

# Foreign Affairs Federalism: Ukraine and Beyond

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## I. INTRODUCTION

What role do U.S. states and localities play in foreign affairs? Should local governments serve as sideline observers on matters of foreign policy? Occasional cheerleaders for federal actions when called upon to voice support? An oppositional force when the federal government, in the view of those U.S. states or localities, has gone astray on a foreign affairs issue? For decades, the courts have largely viewed foreign affairs as the prerogative of the federal government, leaving little room for U.S. states and localities to engage in the foreign policy arena. In *Crosby v. National Foreign Trade Council*, for example,

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\* This article has been written in the author’s personal capacity; all views and opinions are hers alone.

the U.S. Supreme Court struck down a Massachusetts law that limited procurement in Burma—not because the provision created a conflict with federal law or policy—but because it interfered with the President’s ability “to speak for the Nation with one voice.”<sup>1</sup> As Sarah Cleveland and others have noted, *Crosby* joined a long line of decisions in which the Court applied the “one-voice” doctrine to determine whether U.S. state and local actions impinged on the federal government’s monopoly over foreign relations.<sup>2</sup>

But the courts have not caught up with current federal, state, and local practice. Consider Russia’s latest invasion of Ukraine—the focus of this symposium. On February 24, 2022, Russian President Vladimir Putin announced to the world that he planned “the ‘demilitarization and denazification of Ukraine’”—by invading it.<sup>3</sup> Russian troops, amassed at Ukraine’s border and supported by heavy tanks, charged into Ukraine from the north, south, and east.<sup>4</sup> Bombs began exploding across the country.<sup>5</sup> Within thirty minutes of the war’s outbreak, Ukrainian military leaders rushed to call their American allies: the California National Guard.<sup>6</sup> After working the phones for 72 hours, the Guard

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<sup>1</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

<sup>2</sup> Sarah H. Cleveland, *Crosby and the One-Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975–97 (2001); see also Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2135 (2017) (book review) (discussing sister cities); MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 55–76 (2016). A non-exhaustive list of relevant legal scholarship includes: *Id.* (providing in-depth consideration of the legal doctrines constraining foreign affairs federalism); Galbraith, *supra*, at 2135 (reviewing Glennon and Sloane’s book, *The Myth of National Exclusivity*, while providing examples of local foreign affairs actions); Cleveland, *supra*, at 975–97 (challenging the myth of the executive branch’s unitary voice in foreign affairs as articulated by the Supreme Court in *Crosby v. National Foreign Trade Council*); Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999) (arguing that certain state sanctions laws violate the Supremacy Clause and Foreign Commerce Clause); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341 (2001) (arguing *Crosby* is better read as a case about separation of powers than federalism).

<sup>3</sup> Anton Troianovski, *Putin Announces a ‘Military Operation’ in Ukraine as the U.N. Security Council Pleads with Him to Pull Back*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/world/europe/putin-announces-a-military-operation-in-ukraine-as-the-un-security-council-pleads-with-him-to-pull-back.html> [https://perma.cc/F7XD-PHH5].

<sup>4</sup> *Russia Invades Ukraine on Multiple Fronts in ‘Brutal Act of War,’* PBS NEWS HOUR (Feb. 24, 2022), <https://www.pbs.org/newshour/world/russia-invades-ukraine-on-multiple-fronts-in-brutal-act-of-war> [https://perma.cc/K53Z-96B4].

<sup>5</sup> *February 24, 2022: The Day Russia Invaded Ukraine*, FRANCE 24 (Feb. 14, 2023), <https://www.france24.com/en/live-news/20230214-february-24-2022-the-day-russia-invaded-ukraine> [https://perma.cc/Y5NH-FFZH].

<sup>6</sup> Bob Haskell, *Deep Ties*, NAT’L GUARD MAG., Apr. 2022, at 26, 26–27, <https://www.ngaus.org/magazine/deep-ties> [https://perma.cc/V5QN-WB6E].

had mobilized a joint operations command center, “[directing] requirements and requests from the Ukrainians to other parts of the U.S. government to break down bureaucracy and get help to the Ukrainians as soon as possible.”<sup>7</sup> After 30 years of partnering, the Ukrainians knew they could count on California in their time of need. “You can’t surge trust,” the head of the Guard noted.<sup>8</sup>

The federal government leapt into action too. By the end of 2021, the U.S. had committed \$1 billion in security assistance to Ukraine, assistance that ballooned to \$40 billion by June 2023.<sup>9</sup> And in February 2022, the U.S. publicly warned, based on satellite imagery of troops amassing at the border, that Russia intended to invade Ukraine.<sup>10</sup> After Russia re-invaded Ukraine despite this warning, the U.S. federal government ramped up its delivery of tactical equipment and support, expanded targeted sanctions aimed at squeezing the Russian regime, and rallied its allies to mobilize additional support for Ukraine.<sup>11</sup> And contrary to *Crosby*, the federal government at no point asserted that simultaneous U.S. state actions in support of Ukraine encroached upon its exclusive foreign affairs jurisdiction.

Although courts have held, and observers may assume, that U.S. states and localities are at best peripheral to foreign policymaking, I show that subnational

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<sup>7</sup> *Id.* In those early hours, California learned that the Ukrainians needed “Stingers” (lightweight, self-contained air defense systems that can be rapidly deployed by ground troops) and Javelins anti-tank weapons carried on the shoulder). *Id.* U.S. states, in addition to California, jumped in too: more than a half-dozen issued executive orders reinforcing federal sanctions targeting Russia. *See, e.g., Gov. Greg Abbot Wants Russian Products Taken Off Texas Shelves Over Invasion of Ukraine*, EL PASO TIMES (Feb. 28, 2022), <https://www.elpasotimes.com/story/news/2022/02/28/texas-gov-greg-abbott-wants-russian-products-taken-off-texas-shelves-over-invasion-ukraine/9324864002/> [https://perma.cc/EV4D-GRK8].

<sup>8</sup> Haskell, *supra* note 6, at 26–27. After 30 years of military-to-military engagement, the Ukrainians and their California counterparts had developed a close relationship, so close that the top-ranking officer of the Guard estimated that he visited Ukraine 30 times in the last decade alone. *Id.*

<sup>9</sup> Steve Holland & Mike Stone, *Biden Approves \$350 Million in Military Aid for Ukraine*, REUTERS (Feb. 26, 2022), <https://www.reuters.com/world/biden-approves-350-million-military-aid-ukraine-2022-02-26/> [https://perma.cc/6NYQ-SHN5]; Patricia Zengerle & Doina Chiacu, *US Announces \$2.1 Billion More Military Assistance for Ukraine*, REUTERS (June 9, 2023), <https://www.reuters.com/world/pentagon-announces-2-1-billion-ukraine-air-defense-package-statement-2023-06-09/> [https://perma.cc/T5YF-GQJ7].

<sup>10</sup> Alexander Marrow & Aleksandar Vasovic, *West Warns Military Build-Up Near Ukraine Growing, Not Shrinking*, REUTERS (Feb. 16, 2022), <https://www.reuters.com/world/europe/russian-pullout-meets-uk-scepticism-ukraine-defence-website-still-hacked-2022-02-16/> [https://perma.cc/K2DR-CHM4].

<sup>11</sup> Press Release, White House, Fact Sheet: On One Year Anniversary of Russia’s Invasion of Ukraine, Biden Administration Announces Actions to Support Ukraine and Hold Russia Accountable (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/24/fact-sheet-on-one-year-anniversary-of-russias-invasion-of-ukraine-biden-administration-announces-actions-to-support-ukraine-and-hold-russia-accountable/> [https://perma.cc/26Q6-ZY5N].

governments can and do often play a central role in foreign affairs—in Ukraine and beyond. In Part II, I describe the range of U.S. state and local responses to Russia’s 2022 invasion of Ukraine. In Part III, I offer several reasons why U.S. states and localities may see it in their self-interest to engage in foreign affairs, as in response to the war in Ukraine. Part IV considers the primary constitutional constraints on subnational foreign affairs actions, focusing on foreign affairs preemption under the Supremacy Clause, the Dormant Foreign Commerce Clause, and the Compact Clause. Part V shows that U.S. states and localities often utilize many of the same legal instruments as their federal counterparts to advance their foreign affairs goals. In Part VI, I make the case for U.S. state and local government engagement in foreign affairs, which I refer to as “glocalization,” and address common counterarguments. Finally, I recommend concrete ways the federal government and U.S. state and local governments can more effectively embrace and internalize the benefits of glocalization.

## II. U.S. STATE AND LOCAL RESPONSES TO RUSSIA’S 2022 INVASION OF UKRAINE

As Russia launched its February 2022 invasion of Ukraine, worldwide attention largely focused on how the U.S., NATO and other major powers and alliances would respond.<sup>12</sup> Beneath the surface of these national and regional responses, however, a politically diverse set of U.S. states undertook various actions aimed at strengthening Ukraine’s hand in its battle against Russian President Vladimir Putin’s war of aggression. Subnational actions mainly took the form of executive orders amplifying federal sanctions targeting the Russian regime, the provision of in-kind and direct support to Ukraine, and severance of diplomatic ties with Russia.

### A. *Amplifying Federal Sanctions*

Since February 2022, U.S. states have reinforced federal sanctions against the Russian regime in several ways.<sup>13</sup> First, states like North Carolina, Colorado, and Ohio terminated contracts that directly benefited Russian entities.<sup>14</sup> Second,

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<sup>12</sup> See, e.g., Nik Popli, *How NATO Is Responding to Russia’s Invasion of Ukraine*, TIME (Feb. 25, 2022), <https://time.com/6151115/nato-russia-ukraine-article-4/> [https://perma.cc/5ATP-LQX5].

<sup>13</sup> In this article, references to “Russia’s aggression” refer to Russian President Vladimir Putin and his regime, not the Russian people.

<sup>14</sup> N.C. Exec. Order No. 251, 36 N.C. Reg. 1509, 1510 (Feb. 28, 2022), <https://governor.nc.gov/executive-order-no-251/open> [https://perma.cc/HKZ2-94NQ] (directing state entities to “take all reasonable steps” to terminate contracts or operations that “directly benefit” companies headquartered or with their principal place of business in Russia); Colo. Exec. Order No. D 2022 011 (Feb. 24, 2022), <https://www.colorado.gov/governor/news/7306-governor-polis-announces-new-state-actions-response-russias-invasion-ukraine> [https://perma.cc/HKZ2-94NQ] (directing state agencies

several states banned new contracts with Russian entities. These bans took various forms. New York, for example, banned state agencies from contracting with companies that are headquartered or have their principal place of business in Russia, or that provide in-kind or for-profit support for the Russian regime in its war of aggression in Ukraine.<sup>15</sup> California, by contrast, hewed closer to federal government actions, directing state agencies to terminate their contracts with any individuals or businesses subject to federal sanctions.<sup>16</sup> Third, several Governors banned imports and the purchase of Russian and/or Belarusian goods, such as liquor.<sup>17</sup> Fourth, some states divested from Russia or Russian entities. Ohio, California, and New York, for instance, enacted measures to divest their public pension funds from entities that support the Russian regime.<sup>18</sup> Finally, California required major contractors and grantees to report on measures they have taken, or will take, to curtail support for Russia and to aid the Ukrainian government.<sup>19</sup> Given the significant size of California's

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to “work to terminate” any information technology or personnel and administration-related contracts with Russian-state owned companies); Office of Governor Mike DeWine, Exec. Order No. 2022-02D (Mar. 3, 2022), [https://governor.ohio.gov/wps/wcm/connect/gov/\[https://perma.cc/9JW8-2AP3\]](https://governor.ohio.gov/wps/wcm/connect/gov/[https://perma.cc/9JW8-2AP3]) (ordering state agencies to terminate any contracts with a Russian company or institution, to the extent practicable).

<sup>15</sup> N.Y. Exec. Order No. 14, 44 N.Y. Reg. 13 (Feb. 27, 2022), [www.governor.ny.gov/sites/default/files/2022-02/Executive%20Order%20No.%2014.pdf](http://www.governor.ny.gov/sites/default/files/2022-02/Executive%20Order%20No.%2014.pdf) [<https://perma.cc/Z8ZZ-9VQ3>].

<sup>16</sup> Office of Governor Gavin Newsom, Exec. Order No. N-6-22 (Mar. 4, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf> [<https://perma.cc/QN5G-NURG>].

