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### Cooperative and Uncooperative Foreign Affairs Federalism

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## BOOK REVIEW

### COOPERATIVE AND UNCOOPERATIVE FOREIGN AFFAIRS FEDERALISM

FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY. By Michael J. Glennon and Robert D. Sloane. New York, N.Y.: Oxford University Press. 2016. Pp. xxi, 404. \$85.00.

*Reviewed by Jean Galbraith\**

Foreign affairs are a matter for our national government. On this there was agreement from the beginning, with even the Jeffersonians accepting that the nation should be “one as to all foreign concerns,” albeit “several as to all merely domestic.”<sup>1</sup> The text of the Constitution bestows a cornucopia of foreign affairs powers upon the federal government and explicitly limits the powers of the states.<sup>2</sup> The received wisdom was that, as Alexis de Tocqueville wrote, “[n]ations in relation to each other are but single units” and “[a] nation needs a single government above all to give it the advantage when dealing with foreigners.”<sup>3</sup>

But are foreign affairs *exclusively* a matter for our national government? And if not, then what can states and local governments do with regard to foreign affairs? Like other separation of powers issues, these questions have been with us throughout our constitutional history, sometimes salient and sometimes muted, expressed through the continued practice of various layers of government and the sporadic interventions of courts. From early on, states have engaged with issues involving both local and transnational dimensions, including immigration, the treatment of foreign nationals, and the use of foreign law.<sup>4</sup>

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\* Assistant Professor, University of Pennsylvania Law School. For comments, I thank Shyam Balganesh, Curtis Bradley, Stephen Burbank, Ryan Scoville, Peter Spiro, David Zaring, and the editors of the *Harvard Law Review*, especially Raesa Munshi, Peter Schmidt, Chris Young, and Michael Zuckerman.

<sup>1</sup> Letter from Thomas Jefferson to George Washington (Aug. 14, 1787), in II THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA FROM THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 78, 78 (Washington, Blair & Rives 1837).

<sup>2</sup> For the federal government’s powers, see, for example, U.S. CONST. art. I, § 8, cls. 3, 10–16; and *id.* art. II, §§ 2–3. For limits on the states, see *id.* art. I, § 10 (barring the states from treaty-making and requiring the consent of Congress for many other foreign affairs activities, including almost all exercises of war powers).

<sup>3</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA 135 (Isaac Kramnick ed., Gerald Bevan trans., Penguin Classics 13th ed. 2003) (1840).

<sup>4</sup> For more details, see, for example, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign*

Today the shared space between what is local and what is transnational is far greater. Just as issues once viewed as local matters increasingly came to be seen as national, so now they are increasingly taken to have transnational significance. Globalization presses on practically every front: trade, environment, security, health, human rights, investment, migration, and more. One prominent effect of this shift has been the rise of transnational regulation through treaties and other forms of international cooperation.<sup>5</sup> The counterpart is the growing extent to which state and local governments act in this shared space. This is the focus of Professors Michael Glennon and Robert Sloane's thoughtful recent book, *Foreign Affairs Federalism: The Myth of National Exclusivity*.

Glennon and Sloane frame their project as an attempt to debunk "three pervasive myths about foreign affairs federalism" (p. xv). One of these myths is conceptual, another constitutional, and the third political. The conceptual myth is that there is a "neat distinction" between domestic and foreign affairs (p. xvii). The constitutional myth is "that foreign policy is or should be, with a few minor and inconsequential exceptions, exclusively federal" (p. xviii). The political myth is "that state control equates with conservative — and federal [control] with liberal — political causes" (p. xvi). When put in their strongest form, the three read more like straw men than myths, but Glennon and Sloane use them effectively as foils for their own nuanced claims. Broadly speaking, Glennon and Sloane argue that states and cities constantly engage in activities with transnational implications and that constitutional law should be capacious in permitting these activities.

Central to Glennon and Sloane's account is a description of the kinds of transnational work that states and cities are doing in practice (pp. 55–76). For the most part, the authors see states and cities as seeking to fill voids left by federal inaction in the transnational space (pp. 45–55). Their account should cheer liberal hearts. States and cities are not just trying to look after their citizens abroad, ensure security at home, and bring in more foreign investment. They are also

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*Affairs*, 81 TEX. L. REV. 1, 81–162 (2002) (discussing, among other things, state laws regulating immigration and the treatment of noncitizens in the nineteenth century); and David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1426–27 (2006) (describing how, in the early nineteenth century, several states banned the citation of post-1776 English cases in court proceedings).

<sup>5</sup> See, e.g., Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 349–50 (2011) (describing the rise of multilateral treaties regarding "arms control, children's rights, corruption, cybercrime, drugs, enforced disappearances, environmental law, intellectual property, the law of the sea, organized crime, terrorism, trafficking in persons, and violence against women, among others" (footnotes omitted)); Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 745–48 (2014) (noting the rise in transnational regulatory cooperation across a variety of issues).

working to slow climate change, promote human rights, and push back against oppressive foreign regimes. Of course, this is only some states and cities. Others are pursuing policies at the other end of the spectrum, such as laws seeking to crack down on undocumented immigrants. Nonetheless, Glennon and Sloane's celebration of states, and especially cities, as potential guardians of liberal values feels eerily prescient in the wake of the 2016 election.

Glennon and Sloane draw a contrast between the dynamic state and local practice that they document and the contours of current Supreme Court doctrine. For Glennon and Sloane, the Court gets most issues of federalism and foreign affairs at least a bit wrong, and some quite wrong. They explore numerous aspects of the doctrine — dormant preemption, statutory preemption, the relationship between state law and federal common law, the treaty power, and the ability of states to enter into agreements with foreign governments. It is only in the last of these areas that they are unqualifiedly approving of the current law, and this is because the Supreme Court has *not* developed doctrine but has instead left untouched an increasingly permissive practice (p. 277). In the other areas, Glennon and Sloane offer careful analysis and thoughtful critiques of existing doctrine. One need not agree with each of their characterizations and preferred solutions to find their book to be an informative and valuable contribution to the literature on federalism and foreign affairs.

Yet Glennon and Sloane's doctrinal focus does not adequately excavate the ways in which states and local governments engage in foreign affairs and how these ways relate to federal law and practice. It brings to mind a scene in *Huckleberry Finn*, in which Tom Sawyer insists that he and Huck must dig a tunnel with case-knives rather than pickaxes because he has “read all the books that gives any information about these things [and t]hey always dig out with a case-knife.”<sup>6</sup> After hours of fruitless labor, Tom then sets down his case-knife and says, “Gimme a *case-knife*.”<sup>7</sup> As Huck narrates, “I didn't know just what to do — but then I thought. I scratched around amongst the old tools, and got a pickaxe and give it to him, and he took it and went to work, and never said a word. He was always just that particular. Full of principle.”<sup>8</sup>

Glennon and Sloane's focus on the constitutional aspects of foreign affairs federalism as determined by the Supreme Court has some kinship with a case-knife. It works very well for some things, but not so well for understanding how various branches and levels of government

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<sup>6</sup> MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 337 (1912).

<sup>7</sup> *Id.* at 342.

<sup>8</sup> *Id.* This incident is recounted in Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910).

are empowered or constrained with respect to foreign affairs. One reason for this, which Glennon and Sloane acknowledge, is simply that Supreme Court doctrine is not always a reliable guide to practice in foreign relations law, because the Court's interventions are sporadic, discrete, and heavily limited by justiciability doctrines. More fundamentally, Glennon and Sloane pay relatively little heed to how actions by the federal political branches may affect the behavior of state and local governments. Instead, they largely assume that state and local governments are engaging against a backdrop of federal *inaction*. This leads them to pay particular attention to the doctrine of dormant foreign affairs preemption and to emphasize the virtues of states and cities as laboratories of democracy. Where they do consider how action by the federal political branches might affect state and local engagement in foreign affairs, they look almost exclusively at issues of preemption.

But the increasingly transnational nature of our society has done much more than raise the likelihood of state and local involvement in transnational issues. It has also made it much more likely that the federal political branches and state or local governments will find themselves *interacting* with respect to these issues. Such interactions have long been a mainstay of domestic federalism. The phrase "cooperative federalism" speaks to how the federal political branches can encourage state and local governments to pursue federal policies, including through the use of federal funding.<sup>9</sup> More recently, Professors Jessica Bulman-Pozen and Heather Gerken have used the phrase "uncooperative federalism" to describe the ways in which state and local governments can in turn shape or resist these federal policies.<sup>10</sup> Much of foreign affairs federalism — indeed, I suspect most of foreign affairs federalism — is now cooperative or uncooperative.

Climate policy provides a good example. Glennon and Sloane portray progressive state and local governments as having stepped up to act on climate change mitigation, including by embracing international standards, "despite the federal government's failure to ratify the Kyoto Protocol" (p. 62). They identify efforts undertaken by California as a leading example (pp. 62–63). Reading their description, one might think that state and local governments are standing alone against cli-

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<sup>9</sup> Some use this phrase more narrowly and others more broadly. Compare Edward S. Corwin, *National-State Cooperation — Its Present Possibilities*, 46 YALE L.J. 599, 622–23 (1937) (tying "the ideal of Cooperative Federalism," *id.* at 623, specifically to the federal government's ability to use grant money to incentivize state action), with Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 933 (1994) (using the phrase broadly to describe ways in which "two governmental hierarchies will be involved in a particular area of governance instead of one").

