

ESSAY

CFIUS PREEMPTION

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ABSTRACT

Spurred by concerns about a Chinese-owned wind farm, Texas recently enacted the Lone Star Infrastructure Protection Act to prohibit companies and Texas governmental entities from entering into agreements relating to critical infrastructure with companies that have certain ties to China, Iran, North Korea, or Russia. The Texas statute presents an opportunity to consider the preemptive scope of the federal Committee on Foreign Investment in the United States (CFIUS) process, which reviews inbound foreign investments for national security concerns, takes steps to mitigate risks, and occasionally blocks transactions through presidential action. This Essay argues that when state laws, like the Texas statute, purport to apply to areas within CFIUS’s jurisdiction, they pose an obstacle to the federal process and are subject to preemption. However, the Essay also proposes ways to channel state concerns and local knowledge into the CFIUS process and render it more like “cooperative federalism.”

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INTRODUCTION

In June 2021, Texas enacted the Lone Star Infrastructure Protection Act (LSIPA) to prohibit both companies and Texas governmental entities from entering into agreements relating to critical infrastructure with companies that have certain ties to China, Iran, North Korea, or Russia.¹ Spurred by concerns about a wind farm development by a Chinese company near a U.S. military installation,² the statute is intended—according to the bill sponsor—to “ban” the listed governments “from connecting physically/remotely into Texas critical infrastructure due to acts of aggression towards the United States, human rights abuses, intellectual property theft, previous critical infrastructure attacks, and ties to other hostile actions” against Texas and the United States.³ In signing the bill, Texas Governor Greg Abbott noted, “this is the first law of its kind by any state in the United States,”⁴ and the bill’s sponsor, Texas Sen. Donna Campbell, said “I hope that our federal government and all 49 [other] states will follow Texas’ lead.”⁵

What these statements and the LSIPA ignore is that the federal government already operates a statutorily established process for reviewing inbound foreign investment for national security concerns. For several decades, the interagency Committee on Foreign Investment in the United States (CFIUS) has reviewed investments and real estate transactions that raise national security concerns, taken steps to mitigate risks in particular deals, and occasionally blocked transactions through presidential action.⁶ The emergence of a state-imposed control on foreign investment, like LSIPA, provides an opportunity to consider the preemptive scope of the

¹ Lone Star Infrastructure Protection Act, S.B. 2116, 87th Leg., Reg. Sess. (Tex. 2021), <https://capitol.texas.gov/tlodocs/87R/billtext/html/SB02116F.htm> [<https://perma.cc/6V6S-K7EV>] [hereinafter LSIPA].

² Dr. Donna Campbell, FACEBOOK (June 7, 2021, 5:39 PM), <https://www.facebook.com/DonnaCampbellTX/videos/today-governor-abbott-signed-the-lone-star-infrastructure-protection-act-into-la/222663576108748> [<https://perma.cc/8LAU-DBRM>].

³ TEX. SEN. RSCH. CTR., BILL ANALYSIS: S.B. 2116, 1 (2021) <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/SB02116F.pdf#navpanes=0> [<https://perma.cc/X87V-JKXK>].

⁴ Greg Abbott, Gov. of Texas (@GregAbbott_TX), TWITTER (June 7, 2021, 4:30 PM), https://twitter.com/GregAbbott_TX/status/1401999906299170817?s=20.

⁵ Campbell, *supra* note 2.

⁶ See generally U.S. DEP’T OF TREASURY, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [<https://perma.cc/3A7L-4GNS>] (last visited Nov. 6, 2021).

CFIUS process, and even absent an express preemption provision, its preemptive scope is considerable. Although the LSIPA and the CFIUS process both aim to protect national security, where the two regimes overlap, the Texas statute poses an obstacle to the federal process and thus is subject to obstacle preemption.

That said, the Texas legislation raises interesting questions and suggests new opportunities to harness insights from the literature on cooperative and uncooperative federalism.⁷ In particular, establishing mechanisms to channel states' concerns and local knowledge into the CFIUS process could ensure that state and local officials' legitimate security concerns can be addressed in ways less disruptive to and not preempted by federal national security reviews.

This Essay proceeds in four parts. Part I provides a brief overview of the LSIPA and CFIUS. Part II discusses major theories about the relationship between states and the federal government and situates the Texas statute within them, while Part III argues that the CFIUS process preempts at least some applications of the LSIPA on grounds of obstacle preemption. Part IV concludes by suggesting ways that states' concerns about particular transactions might be incorporated into the CFIUS process.

I. REGULATING FOR NATIONAL SECURITY

A brief overview of the LSIPA prohibitions and the CFIUS process shows their similarities, as well as divergences in their methods and scope.

A. *The Texas Statute*

Texas's LSIPA provides that: "A business entity may not enter into an agreement relating to critical infrastructure in this state [Texas] with a company" if the agreement would grant the company "direct or remote access to or control of critical infrastructure in this state, excluding access specifically allowed by the business entity for product warranty and support purposes."⁸ The statute defines critical infrastructure to include "a communication infrastructure system, cybersecurity system, electric grid, hazardous waste treatment system, or water treatment facility."⁹ The prohibition applies if a "business entity knows" that a company is

⁷ See *infra* Part II.

⁸ LSIPA, § 113.002(a)(1).

⁹ *Id.* § 113.001(2).

“headquartered in China, Iran, North Korea, Russia, or a designated country” or is “owned by” or has:

the majority of stock or other ownership interest . . . held or controlled by: (i) individuals who are citizens of China, Iran, North Korea, Russia, or a designated country; or (ii) a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of China, Iran, North Korea, Russia, or a designated country.¹⁰

The LSIPA also establishes a process for the governor to designate additional countries as threats to critical infrastructure after consultation with Texas’s Homeland Security Council and the Texas Department of Public Safety’s public safety director.¹¹

B. CFIUS

President Ford originally established CFIUS by executive order in 1975,¹² and in 1988, Congress lent its authority to presidential review of foreign investments by adopting the Exon-Florio amendment to the Defense Production Act, which, among other things, granted the President authority to block certain transactions that raise national security concerns.¹³ The Secretary of the Treasury chairs CFIUS, which also includes representatives from the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy, as well as the Office of the U.S. Trade Representative

¹⁰ *Id.* § 113.002(a)(2). The prohibition applies “regardless of whether . . . the company’s or its parent company’s securities are publicly traded,” or “listed on a public stock exchange” as a company of a listed or subsequently designated countries. *Id.* § 113.002(b). It is worth noting that federal laws beyond the CFIUS process may also regulate or prohibit transactions with foreign persons, corporations, and governments. In particular, all four countries currently listed in LSIPA are subject to U.S. sanctions programs administered by the Treasury Department. *See* U.S. DEP’T OF TREASURY, SANCTIONS PROGRAMS AND COUNTRY INFORMATION, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information> [https://perma.cc/YN4P-9WAV] (last visited Nov. 5, 2021).