<sup>17</sup> Office of Governor Spencer Cox, Exec. Order No. 2022-03 (Feb. 26, 2022), <https://rules.utah.gov/wp-content/uploads/Utah-Executive-Order-No.-2022-03.pdf> [<https://perma.cc/J4WY-7ZPP>] (banning all Russian-branded or Russian-produced products in Utah State Liquor Stores); Office of Governor Philip Murphy, Exec. Order No. 291 (Mar. 2, 2022), <https://nj.gov/infobank/eo/056murphy/pdf/EO-291.pdf> [<https://perma.cc/3DDL-3VCV>] (directing state agencies to “undertake a review of the State’s ability to boycott or halt the import or purchase of any products or services provided from the Russian Federation or Belarus, including but not limited to food products, energy products, clothing products, and jewelry”); Office of Governor Philip Scott, Exec. Order No. 02-22 (Mar. 3, 2022), <https://governor.vermont.gov/sites/scott/files/documents/EO%2002-22-Solidarity%20with%20the%20Ukrainian%20People.pdf> [<https://perma.cc/JBC9-6U4J>] (immediately stopping the sale, purchase, and delivery of Russian-sourced products and products produced by Russian entities in Vermont State Liquor Stores).

<sup>18</sup> Office of Governor Mike DeWine, Exec. Order No. 2022-02D (Mar. 3, 2022), <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/Executive-Order-2022-02D> [<https://perma.cc/L9JZ-FR WV>]; Office of Governor Gavin Newsom, Exec. Order No. N-6-22 (Mar. 4, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf> [<https://perma.cc/X9QC-7MJU>]; N.Y. Exec. Order No. 14, *supra* note 15.

<sup>19</sup> Office of Governor Gavin Newsom, *supra* note 18. Governor Newsom’s order requires state contractors and grantees with agreements valued at five million dollars or more to report to the state on their compliance with federal sanctions and to detail other steps they have taken to respond to Russia’s actions in Ukraine. *Id.* Such steps, the order states, could

contracting base, the state likely received hundreds of reports—with descriptions of actions each contractor or grantee has taken to support Ukraine and stop investment in Russia.<sup>20</sup>

These governors, as the heads of their state executive branches, demonstrated that they could quickly amplify federal sanctions utilizing their executive authority, subject to constitutional constraints described in Part IV. That same authority enables the governors to swiftly update, expand, or roll back these sanctions as needed or desired, though no such actions have been taken to date.<sup>21</sup> Meanwhile, state legislatures have been less active with respect to Ukraine than in other contexts—for instance, in response to the human rights crises in Burma and Sudan.<sup>22</sup> It is possible, given federal silence on the topic, that U.S. state and local legislative bodies—and even some executive branch leaders—have been uncertain as to whether they have the authority to extend sanctions beyond those imposed by the U.S. federal government or to entities not directly doing business with their states. Whatever the reason, the relatively narrow actions taken by U.S. state leadership have not been subject to legal challenge to date.

### B. *Severing Diplomatic Ties*

In addition to reinforcing and building upon federal sanctions, U.S. states and localities have responded to the war in Ukraine by both severing formal ties with Russian entities and officials and by directly offering support to the Ukrainian government and people. Shortly after Russia launched its 2022 invasion of Ukraine, Vermont, for example, rescinded a 1991 executive order that had established a sister-state relationship with the Republic of Karelia in Russia and called upon localities in Vermont with sister-city or town agreements

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include “desisting from making new investments in, or engaging in financial transactions with, Russian entities, not transferring technology to Russia or Russian entities, and directly providing support to the government and people of Ukraine.” *Id.* The Order also urges all California-based businesses, organizations, and governments to take further actions to support the government and people of Ukraine. *Id.*

<sup>20</sup> See *Public Procurement Information*, CAL E-PROCURE, <https://caleprocure.ca.gov/pages/public-search.aspx> (selecting “Past Purchases in SCPRS” and running search on next screen provides a list of state contracts, sortable “Grand Total,” of \$5 million or more); CAL. GRANTS PORTAL, [www.grants.ca.gov](http://www.grants.ca.gov) (providing a list of state grants with an “estimated total funding” of \$5 million or more). State entities and their contractors make up a significant part of a state’s economy. See generally *US State and Local Government Total Spending Ranked by: Percent GDP*, U.S. GOV’T SPENDING, [https://www.usgovernmentpending.com/state\\_spending\\_rank\\_2021pF0c](https://www.usgovernmentpending.com/state_spending_rank_2021pF0c) [<https://perma.cc/W489-TD5Q>].

<sup>21</sup> See *supra* notes 14–18 and accompanying text.

<sup>22</sup> At the time of writing, no lawsuits have been filed concerning state executive orders imposing or reinforcing sanctions against Russia for its aggression in Ukraine.

with a Russian municipality to suspend or terminate their relationships.<sup>23</sup> Vermont was not alone: cities and counties across the United States, from Chicago and Dallas to Des Moines and Santa Clara, moved to suspend decades-long relationships with Russian sister cities as a condemnation of Russian aggression in Ukraine.<sup>24</sup>

### C. Providing Direct Support

At the same time as severing Russian ties, U.S. states and localities have worked to build and expand upon connections with and support for the Ukrainian government. As noted in the introduction, the California National Guard has worked closely with Ukraine's Armed Forces and Ministries of Defense and Interior since 1993 as part of the National Guard's State Partnership Program, using training facilities in California and Ukraine to develop Ukraine's military capabilities.<sup>25</sup> As a result of these longstanding ties, within a day of the new war, the Guard had developed a comprehensive list of the Ukrainian military's equipment needs.<sup>26</sup> The Guard passed the equipment request to the U.S. European Command and the Joint Staff in the Pentagon, and stood up a Joint Operations Center to track in real time the needs of their Ukrainian counterparts.<sup>27</sup> Some may query whether the federal government—not a state—should have played this coordinating role in the early days of the war. In an ideal world, perhaps it should. But in times of crisis, it can be helpful to have a backstop—here, in the form of another set of longstanding relationships and sources of support that can be coordinated with federal efforts.

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<sup>23</sup> Ethan Weinstein & Peter D'Auria, *As America Severs Ties with Russia, Some Vermonters Are Caught in the Middle*, VT DIGGER (Mar. 29, 2022), <https://vtdigger.org/2022/03/29/as-america-severs-ties-with-russia-some-vermonters-are-caught-in-the-middle/> [<https://perma.cc/Q6PT-C5BC>].

<sup>24</sup> Sophie Kasakove, *Cities Move to Sever 'Sister City' Ties with Russian Governments*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/russian-government-sister-cities-ukraine.html> [<https://perma.cc/GR9V-GF77>]; Santa Clara Cnty., Cal., Ordinance No. 109920 to Amend Chapter XVIII of Division A6 of the Santa Clara County Ordinance Code Relating to the County of Santa Clara/Moscow Sister County Commission (Apr. 19, 2022), [http://sccgov.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=13954&MediaPosition=&ID=109920&CssClass=](http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=13954&MediaPosition=&ID=109920&CssClass=) [<https://perma.cc/MBA9-6LZG>].

<sup>25</sup> Jim Garamone, *Ukraine-California Ties Show Worth of National Guard Program*, U.S. DEP'T OF DEF. (Mar. 18, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/2971781/ukraine-california-ties-show-worth-of-national-guard-program/> [<https://perma.cc/H2XG-2W2C>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Beyond military equipment, California collaborated with local and federal agencies to deliver medical equipment and tactical gear to Ukraine.<sup>28</sup> The Vermont National Guard and state law enforcement agencies similarly coordinated efforts to donate body armor to military units in Ukraine.<sup>29</sup> Other states gave various forms of humanitarian aid to Ukraine. Vermont Governor Phil Scott called upon the Vermont state legislature to appropriate one dollar per Vermonter (\$643,077 in total), plus additional funds collected from the sales of Russian-sourced vodka, to give to “humanitarian efforts needed to support the people of Ukraine.”<sup>30</sup> Less than two weeks later, Governor Scott signed into law a bipartisan bill, passed unanimously by the state legislature, that allocated the requested funds to support Ukraine.<sup>31</sup>

### III. WHY DO U.S. STATE AND LOCAL GOVERNMENTS ENGAGE IN FOREIGN AFFAIRS?

As the example of Ukraine shows, U.S. state and local governments *do* engage in foreign policymaking. But why, given what some may believe to be their more circumscribed mandates and interests?

First, U.S. states and localities often view such engagement as politically advantageous.<sup>32</sup> Many U.S. state and local jurisdictions are home to large numbers of foreign-born and first-generation residents.<sup>33</sup> These constituents may expect their governments to defend their rights both locally and internationally, particularly when those rights align with American values—for instance, by publicly recognizing the Armenian genocide<sup>34</sup> or divesting public

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<sup>28</sup> Press Release, Off. of Cal. Governor Gavin Newsom, California Continues to Send Life-Saving Support to Ukraine (May 5, 2022), <https://www.gov.ca.gov/2022/05/05/california-continues-to-send-life-saving-support-to-ukraine/> [<https://perma.cc/AD6M-8X8X>].

<sup>29</sup> Press Release, Off. of Vt. Governor Phil Scott, Governor Phil Scott Encourages Support for Law Enforcement Body Armor Collection for Ukraine (Mar. 10, 2022), <https://governor.vermont.gov/press-release/governor-phil-scott-encourages-support-law-enforcement-body-armor-collection-ukraine> [<https://perma.cc/EJ4F-QXJS>].

<sup>30</sup> Office of Governor Philip Scott, Exec. Order No. 02-22, *supra* note 17.

<sup>31</sup> Act of Mar. 15, 2022, No. 82, 2022 Vt. Acts & Resolves 21; Press Release, Off. of Vt. Governor Phil Scott, Vermonters Show Support for Ukraine as Governor Phil Scott Signs Ukrainian Aid Bill (Mar. 15, 2022), <https://governor.vermont.gov/press-release/vermonters-show-support-ukraine-governor-phil-scott-signs-ukrainian-aid-bill> [<https://perma.cc/E3RS-BLG2>].

<sup>32</sup> *See id.* (making similar arguments with respect to international human rights work by U.S. state and local governments).

<sup>33</sup> *See, e.g.,* Sarah Parvini, ‘A Dangerous Time’ in Myanmar: Burmese in California Struggle for Answers, Attention, L.A. TIMES (June 3, 2021), <https://www.latimes.com/california/story/2021-06-03/myanmar-burmese-diaspora-reaction> [<https://perma.cc/C7X7-YZRA>].

<sup>34</sup> Siranush Ghazanchyan, California State Legislature Stands in Solidarity with Artsakh, Calls for Accountability for the Armenian Genocide, PUB. RADIO OF ARM. (Apr. 28, 2023), <https://en.armradio.am/2023/04/28/california-state-legislature-stands-in-solidarity->



funds from apartheid South Africa.<sup>35</sup> Securing the support of these constituents can be important for securing support in U.S. state and local elections.<sup>36</sup> Conversely, many foreign governments, seeing the political advantages of subnational foreign affairs relationships, have posted diplomats in U.S. cities and counties to engage in direct diplomacy—Los Angeles, for example, is home to nearly 100 foreign missions, many with Ambassador-rank representatives.<sup>37</sup> And more recently, the United Kingdom appointed an envoy to a sub-region within California, Silicon Valley, to liaise with technology companies in the area.<sup>38</sup>

Second, local action on foreign affairs can be used to influence federal foreign affairs actions—or at least apply pressure to take such federal actions. Consider the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>39</sup> The United States is one of only a handful of countries not yet a party to the treaty.<sup>40</sup> In response to federal inaction to date, several dozen localities in the U.S. adopted nonbinding resolutions, and nearly ten have adopted ordinances, to openly embrace the principles embodied in the

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with-artsakh-calls-for-accountability-for-the-armenian-genocide/ [https://perma.cc/6VJ2-HPRL].

<sup>35</sup> Karlyn Barker, *States, Cities Fight Apartheid*, WASH. POST (Feb. 8, 1985), <https://www.washingtonpost.com/archive/politics/1985/02/08/states-cities-fight-apartheid/c0b8b347-d075-42c6-9c47-da31d41ef7ba/> [https://perma.cc/NK78-C7HT].

<sup>36</sup> See *Armenian American Voters Take Center Stage in 2022 Mid-term Elections*, ARM. NAT'L COMM. OF AM. (Nov. 7, 2022), <https://anca.org/press-release/armenian-american-voters-take-center-stage-in-2022-mid-term-elections/> [https://perma.cc/QQC9-FDRK].

<sup>37</sup> L.A. CONSULAR CORPS, <https://www.laconsularcorps.com/> [https://perma.cc/3FXU-4G3B] (identifying nearly 100 consulates in Los Angeles); see also OFF. OF PROTOCOL, CNTY. OF L.A., LOS ANGELES CONSULAR CORPS (Sept. 2022), [https://file.lacounty.gov/SDSInter/lac/1077134\\_Consular-Corps.pdf](https://file.lacounty.gov/SDSInter/lac/1077134_Consular-Corps.pdf) [https://perma.cc/J3ZN-TKDA].