<sup>10</sup> See generally Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

mate change and that their legal ability to do so turns on their power to regulate against a backdrop of federal silence. In practice, however, the most important developments with respect to climate regulation have involved interactions between the federal and state political branches. During the George W. Bush Administration, the biggest impact that liberal states had with respect to climate change was likely their distinctly uncooperative decision to sue the Environmental Protection Agency for failing to regulate greenhouse gases under the Clean Air Act.<sup>11</sup> Their victory in that case in turn provided California and other states with some authority to regulate greenhouse gas emissions under the cooperative federalism scheme set forth in the Clean Air Act.<sup>12</sup> At least since that time, debate in the courts around the legality of California's actions has centered on the scope of the Clean Air Act and administrative law principles, not on dormant foreign affairs preemption.<sup>13</sup>

The interactive nature of foreign affairs federalism means that different tools — pickaxes, perhaps — are needed to understand and evaluate it. As to doctrine, while preemption remains an important issue, cooperative and uncooperative foreign affairs federalism implicates other strands of law as well. Among these are constitutional doctrines that relate to justiciability, like standing, and substantive ones aimed at commandeering and coercive conditions, which manage the extent to which the federal government can encourage or effectively force state and local governments to take certain actions. Looking outside of constitutional law, how state and local governments interact with the federal government in the foreign affairs space is further affected by international law, administrative law, particular statutory schemes, and sometimes even state law. As to practice, the fact that so much of foreign affairs federalism is cooperative or uncooperative has implications for the federal distribution of powers. Congress and the President can each try to enlist state and local governments in ways that enhance their own power at the expense of the other branch.

In what follows, I argue for reorienting the focus of foreign affairs federalism toward its cooperative and uncooperative aspects. In Part I, I situate Glennon and Sloane's contribution within the broader literature on foreign affairs federalism and describe some of their contributions. In Part II, I briefly examine four of the examples of foreign af-

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<sup>11</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that “greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant’” and thus the “EPA has the statutory authority to regulate the emission of such gases” under the provision at issue). Conversely, conservative states are now suing to overturn a major Obama-era climate regulation. See *infra* notes 73–74 and accompanying text.

<sup>12</sup> See 42 U.S.C. § 7407(a) (2012); see also *infra* note 71 and accompanying text.

<sup>13</sup> See *infra* note 70 and accompanying text.

fairs federalism given by Glennon and Sloane: the sister-cities program, trade sanctions and related measures, the regulation of undocumented immigrants, and climate change mitigation actions. I argue that both the political choices made by state and local governments and the legal consequences of these choices interact closely with a backdrop of federal statutes and executive branch action, while background constitutional principles about state power in the face of federal silence play a distinctly smaller role. In Part III, I draw on scholarly work engaging with cooperative and uncooperative federalism and consider what implications it offers for the foreign affairs context. This literature explores how the federal government can incentivize state and local governments to help advance federal interests, how these state and local governments can in turn influence or resist federal policy, and how both Congress and the executive branch can use state and local action to muster power at the expense of the other branch. At a high level of generality, these insights apply to the foreign affairs context. But because of the added complexity of the foreign affairs context — including its ties to international law and its increased reliance on strong executive power — the specifics cannot simply be imported wholesale. I therefore close by suggesting three sets of ways in which the practice and doctrine associated with cooperative and uncooperative foreign affairs federalism should differ from the domestic context.

### I. FEDERALISM, FOREIGN AFFAIRS, AND CONSTITUTIONAL LAW

From the perspective of constitutional law, federalism in foreign affairs has historically focused on two central questions. First, what can the federal government constitutionally do in relation to foreign affairs where its actions have implications for the states? Second, what can the states themselves constitutionally do in relation to foreign affairs? These are questions to which the text of the Constitution gives considerable clues, but has also left much to be worked out through practice.

For most of the twentieth century, the predominant answers were (1) almost anything; and (2) very little. These answers were apparent at least by the 1920s. Practice and precedent gave the federal government enormous power through the treaty clause — so much so that Professor Quincy Wright's leading treatise on foreign relations law observed that "[a]pparently the only legal limitation upon the exercise of powers in foreign relations imposed by states' rights is [a limit] upon the power to cede state territory by treaty."<sup>14</sup> By contrast, Wright con-

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<sup>14</sup> QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 94 (1922) (adding that even this limit "is acknowledged to evaporate before necessity"). This conclusion was

sidered that, with one exception, “state exercises of power in the field of foreign relations have been so restricted that such powers hardly exist at all.”<sup>15</sup> The exception was that states — and especially state courts — could exercise power to aid the United States in meeting its international responsibilities, as through the enforcement of treaties.<sup>16</sup>

Writing many decades after Wright, Professor Louis Henkin reached conclusions that were similar and in some respects even stronger. Wright had focused on what the President and Senate could do through the treaty power, but the intervening years had, in Henkin’s view, also made congressional-executive agreements “complete alternative[s]” to treaties.<sup>17</sup> These even stronger federal powers were accompanied by a continued lack of state power in foreign affairs. Henkin acknowledged that “the foreign relations of the United States are not in fact wholly insulated from the states, are not conducted exactly as though the United States were a unitary state.”<sup>18</sup> Overall, however, “[a]t the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”<sup>19</sup>

Today, the first of these understandings is becoming unsettled while the second remains well entrenched in doctrine. In the last twenty years, some prominent scholars have pushed for constricting the scope of the federal government’s foreign affairs powers in light of federalism principles.<sup>20</sup> Although the Roberts Court has not yet embraced this approach, it has made the federal government’s power to override federalism principles in the foreign affairs context harder to exercise in

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based on a long line of practice and Supreme Court precedent, including *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>15</sup> WRIGHT, *supra* note 14, at 75.

<sup>16</sup> *Id.* at 129–30.

<sup>17</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 217 (2d ed. 1996). A congressional-executive agreement is a binding international agreement that is “concluded by the president with either the advance authorization or subsequent approval of a majority of both houses of Congress.” CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 75 (2013).

<sup>18</sup> HENKIN, *supra* note 17, at 150.

<sup>19</sup> *Id.* This language echoes *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.”). See also *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down an application of a state statute on the grounds that it intruded on foreign affairs, even though neither Congress nor the executive branch expressed the view that it did so); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316–18 (1936) (claiming in dicta that the states had never held foreign affairs powers even prior to the Constitutional Convention).

<sup>20</sup> See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394 (1998) (“[I]f federalism is to be the subject of judicial protection . . . there is no justification for giving the treaty power special immunity from such protection.” (emphasis omitted)). Cf. generally Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (resisting the thesis that international agreements can be made either as treaties or as congressional-executive agreements and arguing that the Constitution limits the availability of the latter).



practice, most prominently in its decisions in *Medellin v. Texas*<sup>21</sup> and *Bond v. United States*.<sup>22</sup> As to state participation in foreign affairs, however, to date the Court has not revisited its constrictive approach, and at least one case from the late Rehnquist Court seems to cement it.<sup>23</sup>

Glennon and Sloane think the current developments are exactly backward. What *should* be happening, they argue, is that the Court should retain its robust vision of federal foreign affairs powers and also accept a broader vision of state engagement. In other words, they want more foreign affairs powers for government across the board. They do not advocate a free-for-all across the vertical separation of powers; to the contrary, they stress the continued importance of federal supremacy (p. xxi). But they do want more acceptance of state engagement with transnational issues. Throughout the book, they also emphasize engagement by local governments, mainly cities, and tacitly treat their doctrinal analysis with respect to states as applicable to these local governments as well.

Central to Glennon and Sloane's account is their description of current practice. In two richly descriptive chapters — one at each end of the book — they identify ways in which states and cities engage in issues with transnational dimensions. States and cities have:

entered into compacts and agreements with foreign countries; adopted international standards on matters such as climate change, even when the federal government has declined to do so; established offices in foreign countries; sent representatives to foreign countries; offered economic incentives to attract businesses from those countries; barred purchases from those countries with "Buy American" statutes; established countless "sister city" relationships with foreign cities; adopted statements of policy, often based on local referenda, about international issues; given teeth to some of those policies with, for example, economic sanctions and trade bans; enacted laws and adopted police practices to discourage illegal immigration; acted to protect their citizens' data and privacy on the Internet; and contributed to the effort to keep the country safe from national security threats. (p. 35)<sup>24</sup>

<sup>21</sup> 552 U.S. 491 (2008) (holding that a provision of the United Nations Charter was non-self-executing and could not be directly enforced by the courts even if the President so requested).

<sup>22</sup> 134 S. Ct. 2077 (2014) (interpreting treaty-implementing legislation narrowly in light of "principles of federalism inherent in our constitutional structure," *id.* at 2081).

<sup>23</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding preempted a California statute that required insurance companies doing business in California to disclose information about Holocaust-era insurance policies). The holdings in *Medellin* and *Bond* do broaden the ability of states to take actions with foreign affairs consequences, but this is because of their narrow interpretations of federal treaties and statutes.

