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Challenging Federalism: How the States' Loud Constitutional Provocation is Being Met with Silence

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CHALLENGING FEDERALISM: HOW THE STATES' LOUD
CONSTITUTIONAL PROVOCATION IS BEING MET WITH SILENCE

Jennifer M. Haidar[†]

“The peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members.”

–Alexander Hamilton, Federalist No. 80

“The fact that the Paris deal hamstringing the United States while empowering some of the world’s top polluting countries should expel any doubt as to why foreign lobbyists should wish to keep our beautiful country tied up and bound down . . . That’s not going to happen while I’m president, I’m sorry.”

–President Donald J. Trump

“Trump is AWOL, but California is on the field, ready for battle.”

–California Governor Jerry Brown

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INTRODUCTION

In light of the recent political response to President Donald Trump's decision to withdraw from the Paris Agreement,¹ a protocol to the United Nations Framework Convention on Climate Change, the legislation and political responses from several states have called into question the stability of our federalist system. The United States ratified the Paris Agreement on September 3, 2016 during the last months of President Barack Obama's presidency,² and despite President Trump's announcement to withdraw on June 1, 2017,³ the United States is nevertheless obligated to wait three years to announce an intention to exit the agreement.⁴ Following President Trump's announcement, state legislators and politicians have passed unconstitutional statutes and conducted foreign diplomacy in an attempt to constructively ratify the Paris Agreement in spite of the federal government's position.

This Note will not explore the merits of the Paris Agreement, because regardless of the policy value of the agreement, the constitutional issue lies with the states' unconstitutional response. By passing state legislation to uphold the Paris Agreement and conducting diplomacy, states have violated the Supremacy Clause⁵ and the Dormant Foreign Affairs Power.⁶ These constitutional safeguards are in place because the American system of government relies on a stable balance of Federalism. Though the states have reserved many powers, the power to sign treaties and conduct diplomacy is not among them. By outlining how states have increased their disregard for federalist checks on state power, this Note will be a helpful addition to the continuing scholarship on constitutional law. An analysis of intention and constitutionality will reveal that the laws passed in Hawaii, Washington, Massachusetts and Maryland go against our ingrained system of federalism and should be invalidated. Furthermore, the actions of several political figures also unconstitutionally encroach on the executive's exclusive domain over diplomacy.

The United States Climate Alliance (the Alliance) is the embodiment of state-level activism in favor of the Paris Agreement, and as a signal to the growing independence of states, they now count fifteen American states as part of their membership.⁷ Their mandate is to encourage legislation furthering the goals of the Paris Agreement in spite of the federal position on the issue.⁸ Created as a reaction to the

1 Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

2 *Paris Agreement Status: Chapter XXVII Environment*, U.N. TREATY COLLECTION, (Jan. 29, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

3 Shear, *supra* note 1, at 1.

4 Paris Climate Agreement art. 28 *opened for signature* Dec. 12 2015, (entered into force Nov. 4, 2016). <https://www.state.gov/documents/organization/270538.pdf>.

5 U.S. CONST. art. VI, cl. 2.

6 U.S. CONST. art. II, § 2, cl. 2.

7 *About*, U.S. CLIMATE ALL. (Dec. 10, 2017), <https://www.usclimatealliance.org/about-us/>. (These states include California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, and Washington.)

8 *Alliance Principles*, U.S. CLIMATE ALL. (Dec. 10, 2017), <https://www.usclimatealliance.org/alliance-principles/>.

federal government's announcement of withdrawal from the Paris Agreement,⁹ the Alliance has been active in creating domestic support for climate change legislation, practicing international diplomacy, and conducting foreign affairs. When state representatives gathered to speak in November 2017 at the Bonn Climate Conference, the Alliance made a diplomatic appearance and was dubbed a "shadow delegation."¹⁰ In contrast to the American delegation's booth advocating for the benefits of fossil fuels and natural gas, the Alliance made various proclamations assuring our foreign partners that the individual states still support the Paris Agreement and will continue to adhere to its provisions regardless of federal action.

Along with the Alliance, former New York Mayor Michael Bloomberg and Californian Governor Jerry Brown have launched another group advocating for the Paris Agreement called America's Pledge.¹¹ After being asked about America's Pledge, Bloomberg announced that "we want the world to know: The U.S. will meet our Paris commitment, and, through a partnership among American cities, states, and businesses, we will seek to remain part of the Paris Agreement process."¹² In contrast to the constitutional separation of state and federal powers inherent in our federalist system, Mr. Bloomberg's comments are out of line and delve into the preempted field of foreign affairs.¹³ The Alliance and America's Pledge are very similar and both advocate for large scale deviation from federal policy. While states have the power to pledge themselves in favor of increased restrictions on environmental regulation, the problem arises when they intermingle their domestic roles with foreign diplomacy.

This Note considers recent legislation, diplomatic action, and statements made by state officials, and makes the primary contention that the environment in which we find ourselves in tips dangerously towards a constitutional crisis. States have been siphoning federal power without any pushback from the government, and based on a historical review, the state actors in question have reacted with novel responses. Incredibly, within the past fifty years the Supreme Court has only issued two opinions regarding state action and the dormant foreign affairs power,¹⁴ so further contribution to this field is sorely needed. In Part I, this Note will analyze the growing opposition towards President Trump's stance on the Paris Agreement. Next, in Part II, this Note will argue that the foreign affairs power is solely the province of the federal government based on precedent and constitutional authority. Lastly, this Note will consider whether states have encroached on this power in the past and distinguish cultural connections with political statements.

9 *Id.*

10 Lisa Friedman, *A Shadow Delegation Stalks the Official U.S. Team at Climate Talks*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/climate/un-climate-talks-bonn.html?_r=0.

11 *About America's Pledge*, AM.'S PLEDGE, <https://www.americaspledgeonclimate.com/about/>.

12 Robinson Meyer, *'America's Pledge': Can States and Cities Really Address Climate Change?* THE ATLANTIC (June 2, 2017), <https://www.theatlantic.com/science/archive/2017/06/can-states-and-cities-really-commit-to-the-paris-agreement/528945/>.

13 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

14 *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 743 (N.D. Ill. 2007).

I. CURRENT STATE OF AFFAIRS

A. DOMESTIC LEGISLATION

Despite the merits of the Paris Agreement, state action intended to conflict with federal foreign affairs power violates the basic tenets of federalism and the dormant foreign affairs power. Bringing in many states, the pledges made within the Alliance and America's Pledge have inspired anti-federalist pieces of legislation. While states have the power to legislate on climate change, they do not have the power to pair those bills with statements of foreign policy. When President Trump announced the American withdrawal from the Paris Agreement on June 1, 2017, he was speaking for the entirety of the United States, not just the federal government.¹⁵ The federal government has exclusive domain over foreign affairs, and while the states have the power to pass bills addressing their individual emissions rates, they are nonetheless barred by legislating in reference to international agreements.