<sup>38</sup> Joe White was appointed to serve as the British consul general in San Francisco and the “technology envoy to the U.S.” Brendan Bordelon, *Joe White Is Leading the British Charm Offensive in Silicon Valley*, POLITICO (June 14, 2023), <https://www.politico.com/news/2023/06/14/uk-silicon-valley-tech-00101543> [https://perma.cc/XD6U-R72R]. Denmark named its first ambassador to the area in 2017. *Id.*

<sup>39</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>40</sup> Signatories & Signing Notes for Convention on the Elimination of All Forms of Discrimination Against Women, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en) [https://perma.cc/LM8T-AVEW] (showing the Holy See, Iran, Niue, Palau, Somalia, Sudan, Tonga, and the United States as the only countries or territories not to have ratified CEDAW).

treaty.<sup>41</sup> These localities aim to build sufficient momentum to compel Congress to ratify the treaty, though the prospect of ratification appears slim at this time.<sup>42</sup>

Third, pragmatics: good governance often requires U.S. states and localities to tackle foreign affairs matters. Many of the biggest challenges U.S. state and local governments currently face—from the climate crisis<sup>43</sup> to securing data privacy<sup>44</sup>—bear directly on their constituents. These governments may feel that, as good government stewards, they have no choice but to act—and to protect the most vulnerable among us.

Fourth, many constituents in the United States care about transnational issues like the climate crisis, migration, and terrorism—and they expect their political leaders to care too.<sup>45</sup> Constituents often want their governments to demonstrate moral leadership and to use their political and economic might to support basic rights within and beyond their borders, as the subnational response to Russian aggression in Ukraine shows.<sup>46</sup> This phenomenon may not be unique to U.S. state and local governments, instead reflecting a common expectation of the public of any form of representative government.

#### IV. CONSTITUTIONAL CONSTRAINTS ON SUBNATIONAL FOREIGN AFFAIRS ACTIONS

Under the Tenth Amendment of the U.S. Constitution, all powers that are not expressly delegated to the federal government are reserved for the states and the people.<sup>47</sup> States exercise this authority either by enacting their own

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<sup>41</sup> LEADERSHIP CONF. EDUC. FUND & WOMEN'S INTERCULTURAL NETWORK, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN – CEDAW (Jan. 2008), <http://citiesforcedaw.org/wp-content/uploads/2020/03/CEDAW-USFact-Sheet-01-2018-1.pdf> [<https://perma.cc/QQ57-2ZGA>].

<sup>42</sup> U.N. ASSOC. OF THE U.S., CITIES FOR CEDAW: PROMOTING WOMEN'S EQUALITY IN YOUR COMMUNITY, <https://unausa.org/wp-content/uploads/2021/06/UNAWomenCEDAWToolkit.pdf> [<https://perma.cc/M4HN-NQPT>] (“Cities for CEDAW is a nationwide, grassroots effort to encourage local governments to support the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by way of local government proclamations, resolutions and ordinances while at the same time lifting up the need to ratify the international women’s rights treaty.”).

<sup>43</sup> See generally Mina Juhn, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, 89 FORDHAM L. REV. 2731, 2735 (2021).

<sup>44</sup> See generally David H. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RESV. L. REV. 831, 852–55 (1991).

<sup>45</sup> Frank Newport, *U.S. Opinion and the Election: Guns, Immigration, Climate*, GALLUP (Oct. 21, 2022), <https://news.gallup.com/opinion/polling-matters/403742/opinion-election-guns-immigration-climate.aspx> [<https://perma.cc/P2LY-AJBP>]; see Jonathan Landay, *Most Americans Support US Arming Ukraine, Reuters/Ipsos Poll Shows*, REUTERS (June 28, 2023), <https://www.reuters.com/world/most-americans-support-us-arming-ukraine-reutersipsos-2023-06-28/> [<https://perma.cc/LZ4V-QRBV>].

<sup>46</sup> U.S. CONST. amend. X.

<sup>47</sup> *Id.*

legislation or by delegating the power to counties, cities, and other localities to enact laws and policies that preserve and protect the safety, health and welfare of the community.<sup>48</sup> The police power—understood as the ability of a government to enact laws to promote public safety and the public good<sup>49</sup>—is one such power.<sup>50</sup> Depending on the circumstances, the police power can be utilized by a state or locality, as delegated by the state, to engage in foreign affairs matters.

But several constitutional provisions and doctrines constrain the use of such power by U.S. state and local governments. U.S. states may not make treaties or engage in war, federal enactments are the supreme law of the land, and the President must “take care” that these federal enactments are faithfully executed.<sup>51</sup> Early case law took a particularly maximalist position on the federal authority over foreign affairs, with courts stating that, where foreign affairs matters are concerned, “state lines disappear” and the “purpose of the State . . . does not exist.”<sup>52</sup> More recent cases have built out some of the contours of the restrictions that U.S. states and localities face when making foreign affairs policies, including with respect to foreign affairs preemption under the Supremacy Clause, the Dormant Foreign Commerce Clause, and the Compact Clause.<sup>53</sup> But given the scarcity of recent case law on these topics, doctrinal questions remain. Even so, U.S. states and localities have become increasingly involved in core foreign affairs matters, often with the tacit support of the federal government.

### A. Foreign Affairs Preemption

The most significant constraint on U.S. state and local foreign affairs actions is the foreign affairs preemption doctrine under the Supremacy Clause.<sup>54</sup> The doctrine provides that treaties, self-executing executive agreements, federal statutes, executive branch policy, customary international law, and in some

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<sup>48</sup> See, e.g., Howard Lee McBain, *The Delegation of Legislative Power to Cities*, 32 POL. SCI. Q. 276, 276 (1917); Herman Walker, Jr., *The Delegation of Police Power to Counties*, 3 LA. L. REV. 522, 558 (1941).

<sup>49</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public 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,” though “[a]n attempt to define [police power’s] reach or trace its outer limits is fruitless.”).

<sup>50</sup> See generally *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

<sup>51</sup> U.S. CONST. art. I, §§ 8,10; *id.* arts. II, III, VI. See generally CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (7th ed. 2020).

<sup>52</sup> *United States v. Belmont*, 301 U.S. 324, 331 (1937).

<sup>53</sup> See generally STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10808, CONSTITUTIONAL LIMITS ON STATES’ POWER OVER FOREIGN AFFAIRS (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10808> [https://perma.cc/D79M-TU9U].

<sup>54</sup> See, e.g., *Zschemig v. Miller*, 389 U.S. 429 (1968).

cases, even the absence of political branch action, can preempt conflicting U.S. state and local foreign affairs actions.<sup>55</sup> This section does not attempt to cover the entire foreign affairs preemption legal landscape in each of these contexts but instead focuses on a handful of instructive cases to elucidate guideposts for U.S. state and local government foreign affairs actions.

In one such case, *Crosby v. National Foreign Trade Council*, the U.S. Supreme Court considered whether a Congressional statute passed in September 1996 preempted a June 1996 Massachusetts statute, which barred state entities from buying goods or services from any person or organization identified on a state-compiled “restricted purchase list” as doing business with Burma.<sup>56</sup> Among other things, the federal statute imposed mandatory and conditional sanctions on Burma, allowed the President to prohibit U.S. persons from making new investments in the country if the President certified to Congress that such action was warranted, directed the President to develop a comprehensive strategy to bring democracy and improve human rights in Burma, and permitted the President to waive sanctions if the President determined such a waiver would be in the national security interests of the United States.<sup>57</sup> In May 1997, President Bill Clinton made such a certification to Congress, prohibiting U.S. persons from investing anew in Burma.<sup>58</sup>

While both the federal and state laws sought to impose an economic cost on the Burmese regime for its human rights violations,<sup>59</sup> a unanimous Supreme Court found the Massachusetts law was “an obstacle to the accomplishment and execution of Congress’s full purposes and objectives” and denied its “natural effect.”<sup>60</sup> It was impossible, the Court determined, for a private party to comply with both the state and federal law.<sup>61</sup> Relying on the 1941 case *Hines v. Davidowitz*,<sup>62</sup> the Court considered the federal statute as a whole, identifying its purpose and intended effect, both implied and express, to reach this conclusion.<sup>63</sup> The Court relied, in part, on the intrusion of the state law on the delegation of power and diplomatic authority Congress had expressly given to the President and which the President already possesses under the U.S. Constitution.<sup>64</sup> While distinctions in the scope of the laws factored into the

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<sup>55</sup> MULLIGAN, *supra* note 53.

<sup>56</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366–67 (2000); *see also* Foreign Operations Appropriations Act, Pub. Law No. 104-208, § 570, 110 Stat. 3009–166 (1996).

<sup>57</sup> *Crosby*, 530 U.S. at 368–70.

<sup>58</sup> *Id.* at 370.

<sup>59</sup> *Id.* at 363–64.

<sup>60</sup> *Id.* at 373. Justices Scalia and Thomas concurred in the judgment only, disagreeing with the majority opinion’s consideration of circumstances beyond the statutory text. *Id.* at 388–91 (Scalia, J., concurring).

<sup>61</sup> *Id.* at 363 (majority opinion).

<sup>62</sup> *Hines v. Davidowitz*, 312 U.S. 52, 63, 69 (1941).

<sup>63</sup> *Crosby*, 530 U.S. at 379–80.

<sup>64</sup> *Id.* at 381.

Court's analysis—for instance, that the state law applied to both contracts for goods and services as well as non-U.S. persons, unlike the federal law—the central tension lay with the state law's implied interference with the President's power to speak for the country on foreign affairs.<sup>65</sup> The state, the Court found, could not be permitted to be an obstacle to the President and Congress in accomplishing their objectives.<sup>66</sup>

In determining whether a state law is preempted by a federal action, courts also may conduct field and conflict preemption analyses. Under a field preemption analysis, courts consider whether Congress intended to exclusively regulate the field—i.e., that a federal regulatory scheme is “so pervasive” as to imply that “Congress left no room for the States to supplement it”;<sup>67</sup> or, whether a “federal interest” in the field addressed by a federal statute may be “so dominant” that federal law “will be assumed to preclude enforcement of state laws on the same subject.”<sup>68</sup> Courts have commonly found immigration, for example, to be Congress's “field,” not that of the states.<sup>69</sup> Or, under a conflict preemption analysis, a court will consider whether it is impossible to comply with a federal statute that is silent about preemption and a state law, in which case the federal law will preempt the state one.<sup>70</sup> Based on *Hines*, in foreign relations contexts, there is a presumption in favor of preemption.<sup>71</sup> But this presumption has not been frequently put to the test. And generally, an “incidental or indirect” effect on the federal government's execution of foreign affairs has been found insufficient to preempt a state law.<sup>72</sup>

In *American Insurance Association v. Garamendi*, in a 5 to 4 decision, the U.S. Supreme Court extended the preemption analysis for statutes and treaties to inferences of executive branch policy, otherwise known as dormant foreign affairs preemption.<sup>73</sup> *Garamendi* concerned a 1999 California law that required insurance companies operating in California and that sold policies to people in Europe from 1920 to 1945 to make those policies public or else lose their state business license.<sup>74</sup> The Court held that federal government policy preempted the

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<sup>65</sup> *Id.* at 363–64, 377–79; see also Cleveland, *supra* note 2.

<sup>66</sup> *Crosby*, 530 U.S. at 373–77.

<sup>67</sup> *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (internal quotation omitted).

<sup>68</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>69</sup> See, e.g., *Arizona v. United States*, 567 U.S. 387, 401 (2012) (preempting an Arizona state law broadening local immigration enforcement authorities because “[t]he framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration”).

<sup>70</sup> *Crosby*, 530 U.S. at 363, 372.

<sup>71</sup> *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

<sup>72</sup> *Zschernig v. Miller*, 389 U.S. 429, 432–35, 441 (1968) (establishing the doctrine of dormant foreign affairs preemption); see also *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 398, 418 (2003) (affirming *Zschernig*).

<sup>73</sup> See *Garamendi*, 539 U.S. at 439, 443 (Ginsburg, J., dissenting).

<sup>74</sup> *Id.* at 401 (majority opinion).

law.<sup>75</sup> Specifically, in 2000, the President had entered into a sole executive agreement with Germany (and some neighboring countries) in which Germany agreed to establish a foundation to compensate Holocaust insurance claim victims.<sup>76</sup> The agreement provided that, whenever a German company was sued for a Holocaust-era claim in U.S. court, the U.S. would submit a statement that it would be in the U.S.'s foreign policy interests for the foundation to be the exclusive forum and remedy for such claims, and, that the U.S. federal government would try to get U.S. state and local governments to respect the foundation as the exclusive forum for addressing such claims.<sup>77</sup>

A group of insurance companies and a trade organization—not the federal government—brought the legal challenge in *Garamendi*, arguing that only the U.S. government had the right to enact legislation like California's.<sup>78</sup> But the U.S. government filed an amicus curiae brief, restating the core elements of the President's agreement with Germany and others, which the Court referenced.<sup>79</sup> The Court also considered the "national position, expressed unmistakably in the executive agreements signed by the President" as well as letters sent by federal officials to California leaders regarding the state law.<sup>80</sup> A majority of the Court found that logic persuasive, stating that "California s[ought] to use an iron fist where the President has consistently chosen kid gloves."<sup>81</sup> The state, the Court determined, was standing in the way of the President's diplomatic objectives, and therefore conflict preemption applied.<sup>82</sup> In so holding, the Court considered the strength of the state interest, judged by standards of traditional practice.<sup>83</sup> But even so, the Court found that federal foreign policy could overrule state law to the extent there is "evidence of clear conflict between the policies" in question.<sup>84</sup>

Justice Ginsburg, joined by Justices Stevens, Scalia, and Thomas, dissented.<sup>85</sup> In her dissent, Justice Ginsburg argued that dormant foreign affairs preemption "resonates most audibly when a state action reflects a state policy critical of foreign governments and involves sitting in judgment on them," noting that the California law did neither.<sup>86</sup> The dissent described *Crosby* as a statutory preemption case where the state law posed an obstacle to

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<sup>75</sup> *Id.* at 401, 420.