<sup>24</sup> Glennon and Sloane are far from the first to consider the ways in which states and cities can engage globally. Their description overlaps with and often draws explicitly from the work of other scholars in this area. A few examples of scholarly work addressing state and local engagement

A further, important theme for Glennon and Sloane is that states and cities are acting largely because of federal gridlock. “[T]he federal government has neglected a host of festering problems that have and continue to harm the states” (p. 46). States and local governments cannot be expected to stay on the sidelines when problems with global dimensions affect their own citizens (p. 60). Their actions not only address the interests of their constituents but also can advance values of freedom, efficiency, and experimentation (pp. 23–25).

Having cast the engagement of states and local governments in transnational affairs as both inevitable and desirable (at least up to an expansive point), Glennon and Sloane turn their attention to Supreme Court doctrine relating to federalism and foreign affairs. They cover a lot of ground, addressing what the federal government can do under the treaty power, how state courts should decide cases where federal common law in relation to foreign affairs is implicated, and how far the scope of state power to take actions that implicate foreign affairs extends. The last of these ties most closely to the other portions of the book and is what I will focus on here.

With regard to the scope of state power, Glennon and Sloane argue for an approach that “allow[s] states and cities broad discretion when the federal government is silent” (p. 33). Glennon and Sloane acknowledge, however, that their preferred approach is not fully embodied in current Supreme Court doctrine. Where the federal government is silent, Supreme Court precedent still provides for scrutiny of state actions with foreign affairs dimensions — a doctrine known as dormant foreign affairs preemption. In its 1968 decision in *Zschernig v. Miller*,<sup>25</sup> the Supreme Court struck down an application of an Oregon statute that kept East Germans from inheriting personal property of an Oregon resident. The Court reached this conclusion despite the fact that Oregon’s application of its statute did not appear to trouble Congress or the executive branch.<sup>26</sup> Although *Zschernig* was once thought to be a one-off from the Cold War era, Glennon and Sloane

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in foreign affairs include Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 780–81 (2013); Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47 (2016); Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); 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); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L. REV. 31 (2007); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999); and Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT’L L. 337 (2001).

<sup>25</sup> 389 U.S. 429 (1968).

<sup>26</sup> See *id.* at 434.

consider that it was “confirmed . . . as good law” and in their view even arguably expanded by the 2003 decision of *American Insurance Ass’n v. Garamendi*<sup>27</sup> (p. 121). For Glennon and Sloane, both *Zschernig* and *Garamendi* were wrongly decided. Glennon and Sloane argue that in such cases the courts should abstain from constricting state action that bears upon foreign affairs. Such abstention would be the best course of action given the overlap between foreign and domestic affairs and the practical challenges of distinguishing permissible and impermissible state action (pp. 135–37).<sup>28</sup>

Glennon and Sloane further consider what the scope of state power should be when a state is acting on an issue that is also being addressed by a federal statute. They focus almost entirely on situations where the federal statutory scheme arguably preempts the state action. Their positions here are less straightforward. At one point they argue that “when the federal government has expressed a view, [courts should] presume, except in unforeseeable extreme circumstances, that states may still act unless Congress has clearly said otherwise” (p. 33). Yet in discussing two key Supreme Court decisions in this area — the 2012 decision in *Arizona v. United States*<sup>29</sup> and the 2000 decision in *Crosby v. National Foreign Trade Council*<sup>30</sup> — they are narrower in their assertions. In both cases, there was no express conflict between the congressional statute at issue and the state action, and therefore the question for the Court was whether there was obstacle or field preemption. One might think that such situations are ones in which Congress has not “clearly” ruled out state action, and yet Glennon and Sloane do not squarely conclude that the Court was wrong when it found the state action in both cases to be preempted (pp. 182, 296–300, 303 n.51).

Both the description of state and local practice offered by Glennon and Sloane and their mapping and critique of Supreme Court doctrine are detailed, up to date, and thoughtful. They could do more, however, in connecting these two aspects of the book and explaining when

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<sup>27</sup> 539 U.S. 396, 417–20. Although the Court relied on *Zschernig*, it suggested that where “a state has acted within . . . its ‘traditional competence,’ but in a way that affects foreign relations,” it would be more appropriate to use obstacle rather than field preemption in determining the constitutionality of the state’s action. *Id.* at 419 n.11 (citation omitted) (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in the result)).

<sup>28</sup> Glennon and Sloane leave open the possibility that judicial intervention could occur in “[a]n extraordinary, unforeseeable case . . . that [historically] has yet to arise” (p. 137) and they also accept the appropriateness of dormant foreign commerce clause preemption, a doctrine closely akin to its domestic counterpart (p. 181).

<sup>29</sup> 567 U.S. 387 (2012) (holding that an Arizona law seeking to crack down on undocumented immigrants was for the most part preempted by federal immigration law).

<sup>30</sup> 530 U.S. 363 (2000) (striking down a Massachusetts statute limiting the state’s ability to procure materials from companies doing business with the Burmese government as preempted by a federal statute imposing sanctions against Burma).

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and how the doctrines that they describe apply to the types of state and local engagement that they identify. Instead, it is largely left to the reader to think through what Supreme Court doctrine, if any, is relevant to when states and cities can send trade missions abroad, establish sister-city relationships, regulate in the domain of climate, or pursue cybersecurity. Glennon and Sloane's overall approach suggests that the reader should start by assuming that the state and local action occurs against a backdrop of federal inaction. By contrast, in what follows, I suggest that in many situations the right paradigm is one of interaction.

## II. FOREIGN AFFAIRS FEDERALISM IN PRACTICE

The more that distinctions between what is foreign and domestic flatten, the more space is shared between all levels of government: international, national, state, and local. One level can act in the face of silence from the others, or they can pursue uncoordinated policies. But they can also work interactively. From a governance angle, this is perhaps the most likely outcome where two levels of government have interests in the same policy space. This Part makes this point by taking up four forms of foreign affairs engagement that Glennon and Sloane attribute to state and local government — the sister-cities program, sanctions and other trade measures, regulation of undocumented immigrants, and climate policy — and showing how frequently they involve interaction with Congress, the executive branch, or both. These interactions are often cooperative ones, with one or both political branches of the federal government providing support for the state or local action through expressions of approval, the provision of funds, or regulatory delegations. At other times, the interactions are far less amiable, involving disagreement between levels of government about particular policies or resistance by state and local governments to federal pressure to undertake certain actions.

### A. *Sister Cities*

At least six hundred cities in the United States have adopted “sister-city” relationships with cities in other nations.<sup>31</sup> The city where I live, Philadelphia, is a sister city to Florence, Tel Aviv, Torun, Tianjin, Incheon, Douala, Nizhny Novgorod, and Frankfurt am Main.<sup>32</sup> These relationships are meant to facilitate cultural and com-

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<sup>31</sup> *Interactive City Directory*, SISTER CITIES INT'L, <http://www.sister-cities.org/interactive-city-directory> [https://perma.cc/L4RP-P3K3]. Citing a different source, Glennon and Sloane put this number at twice as high (p. 68).

<sup>32</sup> *Sister Cities Program*, CITIZEN DIPLOMACY INT'L PHILA., [http://cdiphila.org/sister\\_cities\\_program](http://cdiphila.org/sister_cities_program) [https://perma.cc/E5VD-XHZB].

mercial exchanges. In the last few years, Philadelphia's mayor has visited sister cities to promote business ties, including foreign direct investment; Philadelphia high schools have had exchanges with schools in Torun; and Florentine artists have come to Philadelphia to operate pop-up art stores.<sup>33</sup> Glennon and Sloane refer repeatedly to sister-city relationships as examples of how U.S. cities can engage internationally (pp. xxi, 35, 42, 62, 68–69, 285, 353).<sup>34</sup>

Sister cities are indeed a good example of how U.S. cities can engage internationally. Yet they have little to do with federalism in its constitutional dimensions. In general, the activities they are undertaking are bland and unobjectionable — and highly unlikely to raise the slightest constitutional concerns. Indeed, cities from many non-federal nations around the world participate in the sister-cities program.<sup>35</sup> If these nations permit their cities to become sister cities, it is hard to imagine that nations built around stronger principles of devolved governance could have legal concerns about the program.

The sister-cities program is nevertheless interesting as an example of how the federal government and local governments can interact in relation to transnational activity. For the sister-cities program is not the product of over six hundred different U.S. cities independently innovating in their laboratories. Nor is it simply the product of coordination among these cities. Instead, it stems in direct ways from policy decisions made by actors in the federal government. Professor Judith Resnik has described it as “exemplifying aspects of cooperative federalism.”<sup>36</sup> The origins of the program lie in a call by President Eisenhower for more people-to-people diplomacy, and every President since has served as the program's honorary chairperson.<sup>37</sup> The State Department has close ties to the program, and federal grant money supports key aspects of it.<sup>38</sup> Even Congress has given at least one ex-

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<sup>33</sup> See Tom Beck, *Nutter Is on a Sister Cities Tour — But What Is a Sister City?*, PHILA. MAG.: CITIFIED (July 17, 2015, 11:32 AM), <http://www.phillymag.com/citified/2015/07/17/nutter-is-on-a-sister-cities-tour-but-what-is-a-sister-city/> [<https://perma.cc/LW93-2WAJ>].

<sup>34</sup> There are the occasional sister-state relationships as well. In practice, these have also not been subject to formalist limits based on the Compact Clause. See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 742–46, 754, 792, 798 (2010) (noting that, notwithstanding the text of the Compact Clause, states do enter into agreements with foreign governmental entities without getting express congressional approval, including agreements establishing sister-state relations).