¹¹ LSIPA, § 113.003.

¹² Exec. Order No. 11,858, 40 Fed. Reg. 20263 (May 7, 1975).

¹³ *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 7–8 (2020), *available at* <https://fas.org/sgp/crs/natsec/RL33388.pdf> [https://perma.cc/69J7-F87S].

and the Office of Science & Technology Policy.¹⁴ The Director of National Intelligence and the Secretary of Labor serve as *ex officio* non-voting members of the Committee.¹⁵

CFIUS has long reviewed transactions that would result in control of sensitive U.S. businesses by foreign investors, including foreign governments or those acting on their behalf.¹⁶ In the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Congress expanded CFIUS’s authority even more.¹⁷ FIRRMA broadened CFIUS’s jurisdiction to include certain transactions by foreign persons in real estate located near sensitive locations, like military bases,¹⁸ and *noncontrolling* investments by foreign persons if they would have “access to information, certain rights, or involvement in the decision-making of certain U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data (i.e., TID businesses).”¹⁹

While FIRRMA made filing mandatory for certain transactions,²⁰ CFIUS has typically relied on voluntary notices from transaction parties. Filing of notices has traditionally been and for many parties remains voluntary, but “firms largely compl[y]” because transactions subject to the CFIUS process “that do not notify the Committee remain subject indefinitely to possible divestment or other appropriate actions by the President.”²¹ In 2020, the subsectors with the most notices filed with CFIUS

¹⁴ U.S. DEP’T OF TREASURY, CFIUS OVERVIEW, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> [<https://perma.cc/RFAQ5-WU7W>] (last visited Nov. 5, 2021).

¹⁵ *Id.*

¹⁶ The CFIUS statute defines control as “the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee.” 50 U.S.C. § 4565(a)(3); *see also* 31 C.F.R. § 800.208 (2020) (further refining and explaining what constitutes “control” for purposes of CFIUS review). For a description of the scope of “covered” transactions prior to 2018, *see* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 14–15 (2018), *available at* <https://crsreports.congress.gov/product/pdf/RL/RL33388/68>.

¹⁷ JACKSON, *supra* note 13, at 10–12. For an overview of CFIUS’s evolution and congressional oversight through 2009, *see* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 91–102 (2009).

¹⁸ JACKSON, *supra* note 13, at 18–19; *see also* 31 C.F.R. § 802.101–.1108.

¹⁹ JACKSON, *supra* note 13, at 19. The current definition of “covered transaction” can be found in the CFIUS statute, 50 U.S.C. § 4565(a)(4), and Treasury regulations, 31 C.F.R. § 800.213.

²⁰ The regulations on mandatory filing are included in 31 C.F.R. § 800.401.

²¹ JACKSON, *supra* note 13, at 8.

were: (1) electric power generation, transmission, and distribution; (2) semiconductor and other electronic component manufacturing; and (3) software publishers.²²

CFIUS uses a multi-step process for screening investments.²³ Parties to a proposed investment typically consult CFIUS informally before filing formally.²⁴ The formal process begins with the filing of either a short-form declaration or a formal written notice,²⁵ and CFIUS may require parties that initially file a declaration to file a notice.²⁶ The filing of a notice triggers a 45-day review period during which CFIUS conducts a risk assessment and determines whether the transaction threatens to impair national security.²⁷ In its risk-based analysis, CFIUS considers: (1) the “threat, which is a function of the intent and capability of a foreign person to take action to impair the national security of the United States”; (2) “vulnerabilities,” specifically “the extent to which the nature of the U.S. business presents susceptibility to impairment of national security”; and (3) the “consequences to national security . . . that could reasonably result from the exploitation of the vulnerabilities by the threat actor.”²⁸

If risks are identified and need to be resolved or if the transaction would result in control of a U.S. business by a foreign government or someone acting on behalf of a foreign government, CFIUS then initiates an investigation,²⁹ which must be completed within 45 days (with a possible 15-day extension).³⁰ The Committee may negotiate with the transaction parties and conclude agreements to mitigate identified risks.³¹ Mitigation measures can include, for example, “prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or technical

²² U.S. DEP’T OF TREASURY, CFIUS ANNUAL REPORT TO CONGRESS - CY 2020, at 26–34 (tbl. I-12) (2021), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf> [<https://perma.cc/K7UK-MARD>] [hereinafter CFIUS 2020 REPORT].

²³ CFIUS regulations can be found in 31 C.F.R. pt. 800.

²⁴ See JACKSON, *supra* note 13, at 15–16 (discussing informal consultation process).

²⁵ See U.S. DEP’T OF TREASURY, *supra* note 14; JACKSON, *supra* note 13, at 16–17 (discussing CFIUS filing requirements).

²⁶ 31 C.F.R. § 800.407 (2020).

²⁷ *Id.* § 800.102, 800.501–.506 (2020); JACKSON, *supra* note 13, at 20–21.

²⁸ 31 C.F.R. § 800.102 (2020).

²⁹ *Id.* § 800.505 (2020) (describing when CFIUS undertakes investigations); see also *id.* § 800.222 (2020) (defining “Foreign government-controlled transaction”).

³⁰ *Id.* § 800.505, .507–.508 (2020).