<sup>76</sup> *Id.* at 405.

<sup>77</sup> *Id.* at 396.

<sup>78</sup> *Id.* at 412.

<sup>79</sup> *Garamendi*, 539 U.S. at 413.

<sup>80</sup> *Id.* at 421, 424.

<sup>81</sup> *Id.* at 399.

<sup>82</sup> *Id.* at 427.

<sup>83</sup> *Id.* at 420 ("[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.").

<sup>84</sup> *Id.* at 421.

<sup>85</sup> *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 400 (2003).

<sup>86</sup> *Id.* at 439–40 (Ginsburg, J., dissenting).

accomplishing Congress's full objectives.<sup>87</sup> In *Garamendi*, by contrast, the dissent argued that the Court took the extraordinary step of holding the state law preempted "by inferring preclusive foreign policy objectives."<sup>88</sup> The agreement with Germany and others only committed to "precatory statements advising courts that dismissing Holocaust-era claims accords with American foreign policy" but the agreement had no binding legal effect.<sup>89</sup> Had there truly been a conflict, the dissent argued, one could have expected to see some reference in the later-in-time executive agreements—but none existed.<sup>90</sup> In other words, the Court invalidated California's disclosure law based upon a conflict with foreign policy "embod[ied]" in executive agreements, even though those agreements did not refer to state disclosure laws or information disclosure generally and the federal government itself did not make an argument in favor of preemption.<sup>91</sup>

In *Zschernig*, the Supreme Court went further down the dormant foreign affairs preemption path. The Court struck down an Oregon law prohibiting nonresident aliens from inheriting property if they could not satisfy certain requirements—even though the U.S. federal government had not exercised its power in this area via a federal statute or otherwise, nor did it occupy the field.<sup>92</sup> Although a subject of debate since *Zschernig*, the decision appeared to hinge on the requirement that followers of the state law would need to make particularized assessments of foreign government policies, thereby interfering with the federal government's dormant foreign affairs power.

Notwithstanding this foreign affairs preemption jurisprudence, U.S. states and localities have continued to lawfully play a significant role in foreign affairs matters. In the 1980s, for example, cities and counties enacted ordinances to divest public pension funds from companies doing business in apartheid South Africa or prohibiting government entities from contracting with such companies.<sup>93</sup> In a memorandum opinion, the U.S. Department of Justice's Office of Legal Counsel (OLC) opined at the time that such local laws "survive constitutional scrutiny" because divestment laws targeting apartheid South Africa do not unconstitutionally interfere with the U.S. federal government's

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<sup>87</sup> *Id.* at 440 n.4. Similarly, the dissent points out that in *United States v. Belmont*, 301 U.S. 324 (1937), *United States v. Pink*, 315 U.S. 203 (1942), and *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court gave effect to the express terms of an executive agreement as opposed to making an inference of the U.S. federal government's objectives that are not explicit in the text of the agreement. *Garamendi*, 539 U.S. at 438.

<sup>88</sup> *Garamendi*, 539 U.S. at 440 n.4.

<sup>89</sup> *Id.* at 440.

<sup>90</sup> *Id.* at 441.

<sup>91</sup> *Id.* at 417, 441. The dissent further argues against resurrecting *Zschernig v. Miller*, in which the Supreme Court ignored U.S. Department of Justice statements denying that an Oregon statute interfered with the conduct of U.S. foreign relations. *Id.* at 439–40; *Zschernig v. Miller*, 389 U.S. 429, 432, 434–35 (1968).

<sup>92</sup> *Garamendi*, 539 U.S. at 433–36.

<sup>93</sup> See *Barker*, *supra* note 35; see, e.g., New York, New York, Local Law No. 1985/019 (Mar. 15, 1985) (imposing certain conditions relating to South Africa on companies bidding for city contracts).

foreign affairs power.<sup>94</sup> OLC analyzed *Zschernig*, asserting “the case may not fairly be interpreted to mean that the court will strike down any state exercise of authority that has some indirect impact on foreign affairs or that is intended to affect the behavior of foreign governments.”<sup>95</sup> The divestment laws at issue, OLC stated, “do not impermissibly encroach into the realm of foreign affairs,” as they do not require assessment of the South African laws or officials (unlike in *Zschernig*), the statutes bear most directly on American companies, and the investment of state funds falls well within a traditional state function.<sup>96</sup> The OLC opinion may have rested, at least in part, on the overall policy alignment between the federal government and the states on divestment—though federal government actions against apartheid in South Africa postdated such state actions.<sup>97</sup> For instance, the U.S. did not support anti-apartheid resolutions at the United Nations Security Council until several years after states enacted these divestment laws.<sup>98</sup>

Building on this more recent precedent, there are several reasons I argue that the preemption analysis conducted by the *Crosby*, *Garamendi*, and *Zschernig* courts should not forestall U.S. states and localities from engaging in foreign affairs in ways that are generally consistent with federal law and policy. First, the Supreme Court decided *Garamendi*, the most recent Supreme Court precedent on point, twenty years ago.<sup>99</sup> While it is still good law, the makeup of the Court has shifted dramatically over the last two decades.<sup>100</sup> Notably, Justices Thomas and Scalia, who joined in Justice Ginsburg’s dissent in *Garamendi*, are now in the majority of the Court—a majority that typically supports state rights

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<sup>94</sup> Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. O.L.C. 49, 49 (1986), [www.justice.gov/d9/olc/opinions/1986/04/31/op-olc-v010-p0049\\_0.pdf](http://www.justice.gov/d9/olc/opinions/1986/04/31/op-olc-v010-p0049_0.pdf) [<https://perma.cc/LMM6-ZVNA>].

<sup>95</sup> *Id.* at 61.

<sup>96</sup> *Id.* at 62. The OLC further stated that the federal government had not preempted the divestment laws, either by executive order or by statute. *Id.* at 65. The memorandum opinion cites congressional testimony suggesting Congress did not intend to preempt any state divestment laws and notes the absence of express language to the contrary. *Id.* at 66.

<sup>97</sup> The U.S. was among the last countries on the United Nations Security Council to support targeted sanctions against the apartheid regime in South Africa. In fact, both the U.S. and the UK continued to veto United Nations sanctions initiatives through the late 1980s. *See, e.g., U.S., Britain Veto U.N. Move for Mandatory S. Africa Sanctions*, L.A. TIMES (Mar. 9, 1988), <https://www.latimes.com/archives/la-xpm-1988-03-09-mn-753-story.html> [<https://perma.cc/4F4V-ANY6>].

<sup>98</sup> *Id.*

<sup>99</sup> *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 396 (2003).

<sup>100</sup> *See Justices 1789 to Present*, Supreme Court of the United States (Jan. 7, 2024), [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/GML4-KNFE>]; Nadine El-Bawab, *How Did the Supreme Court Become So Polarized?*, ABC NEWS (Oct. 5, 2022), <https://abcnews.go.com/Politics/supreme-court-polarized/story?id=90598910> [<https://perma.cc/DQN8-RLQD>].



when they run up against federal ones.<sup>101</sup> At a minimum, there is a reasonable chance that the current Court would analyze *Garamendi* or a similar set of facts in a way that is more favorable to state rights, and thus more closely aligns with the dissent rather than the majority.<sup>102</sup> But a test case would be required to determine whether a differently composed Court would be prepared to overrule or distinguish *Garamendi*.

Second, lawsuits challenging state foreign policy actions appear to be rare, as the sporadic jurisprudence described above suggests. It is hard to know precisely why, but a few factors may play a role. One may be that Congress has become less active in the foreign affairs arena,<sup>103</sup> resulting in potentially fewer statutes and treaties to preempt state laws. For example, in the last several decades Congress has ratified far fewer treaties than in the several decades prior.<sup>104</sup> That, in part, is why major recent foreign policy initiatives that the U.S. has helped to lead—such as the Iran nuclear deal and the Paris climate accord—were negotiated as sole executive agreements, sidestepping the need for Congressional approval.<sup>105</sup> But non-treaty instruments or actions could serve as the basis for a federal preemption claim, and existing treaties may already cover a lot of foreign affairs ground. Another perhaps more compelling factor may be the difficulty in establishing standing to sue, as the aggrieved party must establish an injury-in-fact with respect to a foreign affairs matter.<sup>106</sup> The U.S.

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<sup>101</sup> See Kimberly Wehle, Opinion, *States' Rights Is About to Come Roaring Back*, POLITICO (Nov. 2, 2022), <https://www.politico.com/news/magazine/2022/11/02/the-supreme-courts-deference-to-states-rights-in-dobbs-might-have-been-just-the-start-00064607> [<https://perma.cc/7YX3-PHUS>].

<sup>102</sup> See, e.g., Cleveland, *supra* note 2, at 991, 1001 (arguing “de facto federalism of U.S. foreign relations” already exists, as demonstrated by the Tenth Amendment’s carveout of an (undefined) zone of traditional state authority and historical practice). Furthermore, under *Zschernig* and *Clark v. Allen*, 331 U.S. 503 (1947), courts balance the extent to which a statute intrudes on foreign affairs against the extent to which the exercise of the state power falls within traditional state powers. See *Garamendi*, 539 U.S. at 417–18.

<sup>103</sup> See, e.g., Naveed Shah, *Congress Can’t Ignore Its Responsibility on Foreign Affairs Any More*, HILL (Aug. 30, 2023), <https://thehill.com/opinion/national-security/4175362-congress-cant-ignore-its-responsibility-on-foreign-affairs-any-more/> [<https://perma.cc/VGE8-N8FF>] (criticizing that “[u]nder presidents of both parties . . . Congress abdicated much of its constitutional role”).

<sup>104</sup> See, e.g., CONG. RSCH. SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 17 (2001) (noting the decline in use of treaties for major political commitments).

<sup>105</sup> See GWYNNE TARASKA & HARDIN LANG, CTR. FOR AM. PROGRESS, EXECUTIVE POWER AND THE ROLE OF CONGRESS IN THE PARIS CLIMATE AND IRAN NUCLEAR AGREEMENTS (Jan. 2016), <https://www.americanprogress.org/wp-content/uploads/sites/2/2016/01/IranParisCongress.pdf> [<https://perma.cc/R67U-4C29>]; STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 17 n.142, 21 (2018).

<sup>106</sup> Jean Galbraith, *supra* note 2, at 2135 (noting justiciability challenges, including establishing standing, in foreign affairs federalism cases).

government also historically has not been particularly zealous in bringing its own federal preemption cases. One possible reason is that the federal government may not have the bandwidth to stay abreast of all actions that the fifty states, several territories, and tens of thousands of localities are taking in the foreign affairs arena. But when it is aware, few actions have been brought.

Third and relatedly, past practice shows state engagement in foreign affairs matters has elicited limited federal pushback. As Sarah Cleveland argues, “U.S. history has been characterized both by substantial actions by states that affect foreign affairs and by deference and tolerance of many such state actions by the national political branches,”<sup>107</sup> or even support. For example, laws similar to the one at issue in *Crosby* have been enacted in more than two dozen states and municipalities—without being struck down.<sup>108</sup> More recently, the federal government voluntarily dismissed an appeal in the California-Québec cap-and-trade litigation.<sup>109</sup> Under the cap-and-trade agreement between California and Québec, each jurisdiction has independent laws that place a cap on the amount of greenhouse gasses regulated entities can emit, and through a linked cross-border market, regulated actors can trade their allocated emissions.<sup>110</sup> A district court upheld the agreement, stating that the arrangement was not preempted and did not violate any treaty or compact clauses.<sup>111</sup> The agreement, the court found, did not conflict with the express foreign policy of the federal government, nor was cap-and-trade an area that extended beyond the traditional area of state sovereignty into a field wholly occupied by the federal government.<sup>112</sup> That decision remains good law following the voluntary dismissal of the case shortly after President Donald Trump left office.

Fourth, the U.S. federal government often sets a floor for foreign affairs actions, not a ceiling, permitting or acquiescing to significant U.S. state and local action on foreign affairs matters. The U.S. response to Russia’s aggression in Ukraine is illustrative. To date, no facets of federal government policy suggest that the U.S. is not open to such state and local action. To the contrary, the federal government continues to expand its sanctions regime and broaden enforcement while making no public statements or otherwise indicating through

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<sup>107</sup> Cleveland, *supra* note 2, at 991; *see also* GLENNON & SLOANE, *supra* note 2, at 55–76 (arguing that states and localities frequently engage in activities that impact foreign relations and that constitutional law should be capacious in permitting these activities, even if not fully embedded in Supreme Court doctrine).