<sup>35</sup> Glennon and Sloane note that there are two dozen federal nations overall (p. 361 & n.15). The sister-cities program involves cities in 136 countries. *Interactive City Directory*, *supra* note 31.

<sup>36</sup> Resnik, *supra* note 24, at 48.

<sup>37</sup> *Id.*; see also *Mission and History*, SISTER CITIES INT'L, <http://www.sister-cities.org/mission-and-history> [<https://perma.cc/JMC6-6GYR>].

<sup>38</sup> See, e.g., *State, Foreign Operations, and Related Programs Appropriations for 2012: Hearings Before the Subcomm. on State, Foreign Operations, and Related Programs of the H. Comm.*

PLICIT signal of support for the program, with a statement of policy in a 2004 statute encouraging the development of sister-city programs with cities in predominantly Muslim countries.<sup>39</sup>

Glennon and Sloane do not discuss this cooperation between the federal government and the cities, other than noting President Eisenhower's role in starting the program (p. 285). Yet this interaction is important to understanding the values promoted by the program. It may indeed further freedom, efficiency, and innovation. But it also promotes federal policy. Presumably, the federal government provides financial and technical support to the sister-cities program because it considers that national benefits flow from citizen diplomacy. This does not mean that each specific decision that U.S. cities make in relation to the sister-cities program will further the interests of one or both political branches of the federal government. To the contrary, some such decisions will serve as expressive opportunities for signaling local opposition to national policy (pp. 61–62). But the cost to the federal government of pockets of dissent seems quite cheap in comparison with the broader interests advanced by the program.

#### *B. Trade Sanctions and Related Measures*

The prospect of state and local governments engaging with foreign policy with respect to trade is not new. The Framers were sensitive to this prospect and wary of it. As with domestic commerce, constitutional doctrines have developed that make it difficult for states to establish discriminatory policies even against a backdrop of constitutional silence (pp. 147–70). As Glennon and Sloane note, however, states and cities nonetheless can seek to use their power as market actors in ways that favor American products or disfavor companies doing business with particular foreign actors. As an example of the former, Glennon and Sloane point to “Buy American” procurement requirements for public works projects (pp. 71–72). Examples of the latter in the last half century have included state and local laws that limit their governments from buying from or investing pension funds in companies that have done certain forms of business in South Africa in the apartheid era, Burma in the 1990s, and most recently Iran (pp. 70–71).

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*on Appropriations*, 112th Cong. 198–203 (2011) (statement of Jim Dumas, Executive Vice President and Interim CEO, Sister Cities International); *The How and Why of Federal Funding*, SISTER CITIES INT'L, <http://sistercities.org/how-and-why-federal-funding> [<https://perma.cc/PEN6-ZEGC>].

<sup>39</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7112(b)(3), 118 Stat. 3638, 3796 (codified at 22 U.S.C. § 2451 note). As another example — a much more specific one — Congress waived certain export laws to allow the Anchorage Sister Cities Commission to send “two bowhead whale jawbones” to its sister city Whitby in England. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 210(a), 115 Stat. 748, 779 (2001).

So described, these actions feel like quintessential local democracy. State and local governments can privilege patriotic interests over getting the best bottom line; they can make homegrown judgments about human rights around the world. To the extent that Glennon and Sloane consider how these state and local choices interact with the federal government's choices, they focus either on how the two parallel each other, as with the existence of a federal "Buy American" statute, or on how state and local action can inspire federal action, as with how federal sanctions on South Africa and Burma followed state sanctions.

Yet as with the sister-cities program, at least some of these state and local actions are strongly encouraged by the federal government. Consider the federal "Buy American" statute mentioned briefly by Glennon and Sloane (p. 71). In addition to requiring the use of American goods in public works projects that receive federal funding, it also expresses support for state "Buy American" statutes. Congress explicitly bars "[t]he Secretary of Transportation [from] . . . restrict[ing] any State from imposing more stringent requirements . . . on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with [federal] assistance."<sup>40</sup> In its implementing regulation, the Department of Transportation conditions its participation in state projects on the requirement that state "Buy American" requirements be at least as stringent as federal requirements.<sup>41</sup> At least one federal appellate court has held that the federal statute serves as implicit congressional authorization for state "Buy American" statutes and thus as a shield with respect to dormant foreign commerce clause challenges.<sup>42</sup>

In the sanctions context as well, there is a strong backdrop of federal law. For all its gridlock and incapacity, Congress has passed many laws over the years imposing international sanctions or giving the President considerable discretionary authority to do so.<sup>43</sup> In some cases, as with its sanctions against Burma, Congress makes no explicit provision for the preemption or nonpreemption of similar state laws. But sometimes Congress includes specific clauses that speak to preemption. With regard to Iran, for example, Congress's 2010

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<sup>40</sup> 23 U.S.C. § 313(d) (2012).

<sup>41</sup> 49 C.F.R. § 661.21 (2015) (explicitly stating that through legislation "any State may impose more stringent Buy America . . . requirements" than contained in the federal law and making clear that the Department "will not participate in contracts governed by . . . State Buy America . . . preference provisions which are not as strict as the Federal requirements").

<sup>42</sup> *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 873 (3d Cir. 2012).

<sup>43</sup> See, e.g., Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1063–75 (2013).

Comprehensive Iran Sanctions, Accountability, and Divestment Act<sup>44</sup> expressly authorizes certain kinds of state and local sanctions against Iran<sup>45</sup> and instructs state and local governments to inform the Department of Justice if they adopt such measures.<sup>46</sup> Congress has thus effectively protected these state and local sanctions from challenge with respect to preemption either by congressional law or related executive branch action.<sup>47</sup>

Going forward, Congress may continue to invite state and local participation in sanctions regimes and in protectionist measures.<sup>48</sup> Where Congress does not do this (or where it has not acted at all on a particular issue), then the constitutional doctrines about state and local action in the face of federal silence will come into play. These doctrines are thus important, but they will not apply to all or even necessarily much of the practice. In addition, as I discuss in Part III, by inviting state and local participation in sanctions regimes, Congress can effectively limit the discretion available to the executive branch with respect to international negotiations that are related to sanctions.

### C. Undocumented Immigrants

The treatment of undocumented immigrants is an issue where foreign and domestic policy concerns quite obviously overlap. All levels of government concern themselves with undocumented immigrants. So do scholars across the traditional foreign-domestic divide, and there is already a robust literature on cooperative federalism with respect to

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<sup>44</sup> Pub. L. No. 111-195, 124 Stat. 1312 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>45</sup> *Id.* § 202(f), (i) (expressly providing that certain state and local sanctions are “not preempted by any Federal law or regulation,” *id.* § 202(f), and offering even stronger protection for sanctions that were adopted prior to the passage of this statute).

<sup>46</sup> *Id.* § 202(e).

<sup>47</sup> See Jack Goldsmith & Amira Mikhail, *Does the Iran Deal Require the USG to Seek Preemption of (Some) State Sanctions?*, LAWFARE (Apr. 27, 2016, 2:48 PM), <https://www.lawfareblog.com/does-iran-deal-require-usg-seek-preemption-some-state-sanctions> [<https://perma.cc/5QQJ-BUMP>] (noting that the sanctions referenced in section 202 are protected from being preempted by the 2015 Iran deal). I assume here that the congressional statute is constitutional, notwithstanding a suggestion to the contrary by the George W. Bush Administration with respect to another statute authorizing state and local sanctions. See Presidential Statement on Signing the Sudan Accountability and Divestment Act of 2007, 2 PUB. PAPERS 1596 (Dec. 31, 2007) (stating that while the “Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan . . . the executive branch shall construe and enforce this legislation in a manner that does not conflict with” the federal government’s “exclusive authority to conduct foreign relations”).

<sup>48</sup> Empirical work by Professors Abbe Gluck and Lisa Bressman has found that contemporary congressional staffers are more aware of canons of interpretation related to preemption than of most other kinds of canons. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 942–44 (2013). Such awareness is useful, though of course far from sufficient, for the inclusion of statutory provisions that specifically address preemption.



immigration.<sup>49</sup> Perhaps unsurprisingly, it is on this topic that Glennon and Sloane come closest to recognizing the role of cooperative federalism. They observe in passing that “we might profitably shift our perspective . . . to a more cooperative model” focused on how federal and state governments can work together (p. 305) and also discuss some of the federal-state interactions related to sanctuary cities (pp. 305–06). In general, however, their description of state and local action on immigration emphasizes ways that these actors are filling voids left by federal inaction, and their legal discussion focuses on federal preemption (pp. 300–304).