³¹ In 2020, CFIUS imposed mitigation measures for 23 notices of covered transactions or “approximately 12 percent of the total number of 2020 notices.” CFIUS 2020 REPORT, *supra* note 22, at 40.

knowledge”; barring the foreign transaction party from accessing certain information; “ensuring that only U.S. citizens handle certain products and services”; and “ensuring that certain activities and products are located only in the United States.”³² CFIUS can also require the establishment of a “Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. Government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports, and independent audits.”³³

If CFIUS believes that national security risks have not been or cannot be addressed, it can recommend that the President block the transaction.³⁴ The President must act within 15 days and may “take such action for such time as [he] considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States,” if he determines that there is “credible evidence . . . that a foreign person that would acquire an interest in a United States business or its assets as a result of the covered transaction might take action that threatens to impair the national security” and that in his judgment, other laws are insufficient to protect national security.³⁵

To date, presidents have blocked seven transactions via the CFIUS process,³⁶ including ordering TikTok parent company ByteDance to divest itself of Musical.ly in August 2020.³⁷ Looking only at blocked transactions, however, understates the Committee’s influence. Transaction parties facing unpalatable mitigation measures or adverse presidential action can abandon investments and withdraw filings made to CFIUS in order to avoid such

³² *Id.* at 40–41.

³³ *Id.* at 41.

³⁴ JACKSON, *supra* note 13, at 21–22.

³⁵ 50 U.S.C. § 4565(d) (2015).

³⁶ JACKSON, *supra* note 13, at 21 (listing five blocked transactions in recent years); *see also* Order Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd., 85 Fed. Reg. 13719, 13719–21 (Mar. 10, 2021); Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297, 51297–99 (Aug. 19, 2020).

³⁷ Kristen E. Eichensehr, *United States Pursues Regulatory Actions Against TikTok and WeChat over Data Security Concerns*, 115 AM. J. INT’L L. 124, 129–31 (2021); Jeanne Whalen & Ellen Nakashima, *Biden Revokes Trump’s TikTok and WeChat Bans, But Sets up a Security Review of Foreign-Owned Apps*, WASH. POST (June 9, 2021), <https://www.washingtonpost.com/technology/2021/06/09/tiktok-ban-revoked-biden/> [<https://perma.cc/YD8U-6P8E>] (reporting continued negotiations regarding divestment).

outcomes.³⁸ Of the 1,668 notices that CFIUS determined to be within its jurisdiction between 2011 and 2020, 287 of them, or just over seventeen percent, were withdrawn during the review or investigation phases.³⁹

Having sketched out here the relevant state and federal statutes, the next Part considers theoretical frames that scholars have developed to describe the relationship between states and the federal government in other regulatory areas and then applies them to the relationship between CFIUS and the Texas statute.

II. FEDERALISM AND FOREIGN INVESTMENT REVIEWS

The role of states in foreign relations has traditionally been understood as circumscribed. In Federalist 42, James Madison called foreign relations “an obvious and essential branch of the federal administration,” and argued that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁴⁰ Helped along by broad pronouncements from the Supreme Court,⁴¹ the primacy of the federal government in foreign relations has long been clear.⁴² Louis Henkin argued that foreign relations would remain outside the federalism revolution of the

³⁸ See, e.g., Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 825–27 (2011) (discussing CFIUS’s negotiation of mitigation agreements and noting that the Committee’s influence on transaction parties is substantial, as evidenced by the number of proposed transactions that are withdrawn in order to avoid a formal presidential decision to block them).

³⁹ See CFIUS 2020 REPORT, *supra* note 22, at 16.

⁴⁰ THE FEDERALIST NO. 42 (James Madison).

⁴¹ See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[T]he external powers of the United States are to be exercised without regard to state laws or policies . . . and in respect of our foreign relations generally, state lines disappear.”).

⁴² See, e.g., Sarah H. Cleveland, *Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 990–91 (2001) (“[T]he power of the federal government under the Constitution to control the foreign relations actions of the states is well-established.”); Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2131 (2017) (book review) (noting agreement stretching back to the founding on the idea that “[f]oreign affairs are a matter for our national government . . . with even the Jeffersonians accepting that the nation should be ‘one as to all foreign concerns,’ albeit ‘several as to all merely domestic’” (quoting 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 ADOPTING OF THE CONSTITUTION, MARCH 4, 1789, at 78 (Washington, Blair & Rives 1837))).

1990s,⁴³ and that “[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’.”⁴⁴

The federal government’s role, however, is not necessarily exclusive, and more recent work has emphasized the scope of state actions alongside the federal government in foreign relations-related areas.⁴⁵ In a 2016 book, Michael Glennon and Robert Sloane challenge as a “myth” the idea that “the realm of foreign affairs is, and should be, exclusively federal” and instead argue that states’ “foreign affairs initiatives are frequent in number, broad in scope, and extensive in effect.”⁴⁶ They cite numerous examples of states acting internationally, for example, to enter compacts and agreements with foreign governments on issues like climate change and air quality, establish offices abroad, set up sister-city relationships, and issue statements on foreign policy.⁴⁷ Other scholars have focused on

⁴³ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 149–50 (2d ed. 1996) (arguing that “[f]ederalism . . . was largely irrelevant to the conduct of foreign affairs even before it began to be a wasting force in U.S. life generally” and moreover that the “[r]evolution in the national mood in the 1990s [that] has tended to seek to take from the federal government and give to the states . . . is not likely to have impact on foreign affairs”).

⁴⁴ *Id.* at 150; see also Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1093 (1999) (citing “the perceived irrelevance of federalism to foreign affairs matters” as a feature of the twentieth-century understanding of foreign relations that “has been widely embraced by foreign affairs law commentators”).

⁴⁵ See, e.g., Cleveland, *supra* note 42, at 992–98 (detailing state actions relating to foreign relations including entering agreements with foreign governments, opening trade offices in foreign countries, establishing sister-city relationships, and using procurement or other spending powers in ways that implicate foreign relations); Paul B. Stephan, *One Voice in Foreign Relations and Federal Common Law*, 60 VA. J. INT’L L. 1, 32–33 (2019) (noting examples in which private international law treaties encourage state lawmaking). Even Henkin recognized some role for states in foreign relations-related issues, noting that “despite careless, flat statements to the contrary, the foreign relations of the United States are not in fact wholly insulated from the states” and that “[t]he federal government has also given (or left) to the states a substantial part in the implementation of national foreign policy.” HENKIN, *supra* note 43, at 150.

⁴⁶ MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* xv, xx (2016); see also Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223–27 (1999) (tracing the history of “federal exclusivity” in foreign relations and arguing for states to be permitted a greater role in foreign relations in the post-Cold War era).