<sup>108</sup> *See, e.g.*, Cleveland, *supra* note 2, at 994–95.

<sup>109</sup> *United States v. California*, No. 20-16789, 2021 WL 4240403, at \*1 (9th Cir. Apr. 22, 2021).

<sup>110</sup> Agreement Concerning the Harmonization and Integration of Cap-And-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Que., Sept. 27, 2013, [https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca\\_quebec\\_linking\\_agreement\\_english.pdf](https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca_quebec_linking_agreement_english.pdf) [<https://perma.cc/K8EK-A7W7>].

<sup>111</sup> *See United States v. California*, 444 F. Supp. 3d 1181, 1193, 1196, 1198 (E.D. Cal. 2020).

<sup>112</sup> *See id.* at 1190–93, 1196–97.

public pronouncements, litigation, statutory authority, or other public channels that it intends to occupy the field of Russia sanctions at this time.<sup>113</sup> Based on federal silence or acquiescence in response to several states responding to Russian aggression in Ukraine, the federal government appears to have set a floor, not a ceiling for sanctioned activity, making way for complementary foreign affairs actions by U.S. states and localities. To the extent legal challenges arise, federal courts, in the absence of clear guidance from the federal political branches, should look to the actions and statements made by the federal branches and not infer a limit on state authority in the name of a broad federal foreign relations interest.<sup>114</sup>

### B. *Dormant Foreign Commerce Clause*

The Foreign Commerce Clause stands as another potential constraint on subnational foreign affairs actions. Under U.S. Constitution Article 1, section 8, clause 3, “Congress shall have Power . . . To regulate commerce with foreign Nations.”<sup>115</sup> State regulations that facially discriminate against foreign commerce are *per se* invalid.<sup>116</sup> Nondiscriminatory state enactments affecting foreign commerce violate the foreign commerce clause if the enactment (1) creates a substantial risk of conflicts with foreign governments, or (2) impedes the federal government’s ability to speak with “one voice” in regulating commercial affairs with foreign states.<sup>117</sup> The “one voice” test or doctrine requires courts to distinguish between a state law that will “offen[d]” a foreign nation from one that “merely has foreign resonances.”<sup>118</sup> Under the dormant commerce clause doctrine, courts can strike down a state regulation even where Congress has not expressly or impliedly preempted the state.

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<sup>113</sup> 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/PR5T-3RB9>]. See generally Julia Spiegel, *Embracing Foreign Affairs Federalism in a Post-Trump Era*, LAWFARE (Mar. 3, 2021), <https://www.lawfaremedia.org/article/embracing-foreign-affairs-federalism-post-trump-era> [<https://perma.cc/J384-DYQY>] [hereinafter Spiegel, *Embracing Foreign*]; Press Release, White House, Fact Sheet: One Year of Supporting Ukraine (Feb. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/> [<https://perma.cc/D26W-Q46D>]; *Ukraine-/Russia-related Sanctions*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> [<https://perma.cc/7XZK-9SJ2>].

<sup>114</sup> See Spiegel, *Embracing Foreign*, *supra* note 113.

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>116</sup> *Piazza’s Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006); *Kraft Gen. Foods v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 81 (1992) (“Absent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”).

<sup>117</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979).

<sup>118</sup> *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 194 (1983).

Over time, the Supreme Court has seemingly moved away from a strict interpretation of the “one-voice test” under the dormant foreign commerce clause doctrine. For example, in the 1994 case *Barclays Bank v. Franchise Tax Board of California*, the Court rejected a challenge to California’s method of taxing foreign multinational corporations—even though the method differed from the one enacted by Congress and resulted in significant international protest.<sup>119</sup> The Court found “no ‘specific indications of congressional intent’ to bar the state action,” deciding to “leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate if the national interest is best served by tax uniformity, or state autonomy.”<sup>120</sup> The Court further stated that *Container Corporation* as well as *Wardair Canada Inc. v. Florida Department of Revenue*, a case in which the Court upheld a state tax on jet fuel purchased by foreign airlines, suggested that “Congress may more passively indicate that certain state practices do not ‘impair federal uniformity in an area where federal uniformity is essential.’”<sup>121</sup> Congress “need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce,” the Court explained.<sup>122</sup>

In addition to this capacious precedent, U.S. states and localities have defenses against the Dormant Foreign Commerce Clause that they can invoke. For example, though far from settled, Supreme Court jurisprudence suggests that U.S. states and localities may attempt to invoke the market participant doctrine in defense of any actions they have taken that bear directly on foreign commerce.<sup>123</sup> That doctrine exempts U.S. state or local laws from the Foreign Commerce Clause when a U.S. state or local government acts as a buyer or seller of goods rather than as a regulator.<sup>124</sup> However, the market participant defense is unlikely to be helpful with respect to many kinds of state or local actions, such as divestment laws or those involving economic sanctions on foreign actors.<sup>125</sup>

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<sup>119</sup> *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 324 n.22, 327–28 (1994).

<sup>120</sup> *Id.* at 324, 331.

<sup>121</sup> *Id.* at 323; *Wardair Canada, Inc. v. Florida Dep’t of Revenue*, 477 U.S. 1, 1 (1986).

<sup>122</sup> *Barclays Bank*, 512 U.S. at 323.

<sup>123</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809–10 (1976).

<sup>124</sup> *Id.*

<sup>125</sup> For example, in *National Foreign Trade Council v. Natsios*, the appeals court determined that Massachusetts was not acting as a market participant when enacting its Burma sanctions law because the state was “attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies’ interactions with Massachusetts.” 181 F.3d 38, 63 (1st Cir. 1999). The federal appeals court further noted that “[it] [is] skeptical of whether the market participant exception ‘applies at all (or without a much higher level of scrutiny) to the Foreign Commerce Clause.’” *Id.* at 65.

### C. Compact Clause

Finally, the Compact Clause may constrain certain U.S. state and local foreign affairs actions. Section 10 of Article 1 of the U.S. Constitution proscribes states from “enter[ing] into any Treaty,” or, “without the Consent of Congress . . . enter[ing] into any Agreement or Compact with another State, or with a foreign Power.”<sup>126</sup>

But what is a “compact” subject to this clause? The answer remains ambiguous. But the 1978 case *U.S. Steel Corp. v. Multistate Tax Commission*<sup>127</sup> is instructive. In that case, the Supreme Court held a multistate tax compact was lawful even without Congressional consent.<sup>128</sup> In explaining its rationale, the Court offered that the states had acted within the police powers they already possessed, and the compact did not confer additional authorities that fell outside that scope.<sup>129</sup> Presumably, then, only compacts that extend beyond a state’s existing police powers need be presented to Congress for approval. And practically, such gray zones have not impeded the ability of states to enter into compacts.<sup>130</sup>

## V. FORMS OF SUBNATIONAL FOREIGN AFFAIRS COMMITMENTS

The constitutional constraints described above have not foreclosed states from taking significant foreign affairs actions. U.S. state and local actions most commonly take the form of memorandums of understanding (“MOUs”) and letters of intent, agreements approved by Congress, program linkages and partnerships, and ordinances, statutes, and executive orders—the same legal instruments the federal government often uses to effectuate its own foreign policy. Even if not legally binding in many cases, their impacts can be significant, as with many non-binding federal foreign affairs commitments.<sup>131</sup>

### A. Nonbinding MOUs and Letters of Intent

Memorandums of understanding and letters of intent are a common vehicle utilized by states to establish, in a non-binding manner, common features of a

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<sup>126</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>127</sup> *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 452 (1978).

<sup>128</sup> *Id.* at 471–78.

<sup>129</sup> *Id.* at 473.

<sup>130</sup> See GLENNON & SLOANE, *supra* note 2, at 276–89 (“In practice, issues raised by the Compact Clause have turned out to be few, to require minimal judicial—or, for that matter, congressional—intervention, and seldom if ever to raise concrete problems.”).

<sup>131</sup> See Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281, 1284–90 (2023).

program or practice with a foreign state or locality.<sup>132</sup> For example, California and Japan’s Ministry of Land, Infrastructure, Transport, and Tourism recently issued a joint “letter of intent to support port decarbonization and the development of green shipping corridors.”<sup>133</sup> Effective March 14, 2023, the letter sets out specific efforts each partner commits to undertake to promote decarbonization along their shared shipping corridor, from the sharing of information and technical know-how to developing a system to objectively evaluate the effort toward decarbonization in ports and a plan to study the development of ammonia fuel bunkering methods.<sup>134</sup> Similar letters of intent and memoranda of understanding have been signed by U.S. localities with Singapore<sup>135</sup> and between certain transatlantic ports.<sup>136</sup>

U.S. states and localities negotiated these MOUs on the heels of the Clydebank Declaration, a commitment announced during the COP26 UN climate conference in November 2021.<sup>137</sup> During that conference, 19 countries, including the U.S., agreed to create zero emissions shipping routes to speed up the decarbonization of the global ocean shipping industry, which accounts for nearly three percent of global carbon dioxide emissions.<sup>138</sup> The Declaration

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<sup>132</sup> Such arrangements may be referred to using various titles or names, such as commitment, pledge, proclamation, or compact. See generally *Guidance on Non-Binding Documents*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/treaty/guidance/index.htm> [<https://perma.cc/G6MJ-CHWR>]; U.S. AGENCY FOR INT’L DEV., MEMORANDUM OF UNDERSTANDING (Sept. 2020), [https://www.usaid.gov/sites/default/files/2022-05/MOU\\_Overview\\_Guidance\\_9.15.20.pdf](https://www.usaid.gov/sites/default/files/2022-05/MOU_Overview_Guidance_9.15.20.pdf) [<https://perma.cc/4FH5-2PBV>].

<sup>133</sup> STATE OF CAL. & MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM OF JAPAN, LETTER OF INTENT TO SUPPORT PORT DECARBONIZATION AND THE DEVELOPMENT OF GREEN SHIPPING CORRIDORS 1 (Mar. 14, 2023), <https://calsta.ca.gov/-/media/calsta-media/documents/ca-japan-mlit-port-decarbonization-loi---signed-a11y.pdf> [<https://perma.cc/AAK7-45JY>]. The letter states that it is a “voluntary initiative that does not create any legally binding rights or obligations,” “does not involve the exchange of funds, nor does it represent any obligation of funds by any Participant” and that the letter “will be construed and carried out in a manner consistent with all applicable laws.” *Id.* at 4.

<sup>134</sup> *Id.* at 3–4.

<sup>135</sup> Press Release, Mar. & Port Auth. of Sing., Port of L.A. & Port of Long Beach, Singapore, Los Angeles, and Long Beach Ports Ink Agreement on Green and Digital Shipping Corridor (Apr. 24, 2023), [https://www.c40.org/wp-content/uploads/2023/04/2023\\_04\\_24-Press-release\\_Singapore-green-shipping-MOU-signing.docx.pdf](https://www.c40.org/wp-content/uploads/2023/04/2023_04_24-Press-release_Singapore-green-shipping-MOU-signing.docx.pdf) [<https://perma.cc/W4PL-S9PN>].

<sup>136</sup> Press Release, Port of L.A., Port of Los Angeles Signs Agreements with Tokyo and Yokohama Ports to Establish Green Shipping Corridor (Mar. 16, 2023), [https://www.portoflosangeles.org/references/2023-news-releases/news\\_031623\\_japan\\_mous](https://www.portoflosangeles.org/references/2023-news-releases/news_031623_japan_mous) [<https://perma.cc/4MQV-AFJ5>].

<sup>137</sup> *Clydebank Declaration for Green Shipping Corridors*, U.N. CLIMATE CHANGE CONF. UK 2021 (Nov. 10, 2021) [hereinafter *Clydebank Declaration*], <https://webarchive.nationalarchives.gov.uk/ukgwa/20230313124737/https://ukcop26.org/cop-26-clydebank-declaration-for-green-shipping-corridors/> [<https://perma.cc/A66H-F5P6>].