The issue of federal preemption is indeed important to state and local immigration policy, as *Arizona v. United States* illustrates.<sup>50</sup> The state law at issue in *Arizona* serves as a reminder that foreign affairs federalism will not always lead to progressive outcomes. With this law, Arizona sought to crack down on undocumented immigrants by, among other things, criminalizing as a matter of state law both undocumented status and seeking work as an undocumented immigrant.<sup>51</sup> In a close vote, the Supreme Court struck down these provisions as preempted by federal immigration law.<sup>52</sup> Yet if *Arizona* illustrates the importance of preemption, it also showcases just how much governmental immigration practice is structured around cooperative federalism. (Indeed, Professor Ernest Young has dryly observed that the Arizona statute could be read as an example of “overcooperative federalism.”<sup>53</sup>) The Court recognized that “[c]onsultation between federal and state officials is an important feature of the immigration system,” noting various federal statutory provisions designed to encourage cooperation between federal and state officials.<sup>54</sup> Because of this, it held that another provision of the Arizona law — one requiring police to

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<sup>49</sup> As examples, see Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013) (seeking to evaluate empirically a cooperative federalism program that used local police in screening federal immigration status); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 630 (2008) (calling for more “congressional restraint and cooperative federalism”); and Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 53 INT’L SOC. SCI. J. 67, 73 (2001) (“[A] model of cooperative federalism should allow for increased satisfaction of subnational needs and preferences while protecting national immigration-related interests.”).

<sup>50</sup> 567 U.S. 387 (2012).

<sup>51</sup> *Id.* at 2497–98.

<sup>52</sup> *Id.* at 2502 (holding that field preemption barred Arizona from criminalizing the failure to carry federal immigration documents); *id.* at 2505 (holding that obstacle preemption barred Arizona from criminalizing undocumented immigrants’ attempts to find employment); see also *id.* at 2505–07 (finding preempted a provision of the Arizona statute authorizing police to hold without a warrant any immigrants they had probable cause to believe were removable).

<sup>53</sup> Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 446–47 (2013).

<sup>54</sup> *Arizona*, 567 U.S. at 411.

try to verify the immigration status of certain detained individuals — was not facially preempted.<sup>55</sup>

Yet the role of law in shaping the power of state and local governments to act with respect to foreign affairs goes well beyond preemption. In the Obama Administration and already in the Trump Administration, we have seen efforts by states and cities to employ law in resisting executive branch practice in relation to immigration. Lawsuits have become a major tool for state and local actors, including a challenge brought by Texas and other states to President Obama's policy relaxing deportation with respect to certain undocumented immigrants<sup>56</sup> and challenges brought to President Trump's executive orders restricting immigration from certain Muslim-majority countries.<sup>57</sup> Liberal states and cities are also now looking to law to help them stave off pressure from the Trump Administration to aid the federal government in carrying out federal immigration policy.<sup>58</sup> In contrast to Glennon and Sloane's broader paradigm of state and local governments acting to fill a void left by federal inaction, these sanctuary states, sanctuary cities, and sanctuary counties seek to be inactive despite federal pressure to act.<sup>59</sup> The constitutional doctrines of relevance here are ones that have developed in domestic cases involving

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<sup>55</sup> *Id.* at 411–15. In essence, the Arizona provision required the police to check the immigration status of lawfully detained individuals who the police had reasonable suspicion to think were undocumented with the federal Immigrations and Customs Enforcement Support Center. *Id.* at 411.

<sup>56</sup> *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>57</sup> See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (declining to stay a preliminary injunction issued by the district court in a case brought by Washington and Minnesota challenging the executive order); *Hawaii v. Trump*, No. CV 17-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) (issuing a temporary restraining order with respect to the revised executive order in a case brought by Hawaii).

<sup>58</sup> *E.g.*, *Standing Up for Our Law Enforcement Community*, WHITE HOUSE, <https://www.whitehouse.gov/law-enforcement-community> [<https://perma.cc/G7SC-XQVM>] (stating that “President Trump . . . is dedicated to . . . ending sanctuary cities”). Many state and local governments do currently cooperate with the federal government in enforcing immigration law, whether out of enthusiastic support or an incrementalist interest in helping shape federal practice from the inside. See, e.g., Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1640 (2008) (“[F]or communities concerned about the detrimental effects of immigration enforcement on their community, entering into enforcement MOUs with the federal government pursuant to section 287(g) may be a more effective tool than sanctuary provisions . . . because MOUs offer cities and towns a seat at a table that usually excludes their presence.”); U.S. IMMIGRATION & CUSTOMS ENF'T, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <https://www.ice.gov/factsheets/287g> [<https://perma.cc/8Y27-9ARQ>] (describing a program through which federal immigration enforcement can be delegated to state and local officials and identifying state and local governments where agreements to implement the program are in place).

<sup>59</sup> See Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 35–42 (2016) (describing various forms of cooperation and noncooperation by state and local governments).

federal-state interactions: first, the limit on the federal government's ability to "commandeer" the services of state and local executive branch officials;<sup>60</sup> and second, the limit on the federal government's ability to condition federal grants to states and cities on their cooperation in federal removal efforts.<sup>61</sup> San Francisco is currently invoking these doctrines in a lawsuit it brought against the United States in January 2017.<sup>62</sup>

The issue of sanctuary cities and counties also serves as a reminder that state law can affect the ability of cities and counties in relation to foreign affairs federalism. Much of the liberal agenda that Glennon and Sloane emphasize is being carried out by cities — and the decisions of cities can be overridden by state legislatures. As Professor Cristina Rodríguez noted almost a decade ago, "state preemption of local law is even more effective in flattening out diverse preferences than the immigration preemption sometimes employed by courts, because state preemption is not constrained by functional parallels to the constitutional doctrines that protect states' interests."<sup>63</sup> Within the last year, for example, the Governor of Texas has threatened to cut off state funding to sanctuary cities and to get state laws passed to restrict their power.<sup>64</sup> The more foreign affairs federalism comes to look like domestic cooperative federalism, the more state law may become relevant to how cities and local governments act in areas with foreign affairs dimensions.

#### D. Climate Policy

Mitigating climate change is a challenge for all levels of government — international, national, state, and local. As Glennon and Sloane note, some states and cities have embraced climate change mitigation measures (pp. 62–63). In doing so, states have often coordinated with each other and with foreign counterparts in both practical and

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<sup>60</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress could not commandeer state executive functions for its own ends).

<sup>61</sup> Cf. *NFIB v. Sebelius*, 567 U.S. 519, 580–82 (2012) (opinion of Roberts, C.J.) (holding that the Medicaid expansion under the Affordable Care Act, which would have withheld all federal Medicaid funding from states that did not expand Medicaid, was unconstitutionally coercive); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (suggesting, among other things, that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'" (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))).

<sup>62</sup> See Complaint for Declaratory and Injunctive Relief at 11–18, 20–21, *City & County of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

<sup>63</sup> Rodríguez, *supra* note 49, at 637.

<sup>64</sup> Brandi Grissom, *Gov. Greg Abbott Says He's Cut Money to Texas "Sanctuary Cities," but He Hasn't*, DALLAS NEWS (Nov. 29, 2016, 3:37 PM), <http://www.dallasnews.com/news/politics/2016/11/29/gov-greg-abbott-says-cut-money-texas-sanctuary-cities> [https://perma.cc/YC5U-9W6S].

expressivist ways (pp. 62–63). California’s efforts are exceptionally notable. State legislation requires sweeping emissions reductions;<sup>65</sup> California and Quebec have sought to integrate their cap-and-trade programs;<sup>66</sup> and California has spearheaded a coalition of state and local governments around the world who have committed to climate policy.<sup>67</sup> California even sent a large and high-profile delegation to the United Nations conference on climate change in Paris in 2015.<sup>68</sup>

The issue of climate policy is a rebuttal to all three of the “myths” identified by Glennon and Sloane. It is self-evidently a matter of both domestic and foreign affairs; states and local governments are acting in this space; and some states and local governments are doing so in progressive ways. The actions of state and local governments in this space invite constitutional inquiry. Can California constitutionally regulate carbon emissions, enter into a highly formalized agreement with Quebec and softer agreements with other subnational governments, and send delegations to international negotiating conferences?

Yet focusing exclusively on these questions would lead to a highly incomplete sense of the legal scope of California’s power to act. For although Glennon and Sloane do not mention it, California is acting amidst a welter of federal laws, regulations, and other executive branch actions applicable to climate change. In 2007, in a lawsuit brought by liberal states against the EPA, the Supreme Court held that the federal Clean Air Act<sup>69</sup> applies to greenhouse gas emissions.<sup>70</sup> This Act explicitly delegates authority to California to pursue stronger emis-

<sup>65</sup> See, e.g., Chris Megerian & Liam Dillon, *Gov. Brown Signs Sweeping Legislation to Combat Climate Change*, L.A. TIMES (Sept. 8, 2016, 3:55 PM), <http://www.latimes.com/politics/la-pol-ca-jerry-brown-signs-climate-laws-20160908-snap-story.html> [<https://perma.cc/M3ZF-GKJH>] (describing SB 32, signed in 2016, which updated an earlier emissions law and set more ambitious emissions targets).

<sup>66</sup> See Agreement Between the California Air Resources Board and the Gouvernement Du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Que., Sept. 27, 2013.

<sup>67</sup> See *Background on the Under2*, UNDER2, <http://under2mou.org/background/> [<https://perma.cc/7KWA-CKHA>].

<sup>68</sup> Chris Megerian, *California Isn’t a Country, So Why Are So Many in the State Headed to Climate Talks in Paris?*, L.A. TIMES (Dec. 2, 2015, 10:43 AM), <http://www.latimes.com/politics/la-pol-sac-climate-california-preview-20151202-story.html> [<https://perma.cc/P9VS-4WJF>] (noting the attendance of Governor Jerry Brown, eight state legislators, and “a number of top Brown administration officials”).