⁴⁷ For these and other examples of state activities, see GLENNON & SLOANE, *supra* note 46, at 60–76.

whether courts should apply a presumption against or in favor of preemption of state laws (or neither) in foreign relations-related cases.⁴⁸

Alongside foreign relations scholarship, a parallel track of federalism scholarship mostly focuses on domestic constitutional and administrative law,⁴⁹ though, as many have recognized, there is not a neat distinction between domestic and international issues.⁵⁰ Although I cannot do justice to the extensive federalism literature in this brief Essay, setting out the broad outlines of competing theories of federal and state relationships helps to situate the Texas law.

One conceptual approach to the respective roles of the federal and state governments is a “dual federalism” or autonomy model.⁵¹ This approach treats each government as separate and sovereign, regulating within its own distinct sphere,⁵² and resembling, in the words of Morton

⁴⁸ See, e.g., Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 728 (2013) (arguing that the strength of the states’ role in foreign relations and the preemptive scope of federal law should vary based on whether the United States is a hegemon or instead faces a multipolar international system); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 200–01 (arguing that courts should apply no presumption, for or against preemption of state laws, in cases related to foreign relations). For more on preemption and CFIUS, see *infra* Part III.

⁴⁹ In a review of Glennon and Sloane’s book on *Foreign Affairs Federalism*, Jean Galbraith merges the literatures, discussing Glennon and Sloane’s foreign relations arguments in terms of cooperative and uncooperative federalism. Galbraith, *supra* note 42, at 2134 (speculating that “most of foreign affairs federalism . . . is now cooperative or uncooperative”); see also *id.* at 2156 (noting that the involvement of foreign governments, international organizations, and international law in the foreign relations space “provides reasons why the practice of cooperative and uncooperative federalism in the foreign affairs context will differ in certain ways from the domestic context”).

⁵⁰ See, e.g., GLENNON & SLOANE, *supra* note 46, at xvii (recognizing that “[t]he idea that international and domestic affairs are easily differentiated continues to exercise a firm grip on intellectual and political life in the United States,” but arguing that “this assumption is a fiction”); Goldsmith, *supra* note 48, at 197 (discussing how the blurring of domestic and foreign relations issues poses challenges for courts attempting to apply presumptions for or against preemption of state laws).

⁵¹ For brief overviews of the autonomy model and cooperative federalism, see, for example, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261–62 (2009); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

⁵² See, e.g., Bulman-Pozen & Gerken, *supra* note 51, at 1261–62 (“Most theories of federalism rest upon an autonomy model that depicts states as sovereign policymaking enclaves, able to regulate separate and apart from federal interference.”); Weiser, *supra* note 51, at 665 (explaining that the “dual federalism” model “of federal-state relations

Grodzins, a “layer cake,” with “the institutions and functions of each ‘level’ being considered separately.”⁵³

The most prominent alternative to dual federalism is “cooperative federalism,” which Grodzins called “marble cake” federalism.⁵⁴ Cooperative federalism “best describes those instances in which a federal statute provides for state regulation or implementation to achieve federally proscribed policy goals.”⁵⁵ In contrast to the autonomy model, which requires “sharp jurisdictional lines between federal and state authority,” cooperative federalism “enlists state and local officials in the implementation and enforcement of federal regulatory programs.”⁵⁶ The “overlapping structure of regulatory programs” in a cooperative federalism system “creates a co-regulator relationship between state and federal administrators,” as exemplified by “classic cooperative federalism statutes such as the Clean Air Act and Medicaid.”⁵⁷

More recently, Jessica Bulman-Pozen and Heather Gerken coined the term “uncooperative federalism” to describe instances in which “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”⁵⁸ They focus on the “power of the servant” that states acquire from their role in implementing federal

views each jurisdiction as a separate entity that regulates in its own distinct sphere of authority without coordinating with the other”).

⁵³ MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8 (Daniel J. Elazar ed., 1966).

⁵⁴ *Id.* (explaining that U.S. government “is a marble cake” because “[n]o important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations”). Cooperative federalism arose in the second half of the twentieth century and gained steam in the subsequent decades. *See, e.g.*, Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950) (using the term “Cooperative Federalism” and noting that it is “a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies”); Weiser, *supra* note 51, at 669–73 (tracing the rise of cooperative federalism to the late 1960s and early 1970s when the federal government began to rely on states to implement federal laws, like the Clean Air Act).

⁵⁵ Weiser, *supra* note 51, at 668.

⁵⁶ Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 430 (2013); *see also* Weiser, *supra* note 51, at 665 (“In contrast to a dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law.”).

⁵⁷ Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 468 (2014).

⁵⁸ Bulman-Pozen & Gerken, *supra* note 51, at 1258–59.

regulatory schemes.⁵⁹ While states’ “power to decide is interstitial and contingent on the national government’s choice not to eliminate it,”⁶⁰ they argue that integration into a federal scheme gives state officials “the knowledge and relationships they need to work the system.”⁶¹ They identify different types of uncooperative federalism exemplified by state actions with respect to welfare programs, the Clean Air Act, and the Patriot Act.⁶²

Riffing off of cooperative and uncooperative federalism, Ernest Young identified what he calls “overcooperative federalism.”⁶³ Young uses “overcooperative federalism” to describe instances in which states “wish to enforce federal law more aggressively than do federal officials” and “exercise the ‘power of the servant’ to be overzealous, rather than shirking their duty.”⁶⁴ His best example of overcooperative federalism is an Arizona statute, SB 1070, that purported to empower state officials to enforce federal immigration laws in ways beyond how federal immigration officials sought to enforce them.⁶⁵

All of these flavors of federalism assume that there is an appropriate (though differing) scope for states to act. But preemption functions as an outside check on such action by states—as a remedy for impermissible or undesirable federalism. Notably, the Arizona statute that Young uses to exemplify overcooperative federalism did not survive judicial review; the Supreme Court held that federal law preempted it.⁶⁶ And the closest approximation in this federalism literature for Texas’s LSIPA is Young’s overcooperative federalism.⁶⁷ Like the Arizona statute, the Texas statute is similarly “overcooperative” in going beyond the federal government’s identified national security concerns. While perhaps sharing an interest in protecting the security of critical infrastructure, the LSIPA goes beyond the federal CFIUS statute in various ways, as explained in more detail below.

⁵⁹ *Id.* at 1264.

⁶⁰ *Id.* at 1268.

⁶¹ *Id.* at 1268–69.

⁶² *Id.* at 1271–80.

⁶³ Young, *supra* note 56, at 446.

⁶⁴ *Id.*

⁶⁵ *See id.* at 446–47; *see also* *Arizona v. United States*, 567 U.S. 387, 402 (2012) (holding a provision of SB 1070 field preempted because if it were allowed to stand, “the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies”).