On June 6, 2017, Hawaii made history as its legislature passed a bill explicitly purporting to adopt the goals of the Paris Agreement.¹⁶ The language in the Hawaiian bill is a provocative piece of legislation because it exists in direct contrast to the position of the administration and directly addresses issues of foreign affairs. Claiming that “[r]egardless of federal action, the legislature supports the goals of the Paris Agreement to combat climate change,”¹⁷ the Hawaiian legislature affirmatively outlined their position as contrary to the administration. Furthermore, the bill promises to take up their fair “share of obligations within the expectations apportioned to the United States in the Paris Agreement, regardless of federal action.”¹⁸

Similar to the situation in Hawaii, the Washington State Legislature also proposed a bill in the House on June 14, 2017, which claims to adopt the Paris Agreement.¹⁹ House Bill 2225 uses substantially similar language to the Hawaiian bill and also notes that, “notwithstanding the June 1, 2017, [sic] announcement that the United States would withdraw from the 2015 Paris climate agreement, Washington state intends to fulfill its portion of the United States’ commitment . . .”²⁰ The sponsor of the bill, Representative Vandana Slatter, commented that even though the federal government was being “shortsighted,” there was room for the states of Washington to lead and for all representatives to take action on a state level.²¹

Massachusetts has also disregarded the federal government’s exclusive claim to

¹⁵ Shear, *supra* note 1, at 1.

¹⁶ Merrit Kennedy, *Hawaii Signs Legislation to Implement Goals Of Paris Climate Accord Anyway*, NAT’L PUB. RADIO (June 7, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/07/531882630/hawaii-signs-legislation-to-implement-goals-of-paris-climate-accord-anyway>.

¹⁷ S.B. 559, 2017 Leg., 29th Sess. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/SB559_CD1_.htm.

¹⁸ *Id.*

¹⁹ H.B. 2225, 65th Leg., 2d Spec. Sess. (Wash. 2017), <https://app.leg.wa.gov/billsummary?BillNumber=2225&Year=2017>.

²⁰ *Id.* at § 1, cl. 2.

²¹ Washington House Democrats, *Slatter Introduces Legislation to Align Washington with 2015 Paris Climate Agreement*, WASH. H. DEMOCRATS (June 14, 2017), <https://housedemocrats.wa.gov/press-releases/slatter-introduces-legislation-to-align-washington-with-2015-paris-climate-agreement/>.

set the national agenda for foreign policy. Introduced on November 1, 2017, the House overwhelmingly voted to approve bill H 3994 which makes Massachusetts a “non-party stakeholder” in the Paris Agreement.²² Upon initial glance, the term “non-party stakeholder” seems to avoid explicit ratification of an agreement. Perhaps the result of legal advice is to prevent incursion into the treaty power, but such an analysis would miss the main point that the proposed bill is nonetheless an overreach into foreign affairs and could still be enforced as a treaty. The bill’s definition of “non-party stakeholder” gives room for cities and towns to adhere to the guidelines of the Paris Agreement, and while the term “ratification” isn’t explicitly used, they are still functionally adopting the Accords.²³ While one State Senate representative noted that the bill amounted to “running in place” on regulations aimed at decreasing emissions,²⁴ passage of the bill in both houses is not a requirement to be considered an interference in foreign affairs.

Though Hawaii, Washington and Massachusetts all presented legislation to directly join or adhere to the Paris Agreement, Maryland’s legislation is unique because it instead orders the Governor to join the Climate Alliance group founded by Governors Jerry Brown, Andrew Cuomo, and Jay Inslee.²⁵ Introduced days apart in January of 2018, the House²⁶ and Senate²⁷ bills both contained similar language requiring the governor to include Maryland as a member in the Climate Alliance and prohibiting the governor from terminating membership therein. As a result of such bicameral consensus, Maryland Governor Larry Hogan sent out a letter to the Climate Alliance outlining his commitment to participation and leadership with them.²⁸ The letter also mentioned Governor Hogan’s disagreement with President Trump’s decision to pull out of the Paris Agreement and his hope of collaboration going forward.²⁹ On May 15, 2018, the House bill passed and was signed into law by Governor Hogan, making it the first direct order from a state legislative body to conduct foreign diplomacy.³⁰

22 Katie Lannan, *Mass. House Votes to Commit State to Goals of Paris Climate Accord*, WBUR NEWS (Nov. 2, 2017), <http://www.wbur.org/news/2017/11/02/house-votes-climate-change-accord>.

23 H.B. 3994, 2017 Leg., 190th Sess. § 2 (Mass. 2017), <https://malegislature.gov/Bills/190/H3994/BillHistory?pageNumber=1&direction=asc&sortColumn=BillHistoryDateTime>.

24 Katie Lannan, *Mass. House Votes to Commit State To Goals of Paris Climate Accord*, WBUR NEWS (Nov. 2, 2017) <https://www.wbur.org/news/2017/11/02/house-votes-climate-change-accord>.

25 Scott Dance, *Maryland Will Join Alliance of States Supporting Paris Climate Agreement, Hogan Says*, BALTIMORE SUN (Jan. 10, 2018), <http://www.baltimoresun.com/news/maryland/environment/bs-md-hogan-climate-alliance-20180110-story.html>.

26 H.B. 003, 2017 Leg., 437th Sess. (Md. 2017), <https://legiscan.com/MD/text/HB3/2018>.

27 S.B. 0138, 2017 Leg., 437th Sess. (Md. 2017), <http://mgaleg.maryland.gov/2018RS/bills/sb/sb0138f.pdf>.

28 *Letter to the Executive Director of the U.S. Climate Alliance, Julie Cerqueira, on January 10, 2018*, BALTIMORE SUN (Jan. 10, 2018), <http://www.baltimoresun.com/news/maryland/environment/bal-document-hogan-climate-alliance-20180110-htmlstory.html>.

29 *Id.*

30 H.B. 003, 2017 Leg., 437th Sess. (Md. 2017), <https://legiscan.com/MD/text/HB3/2018>.

B. FOREIGN AGREEMENTS

Led by Governor Brown, California has been a major player in positioning itself as an antagonist to federal climate policy. Following President Trump's decision to pull out of the Paris Agreement, the governor has increased foreign travel, diplomatic meetings, and trade negotiations abroad.³¹ Governor Brown has heavily increased California-China relations through signing Memoranda of Understanding (MOU) and frequent trips to Beijing.³² Generally, it is only presidents or secretaries of states who take the role in signing Memoranda of Understanding. While these agreements are not typically considered treaties or contracts in the common law, other law systems give them significant weight. A Chinese MOU in particular could be viewed as legally binding, and considering that China has a civil law system, the idea of a good faith negotiation would be equivalent to that of a contract.³³ Binding or not, it is not the role of governors to interfere with international relations and confuse foreign actors as to who has legitimate power to negotiate. From the perspective of a foreign nation, discussing policy with conflicting representatives could be seen as strange at best or could be used for a tactical diplomatic advantage at worst.

In what seemed to be a planned trip, days after President Trump announced that the United States was pulling out of the Paris Agreement on June 1st, Governor Brown flew to China the following Saturday to start a five-day diplomatic tour.³⁴ While abroad, Governor Brown signed agreements with the cities of Beijing, Chengdu, and Nanjing, launched a California-Haidian District Innovation Center, and promoted his "Under2 Coalition" which seeks to join national and subnational units of government around the world in the fight against climate change.³⁵ In particular, the Under2 Coalition seeks international alliance in promoting the Paris Agreement, and the conference was able to inspire five new members to join: Denmark, Indian state Chhattisgarh, the French region of Brittany, the South African province of KwaZulu-Natal and the South African province of Western Cape.³⁶ The Under2 Coalition has the same aims as the Climate Alliance and America's Pledge, and along with encouraging membership, Governor Brown was able to attract more

31 Stewart M. Patrick, *California Seizes Climate Leadership After Trump Abandons Paris Accord*, COUNCIL ON FOREIGN REL. (Aug. 7, 2017), <https://www.cfr.org/blog/california-seizes-climate-leadership-after-trump-abandons-paris-accord>.