<sup>69</sup> 42 U.S.C. §§ 7401–7671q (2012).

<sup>70</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007). This decision caused a lower court judge to change his position on whether foreign affairs preemption would apply to California’s efforts to rein in greenhouse gas emissions. Compare *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1179–89 (E.D. Cal. 2007) (rejecting a claim of foreign affairs preemption in light of *Massachusetts v. EPA*), with *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1175–83 (E.D. Cal. 2006) (allowing a claim of foreign affairs preemption to remain at an earlier stage of the same case, largely because of a perceived conflict between executive branch policy and California’s actions).

sions measures for new motor vehicles than are undertaken at the federal level<sup>71</sup> and in general involves states in the Act's enforcement through cooperative federalism.

During the Obama Administration, state and local government efforts to reduce greenhouse gas emissions were not only congruent with the aims of the Clean Air Act (as interpreted to apply to greenhouse gases), but also with the goals of the executive branch. The EPA during the Obama Administration applauded and sought to facilitate state and local efforts.<sup>72</sup> Its leading rule on climate change mitigation measures, known as the Clean Power Plan, explicitly gave states substantial autonomy in crafting their own approaches,<sup>73</sup> although this rule is currently facing a court challenge brought by states that oppose federal efforts to regulate emissions.<sup>74</sup> The Obama White House expressed approval of the transnational coalitions that California and other state and local governments have joined in seeking to address climate change.<sup>75</sup>

All this positive reinforcement will presumably diminish or disappear under the Trump Administration.<sup>76</sup> The Trump Administration may even try to roll back climate change mitigation efforts by progressive states and cities, in addition to undermining or reversing Obama-era regulations and international commitments. If it does so, however, the legal questions that such efforts would raise probably have fairly

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<sup>71</sup> 42 U.S.C. § 7543(b) (providing that California needs a waiver from the executive branch in order to undertake such regulations but limiting the executive branch's discretion to deny the waiver); *see also id.* § 7507 (allowing other states to adopt any such regulations undertaken by California).

<sup>72</sup> *See Climate and Energy Resources for State, Local, and Tribal Governments*, EPA, <https://www.epa.gov/statelocalclimate> [<https://perma.cc/PSG6-LH3U>].

<sup>73</sup> The Clean Power Plan seeks to regulate emissions from existing power plants. States are to submit plans for how they will achieve emissions reductions from power plants, and they have considerable flexibility with regard to what measures they will use to achieve these reductions. *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,663–64 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60) (providing a brief overview of the rule). The rule includes some approving mentions of California's emissions-trading program. *E.g., id.* at 64,725, 64,735, 64,783.

<sup>74</sup> *See West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2015). Earlier in the proceedings, the Supreme Court stayed the implementation of the Clean Power Plan for the duration of the litigation. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.). The Trump Administration, meanwhile, has announced a review of the Clean Power Plan. *See EPA Review of the Clean Power Plan*, 82 Fed. Reg. 16,329 (2017), 2017 WL 1209511.

<sup>75</sup> *E.g.*, Press Release, White House, U.S. Leadership and the Historic Paris Agreement to Combat Climate Change (Dec. 12, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change> [<https://perma.cc/TQ68-9V4M>] (approvingly describing transnational coalitions like the one built by California as “complementary actions” to the Paris Agreement); *see also* Megerian, *supra* note 68 (quoting a U.S. Department of State official as speaking approvingly of the “significant effect on the dynamics surrounding the negotiations” that California brought to the Paris Agreement).

<sup>76</sup> *Cf. supra* note 74.

little to do with the constitutional issues posed by traditional foreign affairs federalism. Instead, they would center on administrative law — around the interpretation of the Clean Air Act and the laws and norms that govern regulatory practice — as they had already come to do by the end of the George W. Bush Administration.

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These four illustrations are far from unique. Sometimes state and local government activity in relation to foreign affairs occurs against a backdrop of federal inaction, as is the case with the incorporation of unratified human rights treaties into the municipal law of progressive cities.<sup>77</sup> But interaction is far more common, sometimes cooperative and sometimes full of contestation. The executive branch approves of and provides some support for states and cities seeking to promote tourism or encourage exports abroad.<sup>78</sup> The federal government collaborates with states in determining U.S. international negotiating positions with respect to insurance.<sup>79</sup> In private international law, the federal government has shown strong interest in using state law rather than federal law to implement certain treaties.<sup>80</sup> And all levels of government deal with security — both traditional and cyber — and interact with each other over it. To understand what is going on, we must focus on the political branches as much as (or even more than) the courts. And we must think not just in terms of constitutional law, but also in terms of international law, administrative law, and state law.

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<sup>77</sup> For examples, see COLUMBIA LAW SCH., HUMAN RIGHTS INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 9–23 (2012), <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf> [<https://perma.cc/S77W-FSLC>].

<sup>78</sup> See, e.g., TASK FORCE ON TRAVEL & COMPETITIVENESS, NATIONAL TRAVEL & TOURISM STRATEGY 17 (2012), <http://tinet.ita.doc.gov/pdf/national-travel-and-tourism-strategy.pdf> [<https://perma.cc/6UDC-BTJQ>] (urging “partnerships with state, local, tribal, and territorial governments to provide promotional content and in-kind support”); *Certified Trade Mission Conditions of Participation*, U.S. COM. SERV., U.S. DEP’T OF COM. (last updated Nov. 11, 2012), [https://build.export.gov/main/ctm/eg\\_main\\_022114](https://build.export.gov/main/ctm/eg_main_022114) [<https://perma.cc/H75Y-89TW>] (describing a federal program that supports various actors, alongside state and local governments, in promoting exports abroad).

<sup>79</sup> See 31 U.S.C. § 313(c)(1)(G) (2012) (authorizing the Director of the Federal Insurance Office within the Department of the Treasury to “consult with the States (including State insurance regulators) regarding . . . prudential insurance matters of international importance”). At the international level, states participate directly in soft-law standard setting done through the International Association of Insurance Supervisors. See Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 BROOK. J. INT’L L. 953 (2009).

<sup>80</sup> For a discussion of some of the grave challenges posed by attempts to rely on state as opposed to federal law for implementation in this context, see Stephen B. Burbank, *Whose Regulatory Interests? Outsourcing the Treaty Function*, 45 N.Y.U. J. INT’L L. & POL. 1037, 1049–60 (2013).

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### III. COOPERATIVE AND UNCOOPERATIVE FEDERALISM IN THE CONTEXT OF FOREIGN AFFAIRS

As foreign affairs federalism becomes increasingly interactive, how much will it resemble cooperative and uncooperative federalism in the domestic context? At the very least, scholarship on cooperative and uncooperative federalism as a domestic matter, especially work focused on the political branches, provides a valuable starting point for understanding foreign affairs federalism today. This scholarship offers insights into how the federal government can incentivize state and local governments to help advance federal interests, how these state and local governments can in turn influence and resist federal policy, and how Congress and the executive branch can each use state and local action to build power at the expense of the other branch. These broad themes manifest themselves in the foreign affairs context as well. Yet the foreign affairs context brings some additional complexities because of its ties to international law and global governance and because it comes with stronger presidential powers. This leads to certain differences between cooperative and uncooperative federalism in the realm of foreign affairs, in terms of both how practice proceeds and of what doctrine should be.

#### A. *Structural Implications*

The interactions between the federal government and state and local governments in relation to foreign affairs mean that federal policy shapes state and local policy. By providing assistance, financial and otherwise, to the sister-cities program, the federal government makes it easier for cities to participate. By signaling its support for state “Buy American” laws, Congress encourages them — and the Department of Transportation incentivizes them even further by refusing to participate in contracts governed by state “Buy American” laws that are less strict than the federal ones. In the context of immigration and climate change, the federal government incentivizes (and sometimes comes close to forcing) state and local action in support of federal policy. All of these examples in the foreign affairs context reflect an “increasing concentration of power at Washington in the instigation and supervision of local policies,”<sup>81</sup> just as cooperative federalism arrangements do in the domestic context.

In work focused on the domestic context, Heather Gerken shows that the interactive nature of modern federalism also provides state and local governments with ways to influence federal policy. State and local actors exercise “the power . . . of the servant,” which offers the

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<sup>81</sup> Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950).

chance “not just to complain about national policy, but to help set it.”<sup>82</sup> In shaping federal policy, these actors are not simply employing the traditional tools of process federalism; rather, it is their role in administering federal policy that gives them a say in the shape that this implementation will take.<sup>83</sup> Yet the scope of this role also limits what they can do: “power dynamics are fluid; minority rule is contingent, limited, and subject to reversal by the national majority.”<sup>84</sup> In related work, Gerken and Jessica Bulman-Pozen elaborate on the ways in which state and local governments can engage in “uncooperative federalism,” including by resisting federal policies that they are charged with enforcing.<sup>85</sup>

Building on the core insight that state and local governments can help shape federal policy through their roles in implementing federal law, Bulman-Pozen further shows that these interactions can affect the distribution of power between Congress and the executive branch. In a pair of articles, she describes the ways in which state and local activities can strengthen the powers of one branch against the other. The more that Congress invites or effectively requires state and local participation in the administration of a federal statutory regime, the more these actors can serve as checks on the executive branch’s power to implement this regime.<sup>86</sup> On the flip side, such shared roles in implementing previously enacted statutory schemes can empower the executive branch and subnational executive actors to work together in ways that crowd out the current Congress.<sup>87</sup>

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<sup>82</sup> Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 1, 7–8 (2010). Gerken also emphasizes that her approach is “not your father’s federalism.” *Id.* at 51. “[I]t is perfectly acceptable for the national majority to play the Supremacy Clause Card whenever it sees fit,” *id.*, and this, along with the existing federal floor of rights, protects against the risk that state and local action will have pernicious effects like those in the Jim Crow era, *id.* at 65. In the foreign affairs context, existing congressional statutes and the applicability of certain constitutional protections to noncitizens considerably limit the ability of state and local governments to engage in unilateral actions that will raise tensions with foreign nations, although this backdrop does not entirely prevent such actions.