⁶⁶ *Arizona*, 567 U.S. at 394–416 (holding three sections of the Arizona statute preempted on grounds of field and obstacle preemption).

⁶⁷ *See supra* notes 63–65 and accompanying text (discussing overcooperative federalism).

The next two Parts consider alternative ways of dealing with state concerns about national security of foreign investments. The Supreme Court has repeatedly shown itself willing to preempt state initiatives in areas related to foreign relations,⁶⁸ and Part III argues that national security review of foreign investments should be added to this list. However, Part IV returns to federalism scholarship and considers ways that state concerns might be incorporated into the CFIUS process, rendering national security reviews of foreign investments more akin to cooperative (or potentially uncooperative) federalism.

III. THE PREEMPTIVE EFFECT OF CFIUS

In the U.S. constitutional system, federal law is supreme over state law,⁶⁹ and the Supreme Court has identified several ways in which federal law may preempt state legal regimes.⁷⁰ The clearest method of preemption occurs when Congress includes an express preemption provision in a statute, specifically directing that the federal statute displaces state law.⁷¹ But the Court has recognized that Congress may also impliedly preempt state law.⁷² As relevant here, there is a “well-settled proposition” that

⁶⁸ The Supreme Court has held state laws related to foreign relations preempted in a number of cases, including *Arizona*, 567 U.S. 387; *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); and *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁶⁹ U.S. CONST. art. VI, cl. 2.

⁷⁰ Although set out as distinct categories here, the Court’s preemption jurisprudence is not a model of clarity. *Cf.* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (“Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.”).

⁷¹ *See, e.g., Arizona*, 567 U.S. at 399 (“Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.”).

⁷² The Court has also recognized that federal law will preempt state law in “cases where ‘compliance with both federal and state regulations is a physical impossibility.’” *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)). This type of conflict preemption is not relevant here because it is possible to comply with both the CFIUS statute and the LSIPA. CFIUS approval is permissive, allowing transactions to go ahead, not mandating that they do so, and thus potential transaction parties could comply with both statutes by simply refraining from engaging in transactions.

The other major category of implied preemption is field preemption, which bars states “from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Id.* The Court has explained that Congress’s “intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Field preemption is often

federal law will preempt state law where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷³

The CFIUS statute contains no express preemption provision,⁷⁴ but there is a strong argument that its provisions nonetheless impliedly preempt Texas’s efforts to regulate foreign investment on security grounds.⁷⁵

In prior obstacle preemption cases, the Supreme Court has invalidated state attempts to layer regulations onto areas related to foreign relations and national security where Congress has established a federal process.⁷⁶ In *Crosby v. National Foreign Trade Council*, the Supreme Court held that a Massachusetts statute restricting the ability of state agencies to purchase goods and services from entities doing business with Myanmar (Burma) was preempted by a federal law governing imposition of sanctions on the same country.⁷⁷ Although both the state and federal regulatory regimes aimed to convince Myanmar’s repressive government to change its behavior, the Court explained that “[t]he fact of a common end hardly neutralizes conflicting means, . . . and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ.”⁷⁸

criticized for sweeping too broadly in displacing state law and inaccurately reflecting the intent of Congress. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2105–07 (2000) (critiquing field preemption); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 829–30 (1996) (arguing for abolishing field preemption); Nelson, *supra* note 70, at 230 & n.22 (collecting sources criticizing field preemption). As detailed in the rest of this Part, the case for obstacle preemption of LSIPA is strong, and thus there is no need to rely on a broader field preemption argument. Cf. Goldsmith, *supra* note 48, at 213–14 (expressing a “modest preference for obstacle over field preemption” because, among other reasons, “obstacle preemption focuses more sharply on Congress’s actual aims than field preemption, which draws inferences from patterns of legislation rather than from a particular statute” and “field preemption tends to sweep more broadly than obstacle preemption”).

⁷³ *Arizona*, 567 U.S. at 406 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁷⁴ 50 U.S.C. § 4565.

⁷⁵ See *infra* note 113.

⁷⁶ The Court has reserved the question of whether the typical presumption against preemption applies in foreign relations-related cases. *Crosby v. Nat’l For. Trade Council*, 530 U.S. 363, 374 n.8 (2000); see also Goldsmith, *supra* note 48, at 215–16 (noting that *Crosby* “embraced neither presumptive canon” in favor of or against preemption).

⁷⁷ 530 U.S. at 373–74.

⁷⁸ *Id.* at 379–80.

The Court further highlighted that the state law undermined the discretion and flexibility Congress intended the President to be able to exercise. Congress, the Court explained, “clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma,” adjusting the sanctions up or down based on the government’s actions and waiving sanctions if he determines that imposing them would contravene U.S. national security interests.⁷⁹ The Court noted that Congress would not “have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.”⁸⁰

Finally, the Court noted that the Massachusetts statute “undermines the President’s capacity . . . for effective diplomacy” by “compromis[ing] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.”⁸¹ Specifically, “the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.”⁸²

These arguments suggest that the CFIUS process preempts the Texas statute. Both processes are aimed at protecting against national security threats, but as *Crosby* explained, similarity of goals does not prevent a state law from presenting an obstacle to a federal scheme.⁸³ Here, as in *Crosby*, the LSIPA attempts to address security concerns by imposing restrictions that differ from federal law. The LSIPA prohibits business entities from entering into *any* agreement that would give access to or control of critical infrastructure to a company headquartered in or owned by citizens of China, Iran, North Korea, Russia, or other countries yet to be designated.⁸⁴ CFIUS, by contrast, applies to certain foreign investments in U.S. entities and to purchase, lease, or concessions in certain real estate.⁸⁵ CFIUS also operates through review of individual transactions,⁸⁶ not blanket nationality-based bans as the LSIPA does. And perhaps most importantly, the CFIUS process allows for negotiation and implementation

⁷⁹ *Id.* at 374.

⁸⁰ *Id.* at 376.

⁸¹ *Id.* at 381.

⁸² *Id.*

⁸³ *See supra* note 78 and accompanying text.

⁸⁴ LSIPA § 113.002(a).

⁸⁵ 50 U.S.C. § 4565(a)(4) (defining “[c]overed transaction”).