32 Memorandum of Understanding from Edmund G. Brown, Governor, State of California, on Establishing "China Provinces and U.S. California Joint Working Group on Trade and Investment Cooperation", to Zhou Shengxian, Minister of Environmental Protection, China (Apr. 10, 2013). http://www.climatechange.ca.gov/climate_action_team/intergovernmental/MOU-Min_of_Commerce_China.pdf.

33 Dan Harris, *Understanding a Chinese Memorandum of Understanding*, FORBES (Aug. 30, 2016), <https://www.forbes.com/sites/danharris/2016/08/30/understanding-a-chinese-memorandum-of-understanding/#ae71cbc7bf0b>.

34 Jessica Meyers, *Jerry Brown in China with a Climate Message to the World: Don't Follow America's Lead*, L.A. TIMES (June 7, 2017), <http://www.latimes.com/world/asia/la-fg-brown-china-20170607-story.html>.

35 *Governor Brown to Expand California's Climate Partnership with China in Chengdu, Nanjing and Beijing*, OFF. OF GOV. EDMUND G. BROWN JR. (June 2, 2017), <https://www.gov.ca.gov/news.php?id=19821>.

36 *Governor Brown Opens Under2 Clean Energy Forum, Welcomes New Under2 Coalition Global Ambassador Christiana Figueres*, EAST VALLEY TIMES (June 8, 2017), <http://valleytimes.com/news/governor-brown-opens-under2-clean-energy-forum-welcomes-new-under2-coalition-global-ambassador-christiana-figueres/>.

attention to his causes with these meetings.

Referencing Governor Brown's Under2 Coalition, the chief director of environmental sustainability from the Western Cape claimed that it was encouraging to hear ". . . that the voice of America is lots of voices and that they differ and that they're not the same voices coming out of the White House."³⁷ While this may be viewed as a positive development for other nations if they disagree with American policy, it is surely a detriment to our system of government when we no longer speak with one voice. Public perception of Governor Brown's trip has been observant of a strong rift between the states and their federal government. The *Los Angeles Times* called Brown's trip a "diplomatic coup" because compared to Energy Secretary Rick Perry's minimal contribution to the Clean Energy Forum in Beijing, Governor Brown was holding productive and extended meetings with President Xi Jinping.³⁸

C. INTERNATIONAL CONFERENCES AND EVENTS

A. CALIFORNIA

Governor Brown has been the most active state governor when it comes to foreign travel and funded in part by non-profits like the Climate Registry and Climate Action Reserve,³⁹ he has used his resources to travel to China, Russia, the Vatican, and the European Union. Along with signing agreements in China, he also gave a lecture at Tsinghua University promoting the necessary academic contributions to climate science and the need for young people to rise to the responsibility.⁴⁰ More importantly, this Note does not seek to analyze Governor Brown's criticism of the Trump administration, which he is well within his rights to do, but rather to criticize his promotion of a foreign treaty. In the speech to Tsinghua, he mentioned the need to stand up for the goals of the Paris Agreement and his intention to persuade other states to adhere to their commitments.⁴¹

Following his tour in China, Governor Brown also went to Vladivostok, Russia for the third annual Eastern Economic Forum to discuss collaboration.⁴² He spoke at a panel titled "The Russia-China-Japan-U.S. Quadrangle: Are There Opportunities for Cooperation?" and made a statement to Russian news organization RT that he

³⁷ Jessica Meyers, *China Is Now Looking To California – Not Trump – To Help Lead The Fight Against Climate Change*, LA TIMES (Jun. 6, 2017), <https://www.latimes.com/world/asia/la-fg-china-global-climate-20170606-story.html>.

³⁸ *Id.*

³⁹ *Gov. Brown Heads to Europe for Climate Talks*, CBS SACRAMENTO (Oct. 31, 2017, 2:06 PM), <http://sacramento.cbslocal.com/2017/10/31/climate-change-jerry-brown-europe/>.

⁴⁰ *China Day 5: Governor Brown Closes California-China Climate Mission with Call to Action: "It's Not a Time for Inertia, It's a Time for Radical Change,"* OFF. OF GOV. EDMUND G. BROWN JR. (June 8, 2017), <https://www.gov.ca.gov/news.php?id=19834>.

⁴¹ *Id.*

⁴² *Governor Brown to Attend Eastern Economic Forum in Vladivostok Next Week*, OFF. OF GOV. EDMUND G. BROWN JR. (Aug. 31, 2017), <https://www.gov.ca.gov/news.php?id=19926>.

was looking to pioneer a “positive path” with Russia despite the economic sanctions.⁴³ In an effort to understand Governor Brown’s intentions in travelling to Russia, Pravda, a pro-government Russian newspaper, made the observation that California and Texas often make a point of “flaunting their disobedience” with the federal government.⁴⁴ Creating a reputation for our states as rogue actors makes it difficult for American allies and foreign counterparts to take negotiations seriously.

Accompanied by U.S. House Representative Scott Peters, Governor Brown also led a delegation to the Vatican to discuss climate change policy.⁴⁵ Attending the conference days before the U.S. ambassador to the Vatican arrived, Brown urged Vatican officials to continue their support of climate science and emissions regulation. Along with his encouragement to continue international collaboration, Governor Brown also used that forum to criticize the administration’s policy by stating that President Trump doesn’t reflect the opinions of the majority of Americans regarding climate change and that the administration has created an absurd situation in American public life.⁴⁶ Criticism of the government is a healthy American pastime, but it should not interfere with foreign affairs when the speaker holds public office and is acting in an official capacity.

The Vatican trip was part of a larger 10-day European tour in November 2017 which included addresses to the President of the European Parliament, press conferences, and meetings with scientists.⁴⁷ After Governor Brown’s efforts in Brussels to create a framework for a common carbon market with Europe and China, the president of the European Parliament said that, “[t]he approach of Mr. Trump at a global level is not necessarily as helpful as it might be. But we are delighted to have Gov. Brown here because it shows there is a strong commitment from the U.S.”⁴⁸ That same day Governor Brown traveled to Stuttgart, Germany to address the Baden-Wuerttemberg state assembly and argued that the world is looking to California for leadership on climate change. He vowed that the United States would eventually sign on to the Paris Agreement and that “[t]he States are coming back.”⁴⁹

Meeting with Norway’s Prime Minister Erna Solberg, Governor Brown was

43 *Relations between US & Russia Can Get 'Much Better' – California Governor to RT*, RT (Sept. 7, 2017, 4:40 PM), <https://www.rt.com/usa/402221-us-russia-california-governor/>.

44 Alexander Artamonov, *Трампу Передали "привет" с Дальнего Востока [Trump Was Given a "Hello" From the Far East]*, PRAVDA.RU (July 9, 2017), <https://www.pravda.ru/authored/07-09-2017/1347820-brown-0/>.

45 Michael J. O’Loughlin, *Gov. Jerry Brown Urges Religious Leaders to Fight Climate Change at Vatican Conference*, AM. MAG. (Nov. 6, 2017), <https://www.americamagazine.org/politics-society/2017/11/06/gov-jerry-brown-urges-religious-leaders-fight-climate-change-vatican>.

