foreign policy."[414] States cannot dictate what form a federal objection to their laws must take, of course, but a state law that signals the federal government's supremacy in this space seems less likely to be struck down on preemption grounds.[415]

Third, as discussed in section III.C.4, states can lobby Congress to include provisions in federal legislation that preserve room for them to act. Fourth, as Bulman-Pozen and Gerken have argued, a state can empower itself (as a servant) by integrating itself into a federal regime.[416] One way that states might be able to strengthen their hand in this space is by urging the creation of and participating in the type of "sanctions working group" that we propose above and thus developing their ties with — and ultimately some dependence on states by — federal officials.[417]

CONCLUSION

As the United States faces this new era of great power competition, federal and state leaders together must confront the challenge of productively channeling states' efforts at entrepreneurial federalism. Where states' activities are counterproductive to the federal government's national security efforts, the federal political branches should preempt them expressly, and courts should hold them to be preempted (whether expressly or impliedly). In doing so, however, all three branches of the federal government should take a long view and displace no more state action than is necessary to achieve the federal national security and foreign policy aims at issue. As this Article has shown, states have a role to play in ensuring the security of their citizens and can play a constructive role in national security and foreign relations.

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413 MINN. STAT. § 11A.245 subdiv. 2.

414 *Id.* § 11A.245 subdiv. 9; *see also id.* § 11A.245 subdiv. 5 ("If the federal government excludes an asset from its present, or any future, federal sanctions relating to Russia or Belarus, that asset is exempt from the divestment requirements and the investment prohibitions in this section.").

415 Pennsylvania's sanctions laws envision a broader form that federal objections could take. *See* 72 PA. STAT. AND CONS. STAT. § 3838.6 (West 2025) (stating that the obligations of public funds under the statute are lifted if "[t]he President or Congress . . . , through executive order or legislation, declares that mandatory divestment of the type provided for in this act interferes with the conduct of United States foreign policy"); *see also id.* § 3837.6 (similar). *But cf.* Kyocera Document Sols. Am., Inc. v. Div. of Admin., 708 F. Supp. 3d 531, 551 (D.N.J. 2023) (concluding that the fact that the New Jersey statute would "terminate[] in lockstep with the federal regime" did not mean that the federal and state approaches did not conflict).

416 Bulman-Pozen & Gerken, *supra* note 195, at 1270 ("[I]ntegration is a source of power for states administering federal programs.").

417 *See* Young, *supra* note 189, at 443 ("[U]ncooperative federalists should consider how federal regulatory schemes could be designed to promote constructive disagreement between state and federal officials.").

All parties concerned — Congress, the Executive, federal courts, and state authorities — should endeavor to maximize the benefits of state involvement while leaving ultimate national security policymaking authority where the Constitution assigns it: with the federal government.