<sup>138</sup> Jonathan Saul & Elizabeth Piper, *Countries at COP26 Launch Plans for Net-Zero Shipping Lanes*, REUTERS (Nov. 10, 2021), <https://www.reuters.com/business/cop/countries->

calls upon the signatories to facilitate the establishment of partnerships to accelerate decarbonization of the shipping sector and its fuel supply, identify and explore actions to address barriers to the formation of green corridors; consider including green corridor provisions in Paris Accord national action plans, and work to ensure that wider consideration is taken for environmental impacts and sustainability when pursuing green shipping corridors.<sup>139</sup> The U.S. state and local MOUs build upon the high-level Declaration, offering more specifics about the actions the parties intend to take—in alignment with the object and purpose of the Declaration.<sup>140</sup> Notably, the Declaration called for the establishment of partners, including with local ports and others, making express that such actions are permissible under the Declaration’s framework.<sup>141</sup> Not all MOUs are coordinated across a wide range jurisdictions, however. For example, in 2012, the County of Santa Clara and the City of San José entered into a standalone binational memorandum of understanding with the Consulate General of México to reduce hate crimes targeting Mexican immigrants.<sup>142</sup>

There can be limits to such kinds of arrangements. For example, in recent years, the federal government has warned against U.S. states and localities from entering into MOUs with certain counterparts and on certain topics. In July 2022, for instance, the National Counterintelligence and Security Center issued a public warning cautioning government and business entities to “exercise vigilance, conduct due diligence, and ensure transparency, integrity, and accountability are built into the partnership to guard against potential foreign government exploitation,” with a specific focus on relationships with China.<sup>143</sup> But such cautions are infrequent, tend to be targeted, and do not foreclose U.S. states and localities from pursuing nonbinding MOUs or letters of intent with foreign governments.

### *B. Agreements and MOUs Approved by Congress*

A second form of U.S. state and local engagement on foreign affairs involves agreements and MOUs that Congress has approved pursuant to Article

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agree-create-green-shipping-lanes-pursuit-zero-carbon-2021-11-10/ [https://perma.cc/5VED-M8GS].

<sup>139</sup> *Clydebank Declaration*, *supra* note 137.

<sup>140</sup> *See supra* notes 135–136.

<sup>141</sup> *Clydebank Declaration*, *supra* note 137.

<sup>142</sup> Memorandum of Understanding Regarding Consular Involvement in Cases Involving Minors, Monterey Cnty., Cal.-Consulate General of Mex. in San José, Cal., June 5, 2012, <https://cimmew.org/wp-content/uploads/MontereyMexican-Consolate-MOU.pdf> [https://perma.cc/RW8G-WT6S].

<sup>143</sup> NAT’L COUNTERINTEL. & 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 (July 2022), [https://www.dni.gov/files/NCSC/documents/SafeguardingOurFuture/PRC\\_Subnational\\_Influence-06-July-2022.pdf](https://www.dni.gov/files/NCSC/documents/SafeguardingOurFuture/PRC_Subnational_Influence-06-July-2022.pdf) [https://perma.cc/ZG4S-NXLB].

1, section 10, of the U.S. Constitution. Many of these agreements pertain to international mutual aid. Such commitments have become increasingly important as the climate crisis has caused significant weather events, from major floods to vast wildfires.<sup>144</sup> For example, in addition to federal resources that were mobilized to support Canada's response to raging summer wildfires, several U.S. states committed personnel and supplies to help beat back the fires.<sup>145</sup> They did so pursuant to existing mutual aid partnerships, such as the Northwest Wildland Fire Protection Agreement, which Congress approved in November 1998.<sup>146</sup> The Canadian provinces of Alberta, British Columbia, Yukon Territory, Saskatchewan, and Northwest Territories/Forests entered into the mutual aid agreement with Alaska, Idaho, Oregon, Washington, and Montana.<sup>147</sup> And several of these U.S. states have sent personnel as well as ground and air assets to their Canadian counterparts to address recent fires.<sup>148</sup>

MOUs ratified by Congress have also been used to provide public health emergency-related mutual aid between U.S. states and other sovereign states. For example, Alaska, Idaho, Oregon, and Washington obtained Congressional approval of their Pacific Northwest Emergency Management Arrangement with British Columbia and the Yukon Territory.<sup>149</sup> Similarly, in 2000, several U.S. states in the northeast entered into an emergency management agreement, known as the International Emergency Management Assistance Memorandum of Understanding, with five eastern Canadian provinces.<sup>150</sup> Seven years later, Congress approved the mutual aid MOU.<sup>151</sup> In the intervening period, the MOU signatories worked together to share equipment during certain emergency

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<sup>144</sup> See *How Climate Change Is Fueling Extreme Weather*, EARTHJUSTICE (July 19, 2023), <https://earthjustice.org/feature/how-climate-change-is-fueling-extreme-weather> [https://perma.cc/TZK3-E5SA].

<sup>145</sup> Press Release, Nat'l Interagency Fire Ctr., U.S. Resources Support Canadian Wildfires (May 19, 2023), <https://www.nifc.gov/fire-information/news-releases/us-resources-support-canadian-wildfires> [https://perma.cc/R5DG-BFF7].

<sup>146</sup> Northwest Wildland Fire Protection Agreement, Pub. L. No. 105-377, § 1, 112 Stat. 3391, 3391 (1998).

<sup>147</sup> *Id.*

<sup>148</sup> Press Release, Nat'l Interagency Fire Ctr., *supra* note 145. These territories also coordinate on economic issues ranging from disaster resilience to water policy as part of the Pacific NorthWest Economic Region. *Pacific NorthWest Economic Region: "The Gold Standard of U.S.-Canada Relations,"* PAC. NW. ECON. REGION, <https://www.pnwer.org/> [https://perma.cc/J6B6-TDPQ].

<sup>149</sup> Congress approved the agreement in a joint resolution dated November 12, 1998. Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105-381, 112 Stat. 3402 (1998).

<sup>150</sup> Other examples include the Great Lakes Forest Fire Protection Agreement, signed in 1989, by Michigan, Minnesota, Wisconsin, and Ontario. See Cooperative Fire Protection Agreement, Sept. 25, 1989, [http://mnics.org/wp-content/uploads/2017/11/GLFFC\\_agreement.pdf](http://mnics.org/wp-content/uploads/2017/11/GLFFC_agreement.pdf) [https://perma.cc/59TV-9QEX].

<sup>151</sup> International Emergency Management Assistance Memorandum of Understanding, Pub. L. No. 110-171, 121 Stat. 2467 (2007).



events, even though the agreement was technically non-binding during that time.<sup>152</sup>

### C. Partnerships and Program Linkages

Partnerships are perhaps the most common vehicle for effectuating foreign affairs federalism. Some take the form of formal, but nonbinding, agreements,<sup>153</sup> and others do not. Consider, again, the “program linkage” with respect to California’s cap-and-trade program, which is currently linked with the cap-and-trade system of Québec (and for a short while, Ontario).<sup>154</sup> As noted in Part IV, in September 2013, California and Québec signed an agreement that outlined common objectives for reducing greenhouse gas emissions, laid out a harmonization and integration process, and cap-and-trade program processes.<sup>155</sup> Pursuant to this agreement, California and Québec each set up regulations that cap the amount of greenhouse gasses that regulated entities can emit.<sup>156</sup> And, through a linked cross-border market, entities in both California and Québec can trade their allocated emission allowances.<sup>157</sup>

Localities have also created broader coalitions to uphold the Paris Climate agreement that do not involve any agreements or MOUs. For example, many subnational governments formed and then joined the “Under2Coalition,” a network of more than 150 subnational states, regions, and provinces from all over the world—totaling more than fifty percent of global GDP—that are

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<sup>152</sup> See, e.g., Daniel D. Stier & Richard A. Goodman, *Mutual Aid Agreements: Essential Legal Tools for Public Health Preparedness and Response*, 97 AM. J. PUB. HEALTH (SUPPLEMENT) S62, S67 (2007).

<sup>153</sup> Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 744 (2010) (stating that, between 1955 to 2008, forty-one U.S. states entered into over 340 agreements with foreign governments).

<sup>154</sup> *Program Linkage*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/program-linkage> [<https://perma.cc/D6W8-XHMM>]; CAL. CODE REGS., tit. 17, § 95943(a)(1) (2019).

<sup>155</sup> Agreement Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Que., Sept. 27, 2013, [https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca\\_quebec\\_linking\\_agreement\\_english.pdf](https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca_quebec_linking_agreement_english.pdf) [<https://perma.cc/55B8-Y53X>].

<sup>156</sup> The statutory basis for California’s cap-and-trade program, Assembly Bill 32, states that the California Air Resources Board will “consult with other states, and the federal government, and other nations to identify the most effective strategies and methods to reduce greenhouse gasses, manage greenhouse gas control programs, and to facilitate the development of integrated and cost-effective regional, national, and international greenhouse gas reduction programs.” CAL. HEALTH & SAFETY CODE § 38564 (West 2007); see also CAL. CODE REGS., tit. 17, § 95943(a)(1) (2019).

<sup>157</sup> Press Release, Cal. Cap-and-Trade Program, Cal. Air Res. Bd., Facts About the Linked Cap-and-Trade Programs (Dec. 1, 2017), [https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/linkage\\_fact\\_sheet.pdf](https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/linkage_fact_sheet.pdf) [<https://perma.cc/MM3E-W5NQ>].

committed to achieving net zero emissions by, or before, 2050.<sup>158</sup> The coalition has a secretariat and co-chairs that provide strategic direction for the coalition's work and coordinates across a wide range of policy initiatives, from climate finance to green transportation initiatives.<sup>159</sup> Similarly, C40, a network of nearly 100 mayors from around the world, coordinates a set of climate-oriented actions across jurisdictions.<sup>160</sup> Membership is based upon cities meeting certain performance-based requirements for addressing the climate crisis.<sup>161</sup> C40 launched the Cities Race to Zero campaign ahead of COP26, for example, which resulted in over a thousand cities around the world committing to net zero carbon emissions by mid-century, the world's largest coalition of actors committed to such action by mid-century.<sup>162</sup> Though these coalitions have no formal legal effect, the efforts have proven to be a powerful tool for mobilizing local, federal, and international support for meeting climate action goals.

#### D. Statutes, Ordinances, and Executive Orders

U.S. states and localities often utilize statutes, ordinances, and executive orders effectuate a range of foreign affairs actions,<sup>163</sup> such as divesting from foreign actors or governments. For example, several U.S. states and localities enacted divestment laws with respect to Sudan. In 2007, the Illinois Governor at the time signed a law barring the state from investing money in the Republic of Sudan and divesting any current investments linked to the country, joining with actions taken by the Governors of Florida, California, Colorado, Texas, Kansas, Hawaii, Indiana, Iowa, Minnesota, Rhode Island, Vermont, and New York.<sup>164</sup> However, in February 2007, a federal district court held Illinois's

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<sup>158</sup> See *Under2 Coalition*, CLIMATE GRP., <https://www.theclimategroup.org/under2-coalition> [<https://perma.cc/E4DS-AMBP>].

<sup>159</sup> See *id.*; *Climate Finance*, CLIMATE GRP., <https://www.theclimategroup.org/climate-finance> [<https://perma.cc/R2XA-YJ6B>]; *Transport*, CLIMATE GRP., <https://www.theclimategroup.org/transport> [<https://perma.cc/946R-ZHEU>].

<sup>160</sup> *About C40*, C40 CITIES, <https://www.c40.org/about-c40/> [<https://perma.cc/GSP9-ALUK>].

<sup>161</sup> *Id.*

<sup>162</sup> *Cities Race to Zero*, C40 KNOWLEDGE (Dec. 2020), [https://www.c40knowledgehub.org/s/article/Cities-Race-to-Zero?language=en\\_US](https://www.c40knowledgehub.org/s/article/Cities-Race-to-Zero?language=en_US) [<https://perma.cc/Q9W8-W5JE>]; Press Release, C40 Cities, 700+ Cities in 53 Countries Now Committed to Halve Emissions by 2030 and Reach Net Zero by 2050 (Apr. 16, 2021), <https://www.c40.org/news/cities-committed-race-to-zero/> [<https://perma.cc/WU3F-WUNM>].

<sup>163</sup> See generally *supra* Parts II, IV.A. U.S. states and localities can issue formal statements, known as proclamations or resolutions as well. They tend to be more aspirational and hortatory in nature, however, and they are nonbinding on the Legislature or Governor who issued them.

<sup>164</sup> Press Release, Off. of the Governor of Ill., Gov. Blagojevich Signs Law Prohibiting Illinois Pension Funds from Investing in Companies that Are Associated with the Republic of Sudan (Aug. 28, 2007), <https://www.illinois.gov/news/press-release.6244.html>

Sudan sanctions law unconstitutional on foreign affairs and foreign commerce clause grounds, permanently enjoining its enforcement.<sup>165</sup> Illinois subsequently repealed and replaced its statute, and the state's appeal in the case was dismissed as moot later that year.<sup>166</sup> Shortly thereafter, Congress passed the Sudan Accountability and Divestment Act of 2007, which authorized U.S. states and local governments to enact divestment or investment prohibitions involving persons the U.S. state or local government determines are conducting business operations in the Sudanese energy and military equipment sectors or who have a direct investment in or carrying on a trade or business with Sudanese entities or the Government of Sudan, provided certain notification requirements are met.<sup>167</sup> The law expressly provides that a measure falling within the scope of the authorization is not preempted by any federal law or regulation.<sup>168</sup>

With respect to Ukraine, U.S. states largely relied upon executive orders, issued by governors, to amplify U.S. federal sanctions targeting the Russian regime, whereas state laws—not executive actions—were the central focus of the *Crosby* and *Garamendi* cases.<sup>169</sup>

## VI. THE CASE FOR FOREIGN AFFAIRS “GLOCALIZATION”

As Part V shows, U.S. states and localities possess a range of tools for lawfully enacting foreign affairs measures—tools they often utilize, contrary to conventional wisdom and increasingly dated case law. I refer to this frequent localization of foreign affairs actions as “glocalization,” a term that dates back several decades and which has been used primarily in business and social science contexts to describe the confluence of global trends and local markets—i.e., “the emerging worldwide phenomenon where globalization and localization

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[<https://perma.cc/N2XY-TGTB>]. According to the Government Accountability Office, by 2010, 35 states had enacted laws or adopted policies concerning state investments in Sudan. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-742, SUDAN DIVESTMENT: U.S. INVESTORS SOLD ASSETS BUT COULD BENEFIT FROM INCREASED DISCLOSURE REGARDING COMPANIES' TIES TO SUDAN 1 (2010).