46 Chris Collins, *California Governor Uses Vatican Conference to Attack Trump on Climate Change*, CRUX (Nov. 5, 2017), <https://cruxnow.com/vatican/2017/11/05/california-governor-uses-vatican-conference-attack-trump-climate-change/>.

47 Chris Megerian, *Gov. Jerry Brown Plans Climate Trip to Vatican, Belgium, Norway and Germany*, L.A. TIMES (Oct. 31, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-jerry-brown-europe-climate-1509478272-htlmstory.html>.

48 Catherine Stupp, *Gov. Jerry Brown and European Union Leaders Agree to Work to Combat Climate Change*, L.A. TIMES (Nov. 7, 2017), <http://www.latimes.com/world/europe/la-fg-brussels-eu-jerry-brown-20171107-story.html>.

49 Natasha Bach, *Hailed As the 'Anti-Trump,' California Governor Jerry Brown Delivers a Blunt Climate Change Message in Germany*, FORTUNE (Nov. 9, 2017), <http://fortune.com/2017/11/09/jerry-brown-governor-climate-change-trump/>.

able to discuss climate goals with a fellow member of the Under2 initiative and participate in a round table of scientists and policy experts.⁵⁰ Considering that membership in Under2 outlines future collaboration and agreements going forward, this meeting with Prime Minister Solberg would have been considered a diplomatic visit with an ally if Governor Brown had been acting as a president. As it stands, Governor Brown's visit to Oslo primarily revolved around recent scientific studies and evidence of climate change strategies.⁵¹ The meeting with the Prime Minister at the official residence was a policy meeting about energy policy and set the tone for the rest of the visit.⁵² When state actors attempt to shape federal policy, they violate the Constitution by stepping out of bounds. Governor Brown's visit would have been normal for a representative of the State Department, but as a state governor, his actions have confused foreign powers and left federal diplomatic staff at a terrible disadvantage.

B. U.N BONN CONFERENCE

While diplomatic intervention from state-level actors is problematic when viewed on a case-by-case basis, challenges to federal power becomes more apparent when unlawful intervention is formally accepted by international actors. State activism reached a high point during the United Nations climate conference in Bonn, Germany when two American delegations attended to present opposing viewpoints on how to solve the climate crisis.⁵³ While the Trump administration sent in a team of negotiators to the conference,⁵⁴ a separate delegation composed of American governors, mayors, and state senators also arrived to advocate in favor of the Paris Agreement.⁵⁵ This conference was meant to be attended by foreign dignitaries with agency power from their respective nation-states, but with two delegations in attendance, the United States presented the world with a split-level offer of diplomacy.

The state-led delegation was, unsurprisingly, led by California Governor Jerry Brown. As the primary stakeholder in several of the state activist groups mentioned earlier in this Note, Governor Brown has been one of the most outspoken critics of federal withdrawal from the Paris Agreement. Prior to the conference, Governor Brown was appointed by the U.N. conference president, Fiji's Prime Minister Frank

⁵⁰ *Governor Brown Meets with Norway's Prime Minister, Convenes First-of-its-Kind Gathering of World's Scientific Academies*, OFF. OF GOV. EDMUND G. BROWN JR. (Nov. 10, 2017), <https://www.gov.ca.gov/news.php?id=20060>.

⁵¹ *Id.*

⁵² Thomas Eckhoff, *Governor Brown Meets with Norway's Prime Minister*, HIGHLAND COMMUNITY NEWS (Nov. 10, 2017), http://www.highlandnews.net/news/political/governor-brown-meets-with-norway-s-prime-minister/article_b6117dba-c66e-11e7-a0d0-67bf6554289b.html.

⁵³ Friedman, *supra* note 10.

⁵⁴ Dave Keating, *There Are Two Rival U.S. Delegations at the Bonn Climate Summit. Which One Speaks for America?*, FORBES (Nov. 6, 2017), <https://www.forbes.com/sites/davekeating/2017/11/06/there-are-two-rival-u-s-delegations-at-the-bonn-climate-summit-which-one-speaks-for-america/#346834bc1e96>.

⁵⁵ See Friedman, *supra* note 10.; See also, *Fiji's Prime Minister and Incoming Cop 23 President Joins Under2 Coalition, Appoints California Governor Brown Special Advisor for States and Regions Ahead of Cop 23*, OFF. OF GOV. EDMUND G. BROWN JR. (June 13, 2017), <https://www.gov.ca.gov/news.php?id=19845> (Noting that members attending the Bonn Summit also include Washington Governor Jay Inslee and Oregon Governor Kate Brown).

Bainimarama, to be a “special advisor for states and regions that have assumed an increasingly important role after Trump’s vow to leave the Paris Accord.”⁵⁶ This appointment served as a formal recognition in the shift of power within American foreign policy.

The *New York Times* called the state-led delegation the “shadow delegation,”⁵⁷ and the appearance of both groups prompted confused reactions to the dual American representation from foreign delegates at the conference. However, some officials preferred to ignore the official delegation entirely in favor of the shadow delegation. One policy expert from the Union of Concerned Scientists made the claim that the world should listen to the unofficial delegation instead of the party led by the American government because they “truly represent the interests of Americans, they are closer to public opinion on this.”⁵⁸ The shadow delegation set up a “US Climate Action Center” which served as a pavilion at the conference to share their views and climate priorities.⁵⁹ At the opening of the pavilion, state senator Ricardo Lara mentioned that “[d]espite what happens in DC, we’re still here.”⁶⁰

II. DORMANT FOREIGN AFFAIRS POWER & FEDERALISM

While the foreign affairs power is an implied constitutional power of the federal government, the Supreme Court has consistently ruled that this power is exclusive to the executive and that it “cannot be subject to any curtailment or interference on the part of the several states.”⁶¹ Moreover, the Court’s jurisprudence on the subject has reasoned that the President is specifically and uniquely empowered to conduct foreign affairs.⁶² Having established that federal preemption is judged in relation between state action and executive decision-making, it becomes imperative to establish what a showing of executive action means in the context of foreign affairs. In the landmark case, *American Insurance Association v. Garamendi*, the Supreme Court invalidated a California law requiring foreign insurance companies to disclose their records with the aim of compensating victims of the Holocaust.⁶³ *Garamendi* represented an expansion of previous case law⁶⁴ wherein state laws were only invalidated if they conflicted with executive actions that had the force of law like treaties and executive agreements with preemption clauses.⁶⁵ Now, state legislation will be

56 Erik Kirschbaum, *California Gov. Jerry Brown Delivers a Blunt Climate Change Message in Germany*, L.A. TIMES (Nov. 8, 2017), <http://www.latimes.com/world/europe/la-fg-germany-jerry-brown-climate-change-20171108-story.html>.

57 Friedman, *supra* note 10.

58 Keating, *supra* note 54.

59 Oliver Milman and Jonathan Watts, *One Nation, Two Tribes: Opposing Visions of US Climate Role on Show in Bonn*, THE GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/environment/2017/nov/09/bonn-climate-change-talks-us-two-tribes>.

60 *Id.*

61 *United States v. Belmont*, 301 U.S. 324, 331 (1937) (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936)).

62 *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319.

63 539 U.S. 396 (2003).