⁸⁶ *Id.* § 4565(b).

of mitigation agreements with transaction parties to address national security concerns, while also allowing transactions to proceed.⁸⁷ The LSIPA contemplates no such flexibility. Consequently, if the Texas statute “is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence,” and it therefore stands as an obstacle to the federal regulatory scheme.⁸⁸

Moreover, state processes like LSIPA would “compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments,” both in general and with respect to particular countries.⁸⁹ In setting out the CFIUS process, the executive branch has emphasized that “[i]nternational investment in the United States promotes economic growth, productivity, competitiveness, and job creation” and that “[i]t is the policy of the United States to support unequivocally such investment, consistent with the protection of national security.”⁹⁰ Allowing a state process like that under LSIPA to countermand a determination by the federal government that an investment is consistent with U.S. national security would undermine the credibility and efficacy of the stated federal policy.

In addition, transactions occur in the context of broader diplomatic relationships, some friendly and others more adversarial. The risk-based analysis that CFIUS uses to determine whether to approve transactions considers the threat posed by the foreign person involved in the transaction, the vulnerabilities of the U.S. business, and the consequences to U.S. national security of “the exploitation of the vulnerabilities by the threat actor.”⁹¹ Particularly the threat portion of the risk analysis depends in part on the identity of the actors involved and an assessment of their intentions with respect to U.S. national security.⁹² The federal government, including

⁸⁷ *Id.* § 4565(l)(3)(A); *see also* Exec. Order No. 13,456, 73 Fed. Reg. 4677, 4679 (Jan. 23, 2008) (setting out procedures for “Risk Mitigation”).

⁸⁸ *Crosby v. Nat’l For. Trade Council*, 530 U.S. 363, 377 (2000); *see also Arizona v. United States*, 567 U.S. 387, 406 (2012) (“recogniz[ing] that a ‘[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy’” (second alteration in original) (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971))).

⁸⁹ *Crosby*, 530 U.S. at 381.

⁹⁰ Exec. Order No. 13,456, *supra* note 87, at 4677.

⁹¹ 31 C.F.R. § 800.102 (2020); *see also* U.S. Dep’t of Treasury, Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567, 74569–70 (Dec. 8, 2008) (discussing CFIUS’s process for assessing risk).

⁹² 31 C.F.R. § 800.102.

the intelligence community, is far better positioned than state governments to make such assessments, as well as to consider aspects of national security that Congress has specified, such as a transaction's effect on U.S. international technological leadership, involved countries' records of counter-terrorism cooperation, and the extent to which domestic production is required for national defense.⁹³ Analyzing these issues is a matter for the federal government's expertise as well as its responsibility for managing U.S. foreign relations.

Like the statute in *Crosby*, which called on the president to work with other countries to improve human rights and further democracy in Myanmar,⁹⁴ the CFIUS statute specifically contemplates the Executive Branch working with other countries. In particular, the statute specifies that the Executive Branch "should establish a formal process" for exchanging information with "governments of countries that are allies or partners of the United States."⁹⁵ The statute suggests that the process should "facilitate the harmonization of action with respect to trends in investment and technology that could pose risks to the national security of the United States" and allied countries and allow sharing of information about specific technologies and investing entities.⁹⁶ This concern about working with allies "belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action," and as *Crosby* recognized, when state-based actions "qualify [the President's] capacity to present a coherent position on behalf of the national economy, he is weakened . . . in working together with other nations in hopes of reaching common policy and 'comprehensive' strategy."⁹⁷ Both the Trump and Biden administrations have sought allied coordination and cooperation on foreign investment reviews.⁹⁸

⁹³ 50 U.S.C. § 4565(f) (2021).

⁹⁴ *Crosby*, 530 U.S. at 380–81.

⁹⁵ 50 U.S.C. § 4565(c)(3)(A).

⁹⁶ *Id.* § 4565(c)(3)(B).

⁹⁷ *Crosby*, 530 U.S. at 381–82.

⁹⁸ See, e.g., WHITE HOUSE, NATIONAL STRATEGY FOR CRITICAL AND EMERGING TECHNOLOGIES 9 (Oct. 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/10/National-Strategy-for-CET.pdf> [<https://perma.cc/9PSK-VFDN>] (explaining that the Trump Administration will "[e]ngage allies and partners to develop their own processes similar to those executed by" CFIUS); Statement from U.S.-EU Trade and Technology Council, Inaugural Joint Statement (Sept. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/u-s-eu-trade-and-technology-council-inaugural-joint-statement/> [<https://perma.cc/W9L3-K9MN>] (addressing cooperation on "investment screening" for national security risks).

If doubt remains about the preemptive effect of the CFIUS process, it should be dispelled by considering that the Executive Branch operates CFIUS pursuant to delegated authority from Congress. The president's operation of CFIUS falls within Category One of Justice Jackson's iconic tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, which specifies that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."⁹⁹ In other *Youngstown* Category One cases, the Supreme Court has broadly construed the preemptive scope of federal action because of the combined action of Congress and the president.¹⁰⁰ The same should be true with respect to CFIUS. The fact that the President operates the CFIUS process pursuant to authorization from Congress—authorization that Congress has monitored and repeatedly expanded—suggests that its preemptive scope should be broadly construed.¹⁰¹

The potential disruptive effect of a state-based national security investment review scheme like the LSIPA may be clearer with a few examples.

Consider first an investment by a company headquartered in China in a company operating in Texas that may access certain critical infrastructure. Assume the transaction is properly filed with and reviewed by CFIUS, which approves it subject to a mitigation agreement requiring, for example, that only U.S. citizens access sensitive systems and that the company allow independent audits of access restrictions.¹⁰² Texas nonetheless seeks to prohibit the transaction pursuant to the LSIPA. This hypothetical may not be far from the situation that motivated the Texas statute in the first place. The bill's sponsor said she "filed this bill to prevent a former Chinese People's Liberation Army General from building 700 ft

⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁰⁰ See Kristen E. Eichensehr, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1310–12 (2021) (discussing *Crosby* and the relationship between *Youngstown* and preemption).

¹⁰¹ *Cf. id.* at 1312 (arguing that with respect to the statute in *Crosby* "the fact that the president was in *Youngstown* Category One, acting pursuant to express authorization by Congress, caused the Court to interpret the preemptive scope of the federal statute relatively broadly").