<sup>83</sup> *Id.* at 18–19.

<sup>84</sup> *Id.* at 8. Similar dynamics can play out between state governments and local governments, whose interactions are structured by state law. See generally Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005) (exploring state and local interactions).

<sup>85</sup> See Bulman-Pozen & Gerken, *supra* note 10, at 1286–89 (discussing how “[b]ecause federal bureaucrats depend on state actors . . . state interests are pursued through not only political channels, but also administrative ones,” *id.* at 1286, and noting that state and local actors can advance dissent from the more compelling stance of “partial insiders,” *id.* at 1288).

<sup>86</sup> Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 461 (2012).

<sup>87</sup> Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954–56 (2016).



Similar dynamics can occur with respect to foreign affairs federalism. Indeed, some of the examples that Gerken and Bulman-Pozen focus on are issues that have transnational implications.<sup>88</sup> With regard to climate, for example, they show how states have used the power of the servant to try to shape federal policy, including efforts by conservative states to push back against the federal regulatory scheme and by progressive states to make it stronger.<sup>89</sup> Bulman-Pozen also uses climate as an example of how “federal and state executives negotiate without Congress” once a broad statutory scheme is in place.<sup>90</sup> Some payoffs for the foreign affairs context here are simply derivative: the more that state and local governments enhance or reduce federal efforts to mitigate climate change, then the more or less the United States does with respect to addressing this global problem. But other implications relate specifically to how the United States engages internationally. Continuing with the climate context, the extent to which President Obama could make commitments on behalf of the United States during the negotiations for the 2015 Paris Agreement was largely limited by the scope of the Clean Air Act, since he had no realistic chance of getting new congressional legislation that would advance his goals with respect to climate.<sup>91</sup> But since California and other progressive state and local actors were doing more than what the Clean Air Act required, President Obama could take this into account in setting the target to which the United States was committing with respect to climate change mitigation.<sup>92</sup> President Obama’s option set was thus enhanced by state and local action in the climate context.

Just as the President can factor state and local action into international negotiating positions in ways that reduce his or her need to go to Congress, so conversely can Congress empower state and local governments in ways that reduce the President’s negotiating power. With regard to Iran, for example, Congress’s explicit embrace of certain state sanctions blocked the President from being able to force the lift-

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<sup>88</sup> See Bulman-Pozen & Gerken, *supra* note 10, at 1276–78 (climate); *id.* at 1278–80 (implementation of the PATRIOT Act); *id.* at 1281 (immigration).

<sup>89</sup> *Id.* at 1276–78.

<sup>90</sup> Bulman-Pozen, *supra* note 87, at 955; see also *id.* at 987 (“Against a backdrop of congressional inaction and an aging statute that is an awkward fit with greenhouse gas regulation, the [Clean Power Plan] can be understood to substitute state regulatory specificity for federal legislative specificity.”).

<sup>91</sup> For more analysis along these lines, see Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. (forthcoming 2017).

<sup>92</sup> See JUDITH GREENWALD, U.S. DEP’T OF ENERGY, UNITED STATES’ INTENDED NATIONALLY DETERMINED CONTRIBUTION (INDC) (Sept. 29, 2015), <https://www.iea.org/media/workshops/2015/15thghgtradingworkshop/1.2Greenwald.pdf> [<https://perma.cc/8YVZ-G436>] (emphasizing state and local activity in a presentation on the emissions reduction target that the United States had identified internationally as its goal).

ing of these sanctions.<sup>93</sup> Congress thus effectively further prevented these sanctions from being something the President could agree to waive in the international negotiations with Iran that took place over the summer of 2015. Instead, the most the President could commit to in the resulting Iran deal was to “actively encourage officials at the state or local level to take into account the changes in the U.S. policy reflected in the lifting of sanctions under this [Iran deal] and to refrain from actions inconsistent with this change in policy.”<sup>94</sup> As these examples suggest, although foreign affairs federalism does not change the formal scope of the President’s power to negotiate internationally on behalf of the United States, it can affect what chips he or she can put on the table.

More generally, the increasingly interactive nature of foreign affairs federalism provides an additional reason for the doctrinal change that Glennon and Sloane urge most strongly — burying *Zschernig*. As Ernest Young has pointed out, the reasoning of *Zschernig* rests on principles of dual federalism, on “making federal authority *exclusive* in a particular sphere, which in turn raises the stakes associated with defining and policing that sphere.”<sup>95</sup> Glennon and Sloane aptly show how ill-fitting a dual federalism approach is from the perspective of state and local governments, which have legitimate and sometimes strong interests in acting in ways that have foreign affairs implications. Thinking about the cooperative dimensions of foreign affairs federalism leads to the same conclusion from a different angle. The fact that the federal government frequently encourages or pressures state and local governments to act in ways that affect foreign affairs strongly undermines claims that these actors have no business in the foreign affairs space.<sup>96</sup> There are of course activities that state and local gov-

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<sup>93</sup> See Goldsmith & Mikhail, *supra* note 47. State sanctions not explicitly authorized by the statute, however, would presumably have been preempted either by the passage of the statute or by a subsequent executive branch use of statutorily delegated authority to lift sanctions. *See id.*

<sup>94</sup> Joint Comprehensive Plan of Action ¶ 25, July 14, 2015, <http://www.state.gov/documents/organization/245317.pdf> [<https://perma.cc/K6DX-NU63>]. The executive branch could commit to stronger steps with respect to state and local sanctions not specifically protected by Congress. *See id.* (“If a law at the state or local level in the United States is preventing the implementation of the sanctions lifting as specified in this [deal], the United States will take appropriate steps, taking into account all available authorities, with a view to achieving such implementation.”).

<sup>95</sup> Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 176 (2001).

<sup>96</sup> A similar point can be made with respect to the “one voice” doctrine — a heavily criticized aspect of U.S. foreign relations law. To the extent that the federal government itself invites or requires state and local governments to take a role in foreign affairs, then the federal government itself is inevitably embracing at least some degree of pluralism in this space. For further discussion and criticism of this doctrine, see generally Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953 (2014).

ernments cannot undertake — they cannot have their own armies or represent the United States on the international plane — but this goes to the secondary issue of what they can do in the foreign affairs space rather than to whether they are broadly excluded from it.

*B. Distinctive Aspects*

Domestic and foreign affairs federalism have different constitutional starting points. In the domestic context, the move from dual to cooperative federalism furthered a constitutional rearrangement such that the federal government now involves itself in much of what were once conceived of as states' affairs. In the foreign affairs context, by contrast, the Founding vision was emphatically one of federal control, and it is states and local governments who are perceived as the newcomers. Perhaps this starting difference should not matter so much, as the two worlds merge together. If similar dynamics, including cooperative and uncooperative ones, are playing out with respect to both domestic and foreign affairs — and especially if the same issues are deemed to be both domestic and foreign — then perhaps there is no reason to distinguish foreign affairs federalism from federalism more generally. This approach is consistent with the broader argument recently made by Professors Ganesh Sitaraman and Ingrid Wuerth that foreign relations law should be “normalized” with domestic law.<sup>97</sup>

Yet the foreign affairs space brings with it an additional level of complexity — one that provides important reasons to resist treating foreign affairs federalism in exactly the same ways as its domestic counterpart. In the domestic context, we have the federal, state, and local governments all interacting in the shared spaces. The foreign affairs context brings in additional actors: foreign governments and international organizations. The interactions between these entities and governmental actors within the United States are structured largely around international law and an accompanying web of norms and practices. Like the interactions stemming from federalism, these interactions can involve both cooperation and contestation and can shape not only federal law and policy but also the relationships between Congress and the executive branch.<sup>98</sup> This denser, more complicated landscape in turn provides reasons why the practice of cooperative and uncooperative federalism in the foreign affairs context will differ in certain ways from the domestic context and also why law in these areas should differ as well. In what follows, I outline three ways in

<sup>97</sup> Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1901–04 (2015).

<sup>98</sup> See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1008–33 (2013) (showing how international law has influenced historical practice regarding the constitutional distribution of powers between Congress and the President).

which I think this is or should be the case. The first is a descriptive point about practice, and the other two are normative in nature.

As a first point, the process by which state and local governments engage in cooperative foreign affairs federalism will sometimes be affected by the broader structure of global governance. California's ability to be part of the Paris negotiating conference was tied to the fact that the United Nations permits members of local governments to participate as accredited observers, rather than holding a conference that is solely open to national representatives.<sup>99</sup> The fact that international insurance regulatory negotiations are done largely by U.S. states rather than the federal government relates to the international structure of these negotiations and their pursuit of soft-law standards rather than binding international agreements.<sup>100</sup> These examples focus on the negotiating process, but a similar tale might be told on the administrative side regarding the relationships between international structure and state and local engagement.