64 *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

65 Leanne M. Wilson, *The Fate of The Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 763 (2007).

preempted if it conflicts with an expressly stated foreign policy objective of the executive.⁶⁶

This section of the Note will serve to provide a detailed background of the jurisprudence and precedent surrounding the dormant foreign affairs doctrine and the Supreme Court's historic balance of federalism. Though there is a dearth of opinions on this matter, with state challenges to federal power on the rise, it is likely that the Supreme Court will bring the matter to review once more if states continue to legislate and interfere with foreign affairs.

A. CROSBY V. NATIONAL FOREIGN TRADE COUNCIL

In the first dormant foreign affairs case examined by the Supreme Court, *Crosby v. National Foreign Trade Council*,⁶⁷ we saw that a state law in Massachusetts limiting business with Burma was an unconstitutional use of state power. The Massachusetts legislature wanted to place regulations on products from Burma because of ideological differences resulting in a ten percent mark-up for blacklisted companies competing for government contracts. If these particular companies still conducted business with Burma, Massachusetts had the ability to sanction them in order to have a subsidiary effect on Burmese business.

Months later, Congress passed its own sanctions bill on Burma and directed the Treasury Secretary to deny loans, entry visas, and put a hold on foreign direct investment until there were measurable improvements on human rights enforcement and democratic ideals. However, *Crosby* established that even if the executive agrees with the state, it ruins the "one voice" concept. Here the Court made the decision that the state legislation interfered with diplomacy because the President's negotiating power is diminished when there emerges the possibility that enclaves within the country will not adhere to the international agreement. The Court observed that "the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy."⁶⁸

By using *Crosby*'s "obstacles conflict" preemption, we can make the reasonable conclusion that the legislation passed in favor of adopting the policies of the Paris Agreement would serve as an obstacle to the current administration. With a particular eye towards the ability of the President to negotiate, such statutes effectively wipe out any bargaining power to negotiate our way back in to the Paris Agreement. Regardless of whether or not a renegotiation is good policy, President Trump has no bargaining power if the top economies within the state are already signed on in spirit if not in pen. California, the biggest actor in promoting the Climate Alliance and diplomacy, has the largest economy of all the states and would have the seventh largest economy in the world if it was its own nation. What would there be left to bargain with once compliance with the Paris Agreement has marked the most economically significant states?

⁶⁶ Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After American Insurance Association v. Garamendi*, 19 CONN. J. INT'L L. 465, 475 (2004).

⁶⁷ 530 U.S. 363 (2000).

⁶⁸ *Id.* at 385.

B. AMERICAN INSURANCE ASSOCIATION V. GARAMENDI

In another dormant foreign affairs case, *American Insurance Association v. Garamendi*, a California law was struck down because it was judged to limit the ability of the executive to speak with “one voice.”⁶⁹ The state tried to regulate insurance reparations for stolen property after World War II, and even though both the state and the federal government were in agreement that the predominately Jewish plaintiffs should get their property back, the state action was still in conflict with federal (executive) negotiations. Even though the Supreme Court in *Garamendi* conceded that the states traditionally had the power to regulate estate law, they nonetheless ruled against the Californian statute because they determined the statute had a “direct impact upon foreign relations and may well adversely affect the power of the central government.”⁷⁰

Garamendi changed the way preemption was enforced because it struck down a statute in the absence of any conflicting treaty or law.⁷¹ There, the only conflict was between a California statute claiming reparations and the likelihood that the State was disturbing foreign relations. The federal government was engaged in active negotiations over reparations to the Jewish people, and one of the very first concessions received was that there would be no supplementary legal action.⁷² Even though the American government didn’t agree to any future claims, the Court nevertheless said that it was an infringement on foreign policy. Justice Souter came forward with a balancing test in the majority opinion and wrote that: [I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.⁷³

When you have states separate from the country to try and create their own foreign policy, it undermines the effectiveness of the country as a whole. Before *Garamendi*, it is likely that current events would not have met the threshold for a cause of action for federal preemption. There is no treaty or federal law in conflict with the legislation passed in Hawaii, Washington, Massachusetts, and Maryland, and the diplomatic outreach conducted by Governor Brown has been met primarily with silence. The executive has not passed any laws regarding the Paris Agreement and despite his open comments on the treaty, he has not issued any executive agreements. In the past, the courts have even upheld divestment movements with the express approval of the executive branch.⁷⁴

After *Garamendi*, the question becomes: is there a sufficient foreign policy interest? It seems that the facts of the case in *Garamendi* create a very low bar for

69 539 U.S. at 442.

70 Steigman, *supra* note 66, at 469 (quoting *Zschemig v. Miller*, 389 U.S. 429, 441 (2005)).

71 Steigman, *supra* note 66, at 476.

72 *See id.* at 474–75.

73 *Garamendi*, 539 U.S. at 420.

74 *See generally* Elizabeth Trachy, Comment, *State & Local Economic Sanctions: The Constitutionality of New York’s Divestment Actions and the Sudan Accountability & Divestment Act of 2007*, 74 ALB. L. REV. 1019 (2011).

preemption. The statute did not contain any language adverse to the federal government or even intended to operate on the level of foreign policy.⁷⁵ It only regulated business in California and did not “require any inquiry into the policies of any foreign government.”⁷⁶ Knowing that the state was not intending to conduct foreign relations, the Court invalidated the statute solely on the basis that it “limited the ability of the government to speak with ‘one voice’ in foreign affairs.”⁷⁷

These pieces of legislation could also be invalidated on the basis that they interfere with foreign policy interests regardless of whether or not it is seen as diplomacy. In the past, the government needed an official statute to claim a foreign policy interest, but with *Garamendi*, mere statements of interest or policy are sufficient to stake a claim for interference. Taking into consideration President Trump’s statements on the Paris Agreement, the status of the United States as a signatory on the protocol, and the current political relevance, it would be hard to deny that this is a significant foreign policy interest of the executive branch.

In the current political situation, the associations of states, cities, and counties who wish to adopt the Paris Agreement are acting above and beyond the relatively neutral statute outlined in *Garamendi*. By contrast, they directly note in their pieces of legislation that they are acting contrary to the federal government’s foreign policy and seek to establish independent connections with other nations. Taking for example Hawaii’s bill on adopting the Paris Climate Agreement, we see that the Hawaiian legislature affirmatively entered into the sphere of foreign policy by naming the treaty. In fact, Hawaii, Washington, and Massachusetts all passed legislation with the intention to adopt the emissions policies outlined in the Paris Climate Agreement. With language explicitly acknowledging that they are going against the expressed view of the president’s foreign policy, their legislation is likely unconstitutional.

Maryland’s piece of legislation presents a different sort of problem regarding the ability of states to conduct diplomacy on their own. Instead of using the statute to adopt the policies of the Paris Agreement, the Maryland legislature solely forced Governor Larry Hogan into signing on as a member to the American Climate Alliance led by Governor Jerry Brown. However, membership in the Climate Alliance by implication means that the state, county, or city is making a commitment to adopt the policies outlined in the Paris Agreement. The difference is that Maryland has made their commitment through membership in an organization rather than through legislation.

Regarding the legislation to adopt the tenets of the Paris Agreement, adopting the balancing test outlined by Justice Souter would result in an affirmative claim of preemption. The administration has been clear that they consider the Paris Agreement to be an issue they consider important regardless of whether or not they are members. President Trump has had many press conferences, tweets, and statements regarding the Paris Agreement, so such a volume of attention would suggest that the topic held some priority in the administration. While there has not been an official pushback towards the states undertaking these actions, unofficially, the media has

⁷⁵ See Steigman, *supra* note 66, at 475.