¹⁰² For examples of mitigation measures, see CFIUS 2020 REPORT, *supra* note 22, at 40–42; *supra* note 32 and accompanying text.

wind turbines . . . right next to a U.S. military installation”¹⁰³—a reference to a wind farm development by a subsidiary of Guanghui Energy Company that CFIUS reportedly cleared to proceed.¹⁰⁴

In such a circumstance, the conflict between the two regulatory schemes is clear and multifaceted. Texas’s action stands as an obstacle to a transaction the federal government has determined to allow to proceed subject to agreements negotiated between the government and transaction parties. There is no indication in the CFIUS statute that Congress intended the federal process to establish only a floor onto which states could layer additional national security reviews. Indeed, CFIUS promises a “safe harbor” to transactions for which CFIUS has completed review or the president has declined to act, making them subject to additional review only in extraordinary circumstances, such as submission of misleading information in the initial review or material breach of a mitigation agreement.¹⁰⁵ Allowing subsequent state action to block an agreement is hardly a safe harbor, and it would throw into question the value for companies of undertaking sometimes onerous mitigation measures to satisfy CFIUS if the transaction could be upended afterwards by sub-national governments. It would also replace the federal government’s calibrated policy of encouraging foreign investment while assessing and managing risk on a transaction-by-transaction basis with a blanket ban.¹⁰⁶ In doing so, the state process might also disrupt the Executive Branch’s management of diplomatic relations with China—signaling hostility and suspicion the federal government does not wish to communicate at all or at a particular

¹⁰³ Campbell, *supra* note 2.

¹⁰⁴ Jack Detsch & Robbie Gramer, *Deep in the Heart of Texas, a Chinese Wind Farm Raises Eyebrows*, FOREIGN POL’Y (June 25, 2020), <https://foreignpolicy.com/2020/06/25/texas-chinese-wind-farm-national-security-espionage-electrical-grid/> [https://perma.cc/2X99-VMZD] (reporting that CFIUS planned to approve the project); John Hyatt, *Why a Secretive Chinese Billionaire Bought 140,000 Acres of Land in Texas*, FORBES (Aug. 9, 2021), https://www.forbes.com/sites/johnhyatt/2021/08/09/why-a-secretive-chinese-billionaire-bought-140000-acres-of-land-in-texas/?sh=2cc90b3d78c3_ [https://perma.cc/U6BU-HTL9] (reporting that CFIUS approved the transaction in December 2020 and that the Department of Defense imposed a mitigation agreement in July 2021 “satisfying concerns about turbines interrupting training routes at Laughlin Air Force Base”). Campbell later said, “CFIUS and the Department of Defense, they need to watch what they’re approving. . . . There needs to be an in-depth look at what really these foreign countries are wanting to do.” Hyatt, *supra* (quoting Texas Sen. Donna Campbell).

¹⁰⁵ U.S. DEP’T OF TREASURY, *supra* note 14; 31 C.F.R. § 800.501(c)(1)(ii), § 800.701.

¹⁰⁶ See *supra* notes 89–92 and accompanying text.

time. All of these possible consequences illustrate how the state scheme is an obstacle to the federal one.¹⁰⁷

Consider another example where the Texas governor exercises his authority under the LSIPA to designate additional countries as threats to critical infrastructure and designates a U.S. ally, thereby prohibiting agreements between business entities and companies headquartered in the allied country. It is easy to see how such a designation would interfere with the federal government's foreign policy, including its "longstanding open investment policy"¹⁰⁸ and its diplomatic relationships. Even more specifically, pursuant to FIRRMA, the Treasury Department established a process that gives preferential treatment to some investments from countries, deemed "excepted foreign states," based on their "robust intelligence-sharing and defense industrial base integration mechanisms with the United States."¹⁰⁹ The list of excepted foreign states currently includes Australia, Canada, and the United Kingdom,¹¹⁰ and CFIUS may add additional countries in the future based on their national security-based investment review processes.¹¹¹ The possible designation of a foreign state as a prohibited party for purposes of the LSIPA and an excepted foreign state for CFIUS purposes illustrates another significant mechanism by which the Texas statute could serve as an obstacle to the federal CFIUS process in particular and the federal government's foreign policy more generally.¹¹²

¹⁰⁷ Cf. Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 99 (2016) (calling for a "flat ban" on state laws that "facially discriminate against (or in favor of) certain nations" because such laws "have a significant and obvious capacity to annoy foreign sovereigns," "embarrass our federal government's conduct of foreign affairs[,] and undercut the benefits of one informed and experienced federal voice in foreign affairs").

¹⁰⁸ *CFIUS Frequently Asked Questions*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-frequently-asked-questions_ [<https://perma.cc/GG3H-7K6N>] (last visited Oct. 8, 2021).

¹⁰⁹ Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3112, 3116 (U.S. Dep't of Treasury Jan. 17, 2020) (to be codified at 31 C.F.R. pts. 800, 801); see also 50 U.S.C. § 4565(a)(4)(E).

¹¹⁰ *CFIUS Excepted Foreign States*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states> [<https://perma.cc/CR4A-G5X9>] (last visited Nov. 6, 2021).

¹¹¹ See Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3116; 31 C.F.R. § 800.1001.

¹¹² Cf. Javid Dharas, *CFIUS's Excepted Foreign States Provision: U.S. Economic Security Policy Gets Longer Arms*, LAWFARE (Nov. 13, 2020), <https://www.lawfareblog.com/cfiuss->

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The argument for obstacle preemption described here focuses on investments within the scope of CFIUS’s jurisdiction: for investments within the scope of CFIUS’s authority, states cannot layer on additional security-focused regulations without posing an obstacle to the federal system established by Congress and implemented by the Executive Branch. This is not to deny that states may well have security concerns about foreign investments related to critical infrastructure within their territory. But Congress has created a system that gives the federal government, via the CFIUS process, responsibility for considering and mitigating those concerns. For transactions within its jurisdiction, CFIUS review is a ceiling, not a floor, for security reviews.¹¹³

Although this Part has made the case for why the CFIUS statute preempts the Texas statute as drafted, the next Part considers constructive ways to bring state concerns about particular transactions into the federal CFIUS process.