These structural dynamics can in turn shape both the strategies pursued by state and local governments and the underlying values advanced by state and local action. The existence of the international layer serves as another pressure point that state and local governments can seek to enlist in efforts to shape national policy. In order to enlist it, however — or sometimes conversely to resist it — state and local governments may need to focus more strongly on coalition building than in the purely domestic context. Where this is the case, foreign affairs federalism may permit less individualized local autonomy, even as it gives state and local governments a voice in the foreign affairs space that traditionally belongs to the federal government.

A second way in which cooperative foreign affairs federalism differs from domestic federalism is that it sometimes relates to the enforcement of treaty obligations.<sup>101</sup> This in turn has implications both for when cooperative federalism should be pursued by the federal political branches and for doctrine as it relates to uncooperative behavior on the part of state and local governments.

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<sup>99</sup> See, e.g., U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Provisional List of Participants Part Three*, at 163, U.N. Doc. FCCC/CP/2015/MISC.2(Part 3) (Dec. 1, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/misc02p03.pdf> [<https://perma.cc/L85F-72AD>] (listing various California officials as participants).

<sup>100</sup> See Brown, *supra* note 79, at 957.

<sup>101</sup> My focus here is on treaties that the President ratifies with the advice and consent of the Senate, pursuant to Article II of the Constitution. I do not discuss how cooperative and uncooperative federalism interact with obligations stemming from congressional-executive agreements, from sole executive agreements (other than as I discuss them later with respect to deference to the executive branch), or from customary international law. The answers to these questions turn on predicate questions that are beyond the scope of this piece.

Where treaty obligations are concerned, cooperative federalism that relies on state legislation is a dubious tool for implementation because of the risk of defection. Consider the Hague Convention on Choice of Court Agreements, which provides for the enforcement of forum selection clauses in transnational litigation and for the recognition of subsequent judgments.<sup>102</sup> In the United States, efforts to ratify this treaty have been bogged down in a debate over whether it will be implemented by solely congressional legislation or instead by a complex patchwork of federal and state legislation.<sup>103</sup> Because of the specificity of the Convention, the latter approach would have to be designed in a way that prevented state legislatures from exercising almost any flexibility and that included a federal backstop.<sup>104</sup> Otherwise, it would run the risk of putting the United States in violation of its treaty obligations, since state legislatures might fail to pass the necessary legislation or might neglect to include adequate provisions in it. In other words, a cooperative federalism approach would be devoid of functional benefits of autonomy and flexibility, but it would give rise to hassle and complexity. Perhaps it would have the virtue of making ratification and implementation easier to get from the Senate and Congress as a matter of political economy, but so far this virtue has yet to materialize. Indeed, my colleague Professor Stephen Burbank has described the use of cooperative federalism in this context as having “the destructive potential of a communicable disease.”<sup>105</sup>

The existence of treaty obligations also has implications for the role that state and local executive branch actors play in carrying out federal law. Certain treaty obligations will increase the need for the federal government to rely on these actors. As an example, the Vienna Convention on Consular Relations provides that treaty parties shall inform arrested noncitizens of their right to seek consular assistance and shall allow consular officials to visit their citizens in prison.<sup>106</sup> Since

<sup>102</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

<sup>103</sup> For an overview of this debate, see Glenn P. Hendrix et al., *Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements*, 49 INT'L LAW. 255, 258–63 (2016).

<sup>104</sup> See generally *id.* at 257–63 (describing various proposals aimed at achieving this and in turn proposing one that would rely on very high uniformity in state laws). There may be more benefit to placing some limited reliance on state legislation in treaty implementation where this legislation is already in place. In explaining why implementing legislation was not needed for the U.N. Convention Against Corruption, for example, the Senate Committee on Foreign Relations noted that “[a]n existing body of federal and state laws will suffice to implement the obligations of the Convention.” S. EXEC. REP. NO. 109-18, at 6 (2006) (further noting the need to make two reservations to ensure the accuracy of this statement).

<sup>105</sup> Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT'L L. 629, 643 (2012).

<sup>106</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(b)–(c), 21 U.S.T. 77, 596 U.N.T.S. 261. There is a further issue of the extent to which these provisions are self-executing, which I will not address here. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346–47 (2006) (not

state and local law enforcement do most of the arresting and imprisoning in the United States, the ability of the United States to meet its international obligations unavoidably depends on the participation of state and local officials. This overlay of treaty obligations could justify a different approach to the commandeering of state executive actors. In *Printz v. United States*,<sup>107</sup> the Supreme Court rejected the commandeering of local officials to carry out handgun background checks, concluding that while this process might be efficient it nonetheless offended “the structural framework of dual sovereignty.”<sup>108</sup> Where the enforcement of treaty obligations like those in the Vienna Convention is concerned, however, the commandeering of state officials does more than promote efficiency. It enables full compliance with international obligations, which was as much a preoccupation of the Framers as was the principle of dual sovereignty.<sup>109</sup> There are thus stronger grounds for a carve-out to the commandeering doctrine where treaty obligations are concerned. This justification would not extend to issues of foreign affairs where treaty obligations are not at issue, such as the matter of sanctuary states, cities, and counties.

A third way in which foreign affairs federalism may not precisely track its domestic counterpart involves the relationships between the executive branch on the one hand and state and local action on the other. Most issues of cooperative and uncooperative foreign affairs federalism do not relate to the enforcement of treaty obligations. Some involve the enforcement of international law obligations made by the executive branch alone as sole executive agreements; some involve nonbinding “soft law” agreements; and others deal with actions that are entirely unilateral from an international perspective. In many of these situations (and this is true of the enforcement of treaty obligations as well), relationships between the federal, state, and local levels will proceed relatively harmoniously. Where they do not, however, a

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resolving whether the Vienna Convention directly provides for a court-enforceable remedy when violated); *id.* at 372 (Breyer, J., dissenting) (“[I]t is common ground that the Convention is ‘self-executi[ng].’” (second alteration in original)).

<sup>107</sup> 521 U.S. 898 (1997).

<sup>108</sup> *Id.* at 932.

<sup>109</sup> See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1065 (2010) (“The founders sought to reconfigure their constitutional system to signal to the world the new government’s willingness and ability to carry out the international responsibilities of the United States.”). For scholarship on commandeering in relation to treaty obligations, see, for example, Bradley, *supra* note 20, at 400–01, 456–61; Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 272–74 (2013); Jonathan Remy Nash, *Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance*, 55 COLUM. J. TRANSNAT’L L. 3, 27–34 (2016); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 480–87 (2003); Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1350–59 (1999).

key issue is whether the executive branch should be given some added measures of control over foreign affairs federalism.

In the past, analysis of the relationship between the executive branch and state and local action in the foreign affairs space has mostly focused on the extent to which the President could use his exclusive or independent foreign affairs powers to preempt state law. The Supreme Court has permitted such preemption where it relates to sole executive agreements tied to the recognition of foreign governments (an issue over which the President now has exclusive constitutional control<sup>110</sup>) and the attendant settlement of claims.<sup>111</sup> As foreign affairs federalism and administrative law become increasingly intertwined, however, other doctrines besides preemption may come to the fore in interactions between the executive branch and state and local governments. The more that administrative law deals with issues that have transnational dimensions, the more the question arises of whether the executive branch should get extra deference in implementing this law because of the foreign affairs dynamics.<sup>112</sup> At least where the executive branch is trying to coordinate its regulatory approach with that of other nations, a touch of added deference seems appropriate to reflect the added difficulties associated with international coordination and the ways in which such coordination can itself serve as a check on executive power.

#### CONCLUSION

The federal government's strong control over U.S. foreign relations does not fully crowd out state and local governments. As Glennon and Sloane convincingly demonstrate, state and local governments can and do act in ways that have foreign affairs implications. To understand law as it relates to these actions, Glennon and Sloane focus mainly on Supreme Court cases dealing with preemption in the foreign affairs context. This is an important slice of law as it relates to foreign affairs federalism. But just as the foreign and the local increasingly overlap in fact, so too do they overlap in law and governance. This means that strands of law that are not traditionally conceived of as within the foreign affairs space are increasingly important to it, including constitutional law related to standing, commandeering, and coercive conditions; administrative law; domestically focused statutes; and even at

<sup>110</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015).

<sup>111</sup> *United States v. Pink*, 315 U.S. 203, 212, 231–32 (1942); *United States v. Belmont*, 301 U.S. 324, 326, 331–32 (1937); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 (2003) (holding that a California statute was preempted because it conflicted with a presidential policy with regard to claims settlement, even though there was no express conflict between the statute and the relevant sole executive agreement).

<sup>112</sup> Galbraith & Zaring, *supra* note 5, at 773–75, 791–92.

times state law. This overlap also affects the practice of governance itself, giving political actors at both the federal and state levels tools with which they can seek to influence each other. Going forward, I think that the central issues for foreign affairs federalism will involve these strands of law and these interactive dynamics as much as or more than the traditional doctrines that Glennon and Sloane explore. But regardless of what tools of legal analysis fit best, state and local engagement in foreign affairs is a reality in practice and will be so for the foreseeable future.