⁷⁶ *Id.*

⁷⁷ *Id.* at 478.

reported that the Administrator of the Environmental Protection Agency, Scott Pruitt, was considering an impromptu trip to the Bonn Summit following reports of a “shadow delegation.”⁷⁸

Even the name of the alternative delegation, “We Are Still In” suggests that states have the power to agree to policy without the support of the federal government.⁷⁹ When President Trump announced that the United States was pulling out of the Paris Agreement, governors and legislators across the country immediately responded with their own supplementary plans. This suggests premeditation in a general resolve for our subnational units to break away from the “one voice” policy that has been in place since the time of the Founding Fathers. Despite the representations that the states have made, they do not have the ability to conduct foreign policy, either individually or collectively in groups.

Examples of how foreign policy has been affected abound in the numerous articles detailing confusion over the American position on climate change. The confusion is so pronounced that some policy experts have suggested that the European Union ignore the policy claims made by the federal government.⁸⁰ Dueling political contingents went to the Bonn Summit, and as a result of months of tireless diplomacy, European attendees preferred to work with the non-official delegation led by Governor Jerry Brown of California. Likely the result of an international tour promoting the Paris Agreement, Governor Brown positioned the “We Are Still In” delegation as a favorable alternative to the negativity of the Trump Administration. This shift away from working with the federal government as a representative of the United States is significant. The transfer of foreign affairs power is non-delegable. Further, considering the enormous impact that these states have made on the ability of the federal government to conduct foreign affairs, there should be no question that there have been negative repercussions.

While the strength of the state interest is very high when it comes to regulating carbon emissions, it is doubtful that the Court in *Garamendi* would disagree with the observation that the states could have legislated for restrictions twice as high as those outlined in the Paris Agreement without jeopardizing American foreign policy. It is one thing to legislate to set higher regulations, and it is altogether another thing to legislate in direct response to treaties and foreign policy. As it stands, there is a wealth of legal literature outlining the preemption questions when states legislate for environmental controls instead of the federal government.⁸¹ An illustrative example would be California’s stringent regulations regarding auto emissions. The federal government allowed a “dual system of control” as long as the Environmental Protection Agency had the power to approve the standards as necessary “to meet serious air quality problems.”⁸² The increased regulation propagated by California also served

78 Keating, *supra* note 54.

79 *Id.*

80 *Id.*

81 See generally Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111 (2015).

82 Richard B. Stewart, *Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions*, 1992 U. CHI. LEGAL F. 41, 60 (1992).

to encourage innovation in the technology surrounding automobile manufacturing.⁸³

C. UNITED STATES V. CURTISS-WRIGHT EXPORT CORP.

In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court in that case ruled that there was a complete preemption of federal executive power in foreign affairs.⁸⁴ The facts in that case revolved around the ability of the President to ban certain types of arm sales.⁸⁵ The Court held that the President has almost complete authority to shape foreign affairs and diplomacy without interference even though the Constitution does not address the foreign affairs power of the President.⁸⁶ The executive's exclusive power to conduct foreign affairs predates the Constitution and was actually passed down from "Great Britain to the United States as a corporate entity by virtue of the law of nations."⁸⁷ This argument sometimes doesn't sit well with strict originalists and textualists who look to the Constitution as an end-all-be-all for our system of government, but let the reader also recall that the Constitution does not explicitly outline the idea of separation of powers which we heavily rely on. This idea is only logically deduced from basic principles.

The Court also reasoned that the executive should have broad foreign affairs powers since discretion was needed given the inherent delicacy with which matters of foreign affairs must be handled.⁸⁸ The Court didn't want to limit what the president could do regarding his or her relationship with a foreign government because to do so would violate the sovereignty of the national government.⁸⁹ It is highly doubtful that either the founders of our constitution or the Court in *Curtiss-Wright* would have every conceived of the scenario we find ourselves in today. That the states would actively seek to undermine the executive in diplomacy, foreign affairs, and even treaty making would have been absurd. It would have seemed like a self-defeating exercise since the federal government naturally speaks on behalf of the states. While the current administration may not engender the same level of loyalty that the country is used to, there is nonetheless a responsibility to defer to the executive branch.

Heavily used as justification for presidential action in the Bush administration, *Curtiss-Wright* still remains good law. When President Bush's government was criticized for their policies on detained actors suspected of terrorism, the administration generally responded back with claims that they had authority from the Curtiss-Wright Doctrine.⁹⁰ While the Supreme Court generally refused to apply the Curtiss-Wright Doctrine to the detainment of citizens, the statute was still upheld for analysis. The

83 *Id.*

84 299 U.S. 304,319 (1936).

85 *Id.* at 311.

86 Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659. (1997).

87 *Id.* at 1660–61.

88 Carolyn A. Pytynia, *Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption After Medellin v. Texas*, 43 VAND. J. TRANSNAT'L 1413, 1416 (2010).

89 *Id.*

90 Dawn E. Johnsen, "The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference, 106 NW. U. L. REV. 467, 476 (2012).

Court in *Curtiss-Wright* was likely referring to normal foreign affairs powers, like the power to negotiate, engage in diplomacy, and make treaties. The Court reasoned that,

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.⁹¹

D. YOUNGSTOWN SHEET & TUBE CO. V. SAWYER

Within the field of foreign affairs, preemption is generally classified into three categories: direct conflict with a federal position, incidental effect on foreign affairs, or no conflict.⁹² The current environment regarding state response to the Paris Agreement falls within the first and second category. The laws are in direct conflict with the government's position since they use language explicitly denying the President's right to make foreign policy decisions for the whole country. The President can exercise preemption under the foreign affairs power by nature of the fact that he has made his administration's policy positions known and available to the public. In considering foreign affairs preemption, courts will look to the actual impact of the law. Here, I think it would be plain to say that such legislation actually exists as a hindrance to American foreign policy.

As an implied power, however, foreign affairs preemption analysis regarding state activism should be considered the context of *Youngstown Sheet & Tube Co. v. Sawyer*.⁹³ In particular, Justice Jackson's concurrence in *Youngstown* is helpful in outlining the general boundaries of executive power in relation to Congress. Three main scenarios help guide this power balance. The first gives the President the greatest amount of authority when Congress has either explicitly or implicitly authorized the President's power. The second is called the "zone of twilight" and applies when the President acts in the "absence of congressional authorization or denial of his actions."⁹⁴ Lastly, the third scenario gives the President the lowest amount of power if he or she acts contrary to a federal statute. In this case, executive power is "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁹⁵

The facts of the *Youngstown* case fell into the third category where the President was acting within the lowest ebb. President Truman had just issued an Executive Order authorizing the seizure of a steel mill in order to ensure a steady supply of materials during the Korean War. The workers at the mill were about to go on strike, and rather than risk a shortage of steel until the negotiations concluded, President

⁹¹ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319.

⁹² See Sapna Desai, Note, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669 (2009).

⁹³ 343 U.S. 579 (1952).

⁹⁴ *Id.* at 635–37 (Jackson, J., concurring).

⁹⁵ *Id.* at 637.