<sup>165</sup> Nat'l Foreign Trade Council, Inc. v. Giannoulis, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007).

<sup>166</sup> Act of Aug. 28, 2007, No. 095-0521, § 5, 2007 Ill. Laws 7166. On June 5, 2007, the Court of Appeals granted defendants' motion to suspend briefing due to pending amendments to the Illinois Sudan Act introduced in the Illinois General Assembly. Nat'l Foreign Trade Council, Inc. v. Giannoulis, No. 06-C-4251, 2007 WL 2688454, at \*1 (N.D. Ill. Sept. 7, 2007). The Court of Appeals subsequently dismissed the case. Nat'l Foreign Trade Council v. Giannoulis, No. 06-C-4251, Dkt. 86 (Nov. 30 2007) (filed with the Northern District of Illinois on Dec. 26, 2007).

<sup>167</sup> Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, §§ 3(b), (d)(1), 121 Stat. 2516, 2518.

<sup>168</sup> *Id.* § 3(b)(g).

<sup>169</sup> See *supra* Part IV.A.

are simultaneously transforming the development landscape.”<sup>170</sup> Here, such glocalization occurs at the cross roads of foreign affairs and U.S. state and local government actions in response to those foreign affairs.

### A. *The Benefits of Glocalization*

As this Article has shown, the under-observed status quo—where U.S. states and localities frequently engage in foreign affairs matters—is already a reality. But is it a reality we should embrace?

I argue the answer is yes—for three primary reasons. First, the federal government needs foreign affairs implementing partners. The Ukraine example described in Part II is a case in point: U.S. states and localities can be critical partners in supporting an ally by amplifying federal sanctions and backfilling for the federal government in providing strategic support as needed and desired.<sup>171</sup> Climate is another powerful example. After President Donald Trump declared that he planned for the U.S. to withdraw from the Paris Climate Accord, U.S. governors formed the U.S. Climate Alliance—a bipartisan coalition of governors coordinating to ensure at least parts of the United States remained committed to achieving internationally agreed climate action goals (in addition to the Under2Coalition and C40 myaors already discussed, *supra*).<sup>172</sup> While the U.S. Climate Alliance’s work is more aligned with the Biden Administration’s current climate policies,<sup>173</sup> its coordination remains critical to achieving the U.S.’s emission reduction targets, among other goals.<sup>174</sup>

Similarly, U.S. state and local elected officials can support U.S. federal foreign policy. California Governor Gavin Newsom’s official trip to China in advance of the 2023 Asia Pacific Economic Partnership served that purpose, setting the stage for President Joe Biden and Chinese President Xi Jinping to meet in San Francisco and announce major joint initiatives on fentanyl and

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<sup>170</sup> Chanchal Kumar Sharma, *Emerging Dimensions of Decentralization Debate in the Age of Globalization*, 1 INDIAN J. FED. STUDS. 47, 47 (2009); Habibul Haque Khondker, *Glocalization as Globalization: Evolution of a Sociological Concept*, 1 BANGL. E-J. SOCIO. 12, 14–15 (2004) (describing the likely origination of “glocalization” in Japan, where marketing experts deployed the term to describe products of Japanese origin with global reach that, at the same time, were “suited to local taste and interests”).

<sup>171</sup> See *supra* Part II.

<sup>172</sup> About, U.S. CLIMATE ALL., <https://usclimatealliance.org/about/> [https://perma.cc/8E5K-PG3D].

<sup>173</sup> *National Climate Task Force*, WHITE HOUSE, <https://www.whitehouse.gov/climate/> [https://perma.cc/7Q42-4AWU].

<sup>174</sup> See, e.g., Press Release, Bloomberg Philanthropies, U.S. Non-Federal Climate Leaders Launch America is All in to Support Cutting Emissions in Half or More by 2030 and Put the Nation on Track to Net Zero by 2050 (Feb. 19, 2021), <https://www.bloomberg.org/press/u-s-non-federal-climate-leaders-launch-america-is-all-in-to-support-cutting-emissions-in-half-or-more-by-2030-and-put-the-nation-on-track-to-net-zero-by-2050/> [https://perma.cc/UH8E-WB4X].

climate action.<sup>175</sup> Other areas where U.S. states and localities can, and often do, serve as critical foreign policy partners include protecting critical infrastructure from cyber-attacks and foreign interference (including, for instance, with respect to safeguarding elections equipment), effective resettlement of refugees, and countering harmful misinformation by overseas actors. In these kinds of circumstances, U.S. state and local actors can serve as powerful U.S. foreign policy force multipliers.

Second, subnational governments can lead on foreign affairs when the federal government falls short in responding to a global crisis or other foreign affairs matter. The U.S. federal government's lackluster response to the COVID-19 pandemic<sup>176</sup> laid bare how important such U.S. state and local leadership can be. Before the U.S. federal government had even declared a national emergency or the World Health Organization had declared the COVID-19 outbreak a pandemic, 45 mayors had convened to share their experiences and best practices in responding to the crisis, leading coordination on local responses.<sup>177</sup> Innovation at the local level, as exhibited through this kind of coordination, can also spawn more robust and meaningful action at the federal and multilateral levels.

Finally, glocalization is here. Though largely underappreciated in academic literature and public discourse, U.S. states and localities have been—and will continue to be—actively involved in responding to a range of foreign affairs matters. Given the extent of the global crises the world faces, and the many local actions taken in response to them, any attempts to roll back this engagement are unlikely to succeed. Instead of resisting this new reality, this is a critical moment to provide organizational clarity on how responsibilities for foreign affairs can be divided and shared among federal, state, and local partners.

## B. Counterarguments

The primary critique of glocalized foreign affairs is that multiple and sometimes inconsistent policies at the local, state, and federal levels of

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<sup>175</sup> Sophia Bollag, *Biden, Xi Set for 'Honest and Direct' Conversation in Historic Bay Area Meeting*, S.F. CHRON. (Nov. 15, 2023), <https://www.sfchronicle.com/politics/article/xi-jinping-president-biden-18491790.php> [<https://perma.cc/5XAL-T5BS>] (“California Gov. Gavin Newsom may have helped lay the groundwork for the agreement when he met with Xi last month during his trip to China. Newsom spoke with Xi for about 45 minutes, during which he said they discussed climate issues and fentanyl's roots in China.”).

<sup>176</sup> See, e.g., David E. Lewis, *Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?*, *Daedalus* (Summer 2021), [https://www.amacad.org/sites/default/files/publication/downloads/Daedalus\\_Su21\\_05\\_Lew is.pdf](https://www.amacad.org/sites/default/files/publication/downloads/Daedalus_Su21_05_Lew%20is.pdf) (on file with the *Ohio State Law Journal*).

<sup>177</sup> Anthony F. Pipa & Max Bouchet, *How to Make the Most of City Diplomacy in the COVID-19 Era*, BROOKINGS (Aug. 6, 2020), <https://www.brookings.edu/articles/how-to-make-the-most-of-city-diplomacy-in-the-covid-19-era/> [<https://perma.cc/4WSH-TG9S>]; Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

government could undermine the federal government's ability to conduct foreign affairs. This policy patchwork may result in competing outcomes or confusion with global partners over who represents America's interests and sets America's foreign policy.

This concern is not a mere hypothetical. For example, some U.S. state and local pandemic coordination efforts led to significant subnational and federal policy discord—as marked by the bidding wars between U.S. states and the federal government for essential protective gear.<sup>178</sup> Or consider recent efforts by pro-Palestine activists, frustrated by the U.S. federal government's ongoing support of Israel's actions in Gaza, to secure city and county governments resolutions in support of Palestine following the conflict stemming from Hamas' October 7, 2023 terrorist attack on Israel.<sup>179</sup> While these resolutions are nonbinding, they can signal to allies abroad a changing domestic political landscape—and to the federal government, mounting pressure to alter its policies.<sup>180</sup>

But has this patchwork undermined U.S. federal policy or informed it? Around the same time as local jurisdictions enacted pro-Palestine resolutions, the Biden administration began making more vocal its calls for Israel to protect civilians and minimize broader harm.<sup>181</sup> Those federal calls have only increased in recent days.<sup>182</sup> There also is no evidence to date to suggest that foreign leaders are confused about with whom to engage on U.S. foreign policy or that U.S. foreign policy on Israel and Palestine has been harmed. To the contrary, many governments have decided to invest in subnational representation, adding envoys and consulates in places like Los Angeles and New York City.<sup>183</sup> While

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<sup>178</sup> Lauren Feiner, *States Are Bidding Against Each Other and the Federal Government for Important Medical Supplies—and It's Driving Up Prices*, CNBC (Apr. 11, 2020), <https://www.cnbc.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html> [<https://perma.cc/2TAX-GDNL>].

<sup>179</sup> Shawn Hubler & Heather Knight, *Frustrated by Washington, Pro-Palestinian Activists Take Their Fight to City Hall*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/us/israel-gaza-ceasefire-local-governments.html> [<https://perma.cc/Y9NQ-NNBD>].

<sup>180</sup> *Id.*

<sup>181</sup> Nandita Bose & Steve Holland, *US VP Harris Urges Israel to Protect Gaza Civilians*, REUTERS (Dec. 2, 2023), <https://www.reuters.com/world/vp-harris-sketch-out-us-vision-post-conflict-gaza-cop-2023-12-02/> [<https://perma.cc/2QQV-CA9T>]; David S. Cloud, Carrie Keller-Lynn, Summer Said & Andrew Restuccia, *In Dueling Remarks, Biden and Netanyahu Spar Over Gaza's Future*, WALL ST. J. (Dec. 12, 2023), <https://www.wsj.com/world/middle-east/israels-netanyahu-rejects-u-s-plan-for-post-war-gaza-d60fc0c3> [<https://perma.cc/JJ6K-MTAA>].

<sup>182</sup> *US Presses Israel on Civilian Deaths, Move to 'Lower Intensity' War in Gaza*, AL JAZEERA (Dec. 15, 2023), <https://www.aljazeera.com/news/2023/12/15/us-presses-israel-on-civilian-deaths-move-to-lower-intensity-war-in-gaza> [<https://perma.cc/V3JB-CPDD>].

<sup>183</sup> See sources cited *supra* note 46. New York City has more than 150 foreign consulates and permanent representations, in part because of the presence of the United Nations.

not all foreign governments can make these additional investments, particularly if subnational governments expand upon their foreign affairs engagements, such resource imbalances are longstanding and predate more significant subnational engagement. Furthermore, built-in mechanisms exist to limit the extent of U.S. and subnational foreign policy discord or policy chaos. As described in Part IV, the federal government can expressly or implicitly preempt U.S. state and local foreign affairs actions it believes contravenes federal policy or law, with courts as the enforcers.<sup>184</sup>

To bring even greater clarity and consistency to foreign affairs jurisprudence, I argue that the courts should extend the *Youngstown Steel* framework to foreign affairs federalism preemption cases.<sup>185</sup> In *Youngstown*, the Supreme Court weighed whether the United States President had the authority to seize and operate private steel mills during the Korean War. Justice Robert Jackson, in a now famous concurring opinion, established a framework for evaluating executive action.<sup>186</sup> The President, Justice Jackson said, has maximum authority when acting with the express or implied authority of Congress, intermediary authority when Congress is silent, and the lowest degree of authority when acting contrary to congressional action.<sup>187</sup>

Foreign affairs preemption could be assessed by adopting a similar framework. U.S. State and local authorities would be at their highest ebb of authority when the President or Congress have expressly or impliedly authorized U.S. state and local action, intermediary authority when the federal branches are silent, and lowest authority when federalized action has been expressly or impliedly foreclosed. The *Crosby* Court hinted at such an analysis when assessing Massachusetts's power to impose its own Burma sanctions, recalling Justice Jackson's observation in *Youngstown* that the President's powers are at their greatest when acting pursuant to Congressional authorization.<sup>188</sup> Subsequent courts, however, have not applied a *Youngstown* framework to their foreign affairs preemption analyses. But future courts could, and I argue should—to the extent justiciable foreign affairs federalism cases arise.