IV. ALTERNATIVE WAYS TO ACCOUNT FOR STATES’ CONCERNS

Congress has monitored and repeatedly expanded CFIUS’s authority, and it could shut states out of national security reviews definitively if it so chose by amending the CFIUS statute to expressly preempt state laws like LSIPA. Whether Congress chooses to expressly preempt state initiatives or leaves them to be impliedly preempted along the lines argued in the previous Part, Congress could direct—or CFIUS on its

excepted-foreign-states-provision-us-economic-security-policy-gets-longer-arms [https://perma.cc/DG4T-VQTZ] (noting that the “excepted foreign states” system “gives the United States new leverage in its efforts to compel other nations to adopt investment review regimes that it finds acceptable”).

¹¹³ The exact scope of the Texas statute’s prohibitions remains unclear. *See, e.g.*, Ken Paxton, Att’y Gen. of Texas, Opinion No. KP-0388 (Sept. 23, 2021), *available at* <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2021/kp-0388.pdf> (answering questions regarding the applicability of the LSIPA to the wind farm project that prompted the statute). It is possible that the prohibition on entering into agreements that would result in foreign entities or persons having access to critical infrastructure may reach beyond investments or real estate transactions that fall within CFIUS’s purview. *See supra* Part I. The preemption arguments set out in this Essay focus on the areas of overlap. Moreover, CFIUS clearance would not preempt other routine state laws with which a company must comply, such as environmental or health and safety restrictions.

own authority could incorporate—state information and expertise into the federal CFIUS process. Although it may be problematic for states to regulate foreign investment on national security grounds directly, state and local officials may be well-positioned to flag concerns to federal regulators. In particular, state and local officials familiar with conditions in their jurisdiction related to critical infrastructure or patterns of real estate transactions may have information to identify security concerns that could feed into the federal process.

CFIUS is required to identify and report to Congress about the process it uses to identify “non-notified” transactions—covered transactions that parties do not report to CFIUS.¹¹⁴ Public details about its efforts are sparse (likely for good reason).¹¹⁵ CFIUS noted in its most recent report to Congress that it “utilized various methods to identify” non-notified transactions “including interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications,” and it suggested that it might improve detection of non-notified transactions by better training of federal government officials and “increasing public awareness of the CFIUS tip mailbox.”¹¹⁶ But another tactic could be to loop in relevant state-level officials. CFIUS could perhaps routinize consultation with a designated official in each state charged with monitoring inbound investments or other transactions for security concerns. Or the Treasury Department could establish an advisory committee of state and local officials that could provide input at a general level or even, subject to appropriate security clearances, be consulted about particular investment reviews.¹¹⁷

¹¹⁴ 50 U.S.C. § 4565(b)(1)(H), (m)(2)(I).

¹¹⁵ CFIUS’s 2020 report to Congress, for example, discusses non-notified transactions in a single page. CFIUS 2020 REPORT, *supra* note 22, at 48.

¹¹⁶ *Id.* CFIUS reported that in 2020, 117 transactions were identified through these mechanisms and considered by the Committee, resulting in seventeen requests for filing. *Id.*

¹¹⁷ See generally Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1–16 (2012) (setting out provisions related to the operation of federal advisory committees). In recent years, the number of federal advisory committees subject to FACA has hovered around 1,000, see Meghan M. Stuessy, *Executive Order to Reduce the Number of Federal Advisory Committees*, CONG. RSCH. SERV. INSIGHT 3 (June 27, 2019), <https://crsreports.congress.gov/product/pdf/IN/IN11139> [<https://perma.cc/BP8N-84E4>] (showing roughly 1,000 committees annually from 2010-17), and a full database is available on the General Services Administration website, see FACADATABASE.GOV, *All Agency Accounts*, <https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation> [<https://perma.cc/8FAG-AKX6>] (last visited Sept. 28, 2021). For an example of even

State officials might also liaise with their federal representatives to provide another avenue of input into the CFIUS process, particularly to identify concerning non-notified transactions. In the case of the wind farm that sparked the LSIPA, Senators Ted Cruz and John Cornyn and then-Rep. Will Hurd, whose district included the project, raised concerns,¹¹⁸ and Hurd even testified in favor of the LSIPA in a Texas senate committee hearing.¹¹⁹ CFIUS is already required, at the conclusion of a national security review, to transmit a notice about the results of the investigation to congressional leadership, as well as, in the case of transactions involving critical infrastructure, to the senators and representative from the state and district respectively where the acquired company is located.¹²⁰ But that notice may come too late.

Providing an *ex-ante* avenue or avenues for channeling state information and concerns directly into the CFIUS process could provide useful sources of information to federal regulators while avoiding the preemption problems and foreign relations concerns caused by the Texas statute. To return to the theories of federalism discussed in Part II, creating a formalized line of communication from states to CFIUS regulators would not render states co-regulators in the sense envisioned by the definitions of cooperative and uncooperative federalism.¹²¹ But providing states with a privileged and direct line or lines of input into the CFIUS process could

greater state involvement in federal decision-making processes, consider the Endangered Species Act (ESA). When the Endangered Species Committee receives an application for an action that, among other things, threatens the existence of an endangered species, the ESA requires notification to the governor of the affected state and the appointment of an individual from the affected state to the Committee for purposes of considering the application. 16 U.S.C. § 1536(a)(2), (e)(3)(G), (g)(2)(B) (2012).

¹¹⁸ Detsch & Gramer, *supra* note 104; Will Hurd, *We Must Prevent Foreign Cyber Attacks on Texas Energy Infrastructure*, HOUS. CHRON. (July 30, 2020), <https://www.houstonchronicle.com/opinion/outlook/article/Hurd-We-must-prevent-foreign-cyber-attacks-on-15445578.php> [<https://perma.cc/N9YL-GTBX>] (citing the Guanghui Energy Company wind farm and arguing “the federal government is not moving fast enough to prevent it, and the state government lacks the power to stop it”); Hyatt, *supra* note 104 (reporting that Cruz and Cornyn “sent a warning letter to U.S. Treasury Secretary Steven Mnuchin” about the wind farm development).

¹¹⁹ *Prohibiting Contracts or Other Agreements with Certain Foreign-Owned Companies in Connection with Critical Infrastructure in This State Before the S. Committee on Business & Commerce*, 87th Leg., Reg. Sess. (Tex. 2021) (testimony of Will Hurd, beginning at 39:02), https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=15776 [<https://perma.cc/725V-SCV8>].

¹²⁰ 50 U.S.C. § 4565(b)(3).

¹²¹ See *supra* Part II.

nonetheless allow them to better play the role of both partner of and challenger to federal officials in national security investment reviews.