Truman thought it would be more expedient to seize the factory. Claiming that his actions were constitutional, he acted solely upon the authority of his Article II power, and the Supreme Court ruled that the Constitution did not envision such a powerful executive.

Considering the current situation of rogue states and political subunits, Justice Jackson would likely consider the President to be operating with implicit favor from the legislature considering the historical approval of expanding executive control in foreign affairs. Over time we have steadily expanded the powers of the President through the consensus of the legislature. Looking to this expansion should inform our analysis of implicit approval from Congress. As mentioned earlier in this Note, the executive has expansive power under *Curtiss-Wright* to conduct foreign policy, and Congress has mirrored judicial approval with laws of their own expanding the power to engage in military action,⁹⁶ make determinations on embassies and citizenship,⁹⁷ and organize legal settlements in collaboration with foreign policy objectives.⁹⁸

Since President Trump is working within Justice Jackson's first category, his actions are at their fullest strength and state action conflicting with the federal agenda should be preempted. Unlike President Truman, who went against the auspice of Congressional approval and drafted an executive order of unprecedented action outside of a declared state of emergency, President Trump has only engaged in a time-tested, traditional power of foreign affairs. Treaty-making and diplomacy are areas of politics reserved for the executive. There is no zone of twilight, and if the federal government was to invalidate the statutes passed in Hawaii, Washington, Massachusetts, and Maryland, he could.

Similarly, the federal government could preempt the legislation under the Supremacy Clause of the constitution. There is significantly more information available about the Supremacy Clause, and while the administration has not issued any laws preventing ratification of the Paris Agreement, preemption could still occur if the state law is "inconsistent with the federal law's objectives and undermines uniformity in foreign affairs."⁹⁹ Preemption can occur when Congress expressly preempts the law, if they implicitly preempt the law by occupying a field, or if a state law is in conflict with a federal law.¹⁰⁰ The field of foreign affairs is occupied by the executive. While Congress has the express power to ratify treaties, declare war, and regulate foreign commerce, it is the executive branch which has the exclusive power to regulate foreign policy. Ignoring for the moment the question of whether it should be the executive or legislative branch that should exercise this power, it is undisputed that it does not naturally belong to the states.

96 Michael D. Ramsey, *Exchange: War Powers: Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548 (2002).

97 *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

98 *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

99 Sapna Desai, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669, 685 (2009).

100 *Id.*

E. RAMIFICATIONS IN INTERNATIONAL LAW

In international law, the party on the other side of the deal operates on a subjective basis without requiring any inquiry into the constitutional system of the proposing state. The biggest example of the presumption for constitutionality would be the international dispute in *Denmark v. Norway*.¹⁰¹ In that case, the Norwegian Foreign Minister said that Denmark would not experience any push back from Norway if the Danes continued to inhabit Greenland. His passive statement was considered to be a treaty despite the fact that in Norway, the Foreign Minister doesn't have authority to bind the entire country.¹⁰² *Denmark v. Norway* was the first time a vague, oral agreement was upheld as a binding contract in international law. The facts would suggest an inference, at best, that Norway would allow Denmark to have the land, and yet that was sufficient enough.

Taking into consideration the precedent established by *Denmark v. Norway*, the United States would likely lose if a case was brought to the International Court of Justice. The court would not look into our system of federalism or the precedent around actual agency in our own common law. While many critics question the utility of international law, the Supreme Court made it clear in *The Paquete Habana and Murray v. Schooner Charming Betsy* that customary international law is part of American common law and that Congressional statutes should be read as consistent with international law.¹⁰³ Therefore, it would be irrelevant that Governor Brown doesn't have the constitutional authority to bind the United States—the International Court of Justice will not conduct an inquiry regarding the constitutionality of his actions. According to international law, the governor's apparent, subjective authority is all that matters.

Furthermore, a close look at attribution precedent in international law will show that it is possible for a political unit to bind the state as a whole even if the other legal party to the controversy is aware of the constitutional background. There are three principles outlined for attributing conduct to the state.¹⁰⁴ The first and most relevant for the scope of this debate is that the state acts through people exercising the state's machinery of power and authority. This includes the official organs or agents of the state including political subdivisions. In consideration of the Paris Agreement, a governor of the state would be considered an "official organ or political subdivision."¹⁰⁵ The second principle gives no attribution for non-state actors like private persons, mobs, corporations or trade unions, but the third principle attributes agency when there is failure to act in a scenario that requires state action.

In light of the Geneva Convention on the Law of Treaties, there would also be a

¹⁰¹ See generally *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment*, I.C.J. REP. 38 (1993).

¹⁰² *Id.* at 290.

¹⁰³ See, *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also, 2 Cranch 64 (1804).

¹⁰⁴ Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51, 52–53 (1990).

¹⁰⁵ See generally, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, reprinted in *Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 548 (1961).

counter-federalist argument as to what exactly the “organs of the state” are defined as. This could presumably include mayors and governors, but any reviewing court would look into the subjective nature of the other side’s belief (in this case China, Russia, or the EU) to determine liability. The question for the court in that case would be to ask whether it was possible to bind a state in the U.S., but not the country itself in international law. Considering that other nations like Australia, Switzerland, and Germany all have political subunits that participate in treaty making and legislation,¹⁰⁶ the court will consider it a likelihood. This fact could also support the contention that China was operating under the legitimate assumption that Governor Brown was constitutionally representing a political subunit.

When deciding the question of state responsibility for diplomatic agreements, the International Court of Justice does not inquire into the constitutional system of the country under analysis. Federalism is not an assumed characteristic of the constitutional design of a state, and in fact, many states like Australia, Germany, and Switzerland allow their political subunits to conduct their own foreign affairs and develop treaties. When considering the sheer number of political subunits in the United States that have openly called for ratification of the Paris Agreement within their own capacity, this could potentially leave the country open to international liability within the International Court of Justice.

Though the Supreme Court’s holding in *The Paquete Habana* has been challenged by Justice Neil Gorsuch in his concurrence in *Jesner v. Arab Bank*,¹⁰⁷ his concurrence is not binding law and only serves to suggest an opening for further discussion on the application of *The Paquete Habana*. Practically, this means that despite the fact that every constitutional scholar would agree that a state governor would not have the power to hold our entire country liable for his or her actions made in an international setting, the International Court of Justice could find the United States in breach of its obligations and we would be bound to accept it since *The Paquete Habana is still good law*. Further, any new legal developments in international treaty law would bind the United States. This issue could potentially arise if China ever sought to challenge Governor Brown on the enforcement of the Memorandum of Understanding that they signed in Beijing.

III. IS DIPLOMACY THE EXCLUSIVE PROVINCE OF THE FEDERAL GOVERNMENT?

A. BACKGROUND ON DIPLOMACY WITH THE INDIVIDUAL AMERICAN STATES

Cultural connections, like the establishment of sister cities, are not considered to be in conflict with the dormant foreign affairs power of the executive. The reasoning behind this is because cultural ties, while politically significant in their own right, do not negatively affect the bargaining power of the executive branch. Recently the legitimacy of state action in establishing international cultural connections was challenged in a case regarding a Comfort Women Statue in Glendale, California, but the

¹⁰⁶ See generally France Morrisette, *Provincial Involvement in International Treaty Making: The European Union as a Possible Model*, 37 QUEEN’S L. J. 577 (2012).

¹⁰⁷ *Jesner v. Arab Bank*, 138 S.Ct. 1386, 1412 (2018) (Gorsuch, N., concurring).