A related critique is that U.S. state and local governments lack the expertise to engage in the foreign policy arena thoughtfully and carefully. Others may worry that U.S. state and local governments could succumb to the pressure of vocal minorities espousing counter-democratic positions, perhaps because of a

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FOREIGN CONSULATES IN N.Y., <https://www.consulate-new-york.com/index.php> [<https://perma.cc/Q7ZF-GDV6>].

<sup>184</sup> See *supra* Part IV.

<sup>185</sup> For the first iteration of my argument that courts apply a *Youngstown* framework to foreign affairs preemption cases, see Spiegel, *Embracing Foreign*, *supra* note 114.

<sup>186</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 636 n.2 (1952).

<sup>187</sup> *Id.*

<sup>188</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (internal citation omitted).

relative lack of expertise in foreign affairs matters. Several approaches can mitigate these risks and address knowledge gaps, to the extent they exist.

First, U.S. state and local governments can hire staff with foreign affairs expertise and experience, as many have with respect to climate action.<sup>189</sup> Second, subnational governments can pool foreign affairs resources—through networks, as the C40 mayors coalition and the governors’ U.S. Climate Alliance to address climate action have done, and through engagement with the U.S. State Department’s recently created Subnational Diplomacy Unit and Special Representative for City and State Diplomacy.<sup>190</sup> Third, where localities are not comfortable making foreign affairs statements or commitments, their elected bodies can limit their ability to do so. The City of San José, for example, passed bylaws in the 1970s that were refreshed in 2016 that restrict the city council from passing resolutions related to foreign policy matters.<sup>191</sup> Should the people of San José change their views on the city’s role with respect to foreign policy, they can amend the city’s bylaws to allow for foreign affairs actions. Finally, where a vocal minority may be pressing subnational governments toward counter-democratic positions, checks exist. If the locality were to adopt a discriminatory position or program, federal and state constitutional law would provide protection through the courts. And, of course, the broader electorate could provide accountability for any counter-democratic or anti-majoritarian positions at the polls.

### C. *Strengthening Glocalization*

As I have argued, glocalization is already a fact of foreign policy life that should be embraced. I suggest three ways the glocalization process can be strengthened to better realize its benefits.

First, to avoid a chilling effect due to foreign affairs preemption ambiguity, the U.S. federal government, whether the executive branch or Congress, should proactively provide express direction to U.S. state and local governments. The

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<sup>189</sup> Ned Parker, *U.S. Cities Hire Specialists to Counter Climate Change as Impacts Worsen*, REUTERS (June 1, 2021), <https://www.reuters.com/business/environment/us-cities-hire-specialists-counter-climate-change-impacts-worsen-2021-06-01/> [<https://perma.cc/PU4C-FVRL>].

<sup>190</sup> Nina Hachigian, Daniel Ricchetti & Irina Karmanova, *Subnational Diplomacy Unit: Leading Department Engagement with Local Officials in the United States and Abroad*, U.S. STATE MAG. (July 2023), <https://statemag.state.gov/2023/07/0723office/> [<https://perma.cc/QB28-F672>].

<sup>191</sup> City of San José, California, Council Policy, July 10, 1979, revised Nov. 1, 2016, [www.sanjoseca.gov/home/showpublisheddocument/12915/636670004989470000](http://www.sanjoseca.gov/home/showpublisheddocument/12915/636670004989470000) (“[T]he Council of the City of San José . . . shall not act or take a position on . . . [m]atters concerning the foreign policy of the United States of America nor its relationship to other countries of the world except at the expressed request of an elected official of the federal government or an authorized representative of a department or agency of the federal government, except those matters directly affecting the City and citizenry of San José.”) [<https://perma.cc/62J3-W2GN>].



federal government should call on their subnational counterparts to amplify or build upon federal actions when, for example, the federal government imposes sanctions targeting the Russian regime for its aggression in Ukraine and it deems reinforcement by state and local governments to be beneficial.<sup>192</sup> Clear guidance at the front end of a federal foreign affairs action would lead to more effective and coordinated action at the U.S. state and local level—and potentially, more effective foreign policy coordination and impact.

Absent such clear messaging, the federal government will continue to leave U.S. states and localities in the dark as to their preemption intentions, and where conflict arises, let the courts determine what Congress or the President may have intended as opposed to defining those bounds themselves. Congress has a particularly important role to play, since courts do not necessarily heed whatever the executive says, as it eventually did with respect to Sudan sanctions.<sup>193</sup> Where Congress intends to set a floor for a foreign affairs action, it should expressly authorize U.S. states and localities to engage in related foreign relations activities that might otherwise be subject to foreign affairs preemption.<sup>194</sup>

Critically, the President and Congress would not give up any power or authority by following this recommendation. Should either decide, given changing dynamics, that it is in the U.S.'s interest to preempt U.S. state and local foreign affairs actions, they could do so through clear pronouncements and through the courts if necessary. In such circumstances, the federal government could either expressly preempt globalization in the text of a statute or executive order, for instance, or it could sue to enjoin any state or local actions that it views as inconsistent with its own actions. Being express about not preempting globalization at a certain point in time would not waive or weaken these avenues for preemption.

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<sup>192</sup> In the Biden Administration's recap of actions it had taken one year into Russia's latest invasion of Ukraine, it emphasized that the Administration had "ensured that Ukraine's resilience has been matched with global resolve." Press Release, White House, *supra* note 113. But nowhere did it mention any actions to engage with U.S. state and local governments to similarly amplify its actions (or, alternatively, that such actions by states and localities would be foreclosed). California, alone, is on track to have the fourth largest economy in the world and can have a sizable impact in shaping markets and influencing major industries. Matthew A. Winkler, Opinion, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG (Oct. 24, 2022), [https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy?in\\_source=embedded-checkout-banner](https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy?in_source=embedded-checkout-banner) [<https://perma.cc/A6K5-HH2H>].

<sup>193</sup> See generally *Crosby*, 530 U.S. 363; *Zschemig v. Miller*, 389 U.S. 429 (1968) (where the Court seemingly ignores U.S. Department of Justice statements denying that an Oregon statute interfered with the conduct of U.S. foreign relations); *Bond v. United States*, 572 U.S. 844, 858 (2014) (It is a "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 state powers." (internal citation omitted)).

<sup>194</sup> See generally *supra* Part IV.A.

Second, when the U.S. federal government takes a foreign affairs action that either requires or encourages U.S. state and local compliance with or reinforcement of that action, the federal government should make such actions as easy to follow as possible. Turning again to Ukraine: by the one year anniversary of the war, the U.S. had imposed or broadened “more than 2,000 sanctions listings and more than 375 export control Entity Listings, including major state-owned enterprises and third-country actors supporting Russia’s war machine.”<sup>195</sup> Eighteen months into the war, the website of the Office of Foreign Asset Control (OFAC), the subdivision of the U.S. Department of Treasury that leads the federal government’s sanctions work, remains a challenge to navigate for any layman—or any U.S. state or locality—seeking to comply with the law.<sup>196</sup> For example, the website’s “Overview of Sanctions” brochure is dated June 16, 2016—after which the U.S. added a substantial number of sanctions targeting Russia and others.<sup>197</sup> There are no other high-level guides or explainers on the website, though several industry- or sector-specific factsheets have been created and made available elsewhere.<sup>198</sup> Hundreds of “Frequently Asked Questions” and answers have been added, too, offering helpful clarification on how U.S. states, localities, and others should navigate the many circumstances and questions that may arise when seeking to comply with U.S. sanctions related to Russia.<sup>199</sup> But the Russia sanctions landscape remains dense and difficult to parse.

If the federal government wants maximal compliance with its sanctions across the United States, it should consider prioritizing clear, easily accessible communications that are updated in a timely manner when new sanctions actions are taken. Such an approach may require a greater emphasis on swift public relations and messaging as new sanctions are imposed, including with respect to subnational governments. To the extent the federal government expressly seeks U.S. state and local support, specific guidelines or explainers

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<sup>195</sup> Press Release, White House, *supra* note 113.

<sup>196</sup> Several law firms seized the opportunity to write lengthy explainers. *See, e.g., Current State of U.S. Economic Sanctions Imposed on the Russian Federation and Covered Regions of Ukraine in Response to the Russia Federation’s Invasion of Ukraine*, BAKER HOSTETLER (Mar. 13, 2023), <https://www.bakerlaw.com/insights/current-state-of-u-s-economic-sanctions-imposed-on-the-russian-federation-and-covered-regions-of-ukraine-in-response-to-the-russia-federations-invasion-of-ukraine-march-2023/> [<https://perma.cc/9JC2-MTC3>]; Tamer A. Soliman et al., *Sanctions Weekly Update—Ukraine/Russia Conflict*, MAYER BROWN (July 17, 2023), <https://www.mayerbrown.com/en/perspectives-events/publications/2023/07/sanctions-weekly-update-ukraine-russia-conflict-july-17-2023> [<https://perma.cc/U6UF-SXWG>].

<sup>197</sup> OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, UKRAINE/RUSSIA-RELATED SANCTIONS (June 2016), <https://ofac.treasury.gov/media/8741/download?inline> [<https://perma.cc/GU6A-CR64>].

<sup>198</sup> *Id.*

<sup>199</sup> *See, e.g.,* OFF. OF FOREIGN ASSET CONTROL, U.S. DEP’T OF THE TREASURY, UKRAINE-RUSSIA-RELATED SANCTIONS FAQ TOPIC PAGE, <https://ofac.treasury.gov/faqs/topic/1576> [<https://perma.cc/63P8-4UUS>].

for subnational governments would be a particularly useful tool for coordinating such actions.

Third and finally, U.S. state and local governments should consider building more foreign affairs-oriented networks to pool information and ideas. As discussed above, C40 Cities is a paradigmatic example of such resource-sharing: city mayors work together to determine how best to uphold the U.S.'s Paris Accord climate commitments, even as the U.S. federal government announced its intention to withdraw from the agreement.<sup>200</sup> So do many U.S. governors.<sup>201</sup> But outside of the climate crisis, U.S. state and local government networks to tackle foreign affairs matters are limited.<sup>202</sup> For example, no evidence to date suggests any coordination across the states that issued executive orders in response to Russia's aggression in Ukraine—despite the complexity of federal sanctions and a common desire among many governors to reinforce federal actions. More coordination among and between states would diminish the burdens of foreign affairs federalism by sharing resources and ideas across jurisdictions. Such foreign affairs coordination also could offer a rare opportunity for bipartisanship, as the actions regarding Ukraine by Republican and Democratic governors alike has shown.<sup>203</sup>

## VII. CONCLUSION

Ukraine is deep into its second year of war defending against Russia's latest invasion of its territory—despite significant support from the U.S. and many of its allies. Good options to truncate the war are in short supply. Yet U.S. states and localities have remained largely untapped resources in supporting U.S. federal efforts to aid the Ukrainian government and people. Given the economic, political, and military heft of many U.S. states and localities, the U.S.

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<sup>200</sup> Press Release, C40 Cities, One Year After Trump Decision to Withdraw from Paris Agreement, U.S. Cities Carry Climate Action Forward (June 1, 2018), <https://www.c40.org/news/one-year-after-trump-decision-to-withdraw-from-paris-agreement-u-s-cities-carry-climate-action-forward/> [https://perma.cc/FJ4T-M43L].

<sup>201</sup> *Members*, U.S. CLIMATE ALL., <https://usclimatealliance.org/members/> [https://perma.cc/ZCP8-5E9B].

<sup>202</sup> A similar network regarding reproductive rights and justice was formed following the U.S. Supreme Court's reversal of *Roe v. Wade*. California Governor Gavin Newsom launched the Reproductive Freedom Alliance, a nonpartisan coalition of 22 Governors committed to protecting and expanding reproductive access in their states. Press Release, Off. of Governor Gavin Newsom, Twenty-One States Announce Historic Governor-Led Reproductive Freedom Alliance (Feb. 21, 2023), <https://www.gov.ca.gov/2023/02/21/twenty-states-announce-historic-governor-led-reproductive-freedom-alliance/> [https://perma.cc/EH8V-Z254] (describing twenty-one Governors joining in the launch of the Reproductive Freedom Alliance); Press Release, Off. of the Governor of Guam, Guam Joins Reproductive Freedom Alliance (May 2, 2023), [https://governor.guam.gov/press\\_release/guam-joins-reproductive-freedom-alliance/](https://governor.guam.gov/press_release/guam-joins-reproductive-freedom-alliance/) [https://perma.cc/8YLY-VVGD] (announcing that Guam joins the Reproductive Freedom Alliance as its twenty-second member).

<sup>203</sup> See *supra* Part II.

government's exclusive focus on actors beyond its own borders is a missed opportunity. Even so, U.S. states and localities have and will continue to glocalize foreign affairs in response to their own constituents and needs and within constitutional limits. Greater recognition, acceptance, and support for such actions by the U.S. federal government, or express preemption where such actions are not desired, would not only benefit Ukraine but potentially many other nations and people given the manifold foreign affairs challenges the U.S. and world face.