Supreme Court declined to address the issue.¹⁰⁸ During WWII, Japanese soldiers captured, raped, and forced Korean women to be prostitutes in war brothels. The statute commemorated their inhumane treatment and the dignity they still carry despite a lack of accountability.¹⁰⁹ Japanese diplomats said that the statute was harming relations between the countries and that the cities did not have the power to erect them. The court disagreed and said that this was a constitutional power.¹¹⁰

The current situation is different from something like the Comfort Women Statue because these statements and statutes are not cultural claims but rather economic and political alliances that are at odds with the executive. It would be as if though Glendale passed a divestment statute severing economic ties to Japan instead of allowing art to be displayed in a public park. Logically, allowing states to establish cultural connections would help with the public image of the United States and perhaps even serve to reinforce American diplomacy without the risk of infringing upon the “one voice” policy.

CONCLUSION AND ANALYSIS

The actions of the governors, mayors, and state legislatures are likely unconstitutional, and if we want to prevent a dangerous precedent of rogue states from departing from federal foreign policy, the courts should prohibit these actions. While the states of Hawaii, Washington, Massachusetts, and Maryland have been the first to pass legislation regarding the Paris Agreement, it is unlikely that they will be the last. In fact, it is part of the mission statement for organizations like the Climate Alliance to encourage other states to follow their lead. All of the states that have passed this legislation are part of the Climate Alliance, so it can be expected that they will supplement their legislation with encouragement.

The statutes violate the dormant foreign affairs doctrine because along with going against expressed foreign policy from the Trump administration, they effectively seek to ratify the Paris Agreement as if they were independent political actors. While these states claim that they have a vested and significant interest in maintaining low carbon emissions, this interest is not enough to justify direct conflict with the federal government. States generally have the ability to skirt the grounds of the dormant foreign affairs doctrine when they are legislating in an area traditionally left under the responsibility of the state, but that is not the case regarding diplomacy and foreign affairs. The federal government has always had exclusive domain over appointments of ambassadors, foreign affairs, diplomacy, treaty making, and any general agreement with a foreign nation. While states have the power to engage in cultural exchange, like that of applying to be a “sister city,” this is not political, but rather a cultural connection unregulated by the foreign government.

In particular, courts look to the effect that the legislation has had on the federal government’s ability to conduct foreign affairs, and in this case, President Trump has

¹⁰⁸ Agnes Constante, *Supreme Court Declines Case Over Lawsuit to Remove “Comfort Women” Memorial*, NBC News (Mar. 31, 2017, 9:57 AM), <https://www.nbcnews.com/news/asian-america/supreme-court-declines-case-over-lawsuit-remove-comfort-women-memorial-n740996>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

been severely limited in his ability to engage the European Union and other allies on the topic of re-entry of the Paris Agreement. Here, we are seeing the effect of violating the “one voice” policy. How can the President re-negotiate for entry if he is being undermined by factions within our own country? The legislation and participation in international conferences all signal to the world that the United States does not have “one voice” but is instead a raucous crowd with competing opinions.

There is a public policy interest in preventing the states from setting their own foreign affairs agenda, because not only does it undermine the authority of the government of the United States, but it also undermines their own expressed interests. For example, if the states who joined the Climate Alliance truly want to see American involvement in the Paris Agreement, then attempts to undermine the executive’s bargaining position will only serve to limit the possibility of re-joining.

While the actions of the states and actors mentioned above are unconstitutional and should be challenged by the federal government, they also pose a threat in the international sphere. According to customary international law, of which is part of American common law, if a government representative enters into a legally binding agreement, they will bind their government if the receiving country views that representative as having apparent authority. When Governor Jerry Brown went to China and signed a Memorandum of Understanding with Chinese President Xi Jinping, his actions were perceived as legally binding. In Chinese law, Memoranda of understanding are as legally binding as formal contracts in our system, so the question remains as to whom he was binding.

If China wanted to take us to the International Criminal Court in order to enforce Governor Brown’s actions, they would likely win with reliance under established precedent from *Denmark v. Norway*. In that case, the Norwegian Foreign Minister made it seem like they were conceding land, and while there was no mention of a contract nor were there any definitive words of acceptance mentioned, it was still binding. So, it is important to tease out the difference between a Foreign Minister and a state Governor.

While it is not immediately apparent that the Chinese President would be acting under a reasonable assumption that a Governor has the power to bind a nation, especially considering the limiting language employed in the MOU, he might have a legitimate assumption that the MOU has the power to bind California as a state. This is unconstitutional because in the American system, states cannot be bound in international agreements regarding foreign affairs, but an international court is under no obligation to inquire after the constitutional system of its prospective litigants. The hypothetical international court would make the argument that such actions would be presumed constitutional.

Practically, if we were taken to the International Court of Justice to argue against a claim that a subunit of our government is internationally liable, it would likely spark intense disagreement within the United States. *Medellin* would be an effective example of when the United States did not accept an International Court of Justice provisional ruling and decided instead to act independently. In that case, the Department of Justice filed an amicus brief suggesting that the ruling was optional and encouraged Texas to follow through with their criminal proceedings. President Bush tried

to intervene, claiming that the foreign affairs power of the President under Curtiss-Wright allowed him to force Texas to wait on carrying out their execution sentence against the foreign national. However, Texas responded with the contention that criminal law is an area that was traditionally left to the complete regulation by the state, and though the executive has extensive foreign affairs powers, that was not one of them. By contrast, legislating on foreign affairs and traveling abroad to conduct diplomacy is not a historically protected area in which states have exclusive power.

The Trump Administration has had very negative relations with many of the states under analysis that have set out to promote the Paris Agreement, and while it may be difficult to put aside such grudges, it is often necessary. While partisanship is sometimes inevitable, it should not be at the risk of our entire system of government. Scholars may argue against the expanse of the president's power and the extent to which it is the executive or the legislature that has the primary responsibility of regulating foreign affairs, but that we have a strong system of federalism has not been a serious contention since the Antebellum Period.

We must encourage reliance on the federalist system lest we suffer the same pitfalls as the Continental Congress. There was a reason why the post-war currency was volatile, trade was confusing, and why our citizens suffered inconsistent taxes—the lack of leadership from a unitary executive. Drawing away from the political backdrop inevitable in such a discussion, what would commentators say if individual states started levying tariffs against countries they dislike? Hypothetically, if California started levying tariffs against Saudi Arabia and penalizing all companies associated with Saudi Arabia, the response would be strongly against such actions. The reasoning behind California's decision making would not matter because that is simply not their role.

Climate change is a legitimate and dangerous risk to our standard of living, water supply, and long-term inhabitation on this planet, but it is not enough to say that the threat to an individual state is enough to ignore the constitutional safeguards evident in the American constitution and jurisprudence. Unlike cultural overtures, foreign affairs are solely within the province of the federal government. In our history, there has been no recorded time where a state has sent diplomats abroad or contracted with foreign allies at the direct expense of the federal government's foreign policy. This is not to say that states cannot criticize the government, as is done in healthy political discourse, but to embrace terms like “shadow delegation” and the “anti-Trump official” only signals the deterioration of our united government. While presidential administrations may come and go, the bedrock of our democracy rests on a strong adherence to federalism. If states wish to become active against the federal government, they need not risk the deterioration of our federalist system when there are better alternatives of political engagement.