

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 5

June 2020

No. 4

THE CONSTITUTIONALITY OF STATE AND LOCAL “NORM SUSTAINING” ACTIONS ON GLOBAL CLIMATE CHANGE: THE FOREIGN AFFAIRS FEDERALISM GREY ZONE

*Sharmila L. Murthy**

States and cities have long been leaders on global climate change by participating in international meetings, forming cross-border alliances, entering into bilateral memoranda of understanding, and even harmonizing their regulatory systems, as in the case of the California-Quebec emissions trading program. Such subnational efforts have taken on a new importance in the wake of President Trump’s withdrawal of the United States from the Paris Agreement on climate change. Although states and cities cannot be parties to this international agreement, they can contribute to its success by engaging in what I describe as “norm sustaining” activities. However, how can such norm sustaining activities survive constitutional scrutiny when the Supreme Court has often said the nation should speak with “one voice” on foreign affairs?

The analysis of several different cross-border climate agreements between subnational actors raises some concern, especially for California’s linked cap-and-trade program with Quebec, which the Trump administration

* Associate Professor, Suffolk University Law School; JD/MPA, Harvard Law School and Harvard Kennedy School of Government. For helpful comments, I thank Susan Biniaz, Richard Buckingham, Cale Jaffe, Martha Davis, Greg Dotson, Lorie Graham, Duncan Hollis, Debra Perlin, Shalini Ray, Nicholas Schroeck, Ganesh Sitaraman, Bob Smith, Danielle Tully, Ingrid Wuerth, and Katrina Wyman. For research assistance, I am grateful to David Brackman and Gregory Ewing. This Article also benefited from insightful feedback provided at the Sabin Colloquium on Innovative Environmental Law Scholarship at Columbia Law School, the Colloquium on Environmental Scholarship at Vermont Law School, and workshops held at Western New England Law School and at the American Association of Law Schools Annual Meeting.

has challenged in court. Under the Compact Clause, the presumed constitutionality of existing agreements between states and foreign governments largely turns on the assumption that the interstate doctrine applies. Under the Supremacy Clause, the Supreme Court’s expansive reading of executive power could be interpreted to give preemptive effect to President Trump’s repudiation of the Paris Agreement. If California’s emissions trading program is perceived as a tax under the dormant Foreign Commerce Clause, then the requirement that the nation speak with one voice on international commerce could be violated.

However, two trends—one legal and one factual—suggest otherwise. First, the legal and historical justifications for foreign affairs exceptionalism may make less sense in today’s society than at our nation’s founding. Recent cases suggest that the Supreme Court may be more likely to treat foreign affairs like domestic matters, at least where national security is not at issue. Second, when one considers the other ways in which state and local governments have engaged in the grey zone of foreign affairs law—such as by conducting trade and investment missions, entering into agreements to facilitate cross-border legal processes, and engaging in human rights treaty processes—subnational climate actions do not seem so extraordinary. Even the agreement creating the California-Quebec emissions trading program is similar to other cross-border activities, such as an agreement between New York and Quebec on driver’s licenses and an agreement between states and provinces on the Great Lakes. Through a unique analysis that situates subnational climate change agreements within a broader legal and factual context, this Article argues that cross-border climate action by states and cities is well-positioned to survive constitutional scrutiny.

| | |
|---|----|
| INTRODUCTION | 37 |
| I. STATES AND CITIES AS GLOBAL ACTORS..... | 44 |
| A. <i>Foreign Engagement by States and Cities</i> | 44 |
| B. <i>Global Climate Action</i> | 46 |
| C. <i>States and Cities as “Norm Sustainers”</i> | 52 |
| II. COMPACT CLAUSE AND TREATY CLAUSE..... | 56 |
| A. <i>Doctrine: Functional Test</i> | 56 |
| B. <i>Subnational Climate Analysis</i> | 62 |
| 1. Transnational networks: Under2MOU | 62 |
| 2. Domestic coalitions: U.S. Climate Alliance | 63 |
| 3. MOU between California and China | 64 |
| 4. Cap-and-trade agreement between California and Quebec | 66 |
| a. Analogy: Cross-border cooperation on the Great Lakes | 72 |
| b. Analogy: Cross-border agreement on drivers licenses and traffic offenses | 75 |

C. *A Different Standard for Foreign Agreements?*77

III. PREEMPTION.....80

 A. *Doctrine*80

 1. Implied preemption.....82

 a. Preemption by statute83

 b. Preemption by executive action83

 2. Dormant foreign affairs preemption85

 B. *Subnational Climate Analysis on Conflict and Dormant Preemption* .87

 1. Field preemption.....87

 2. Conflict preemption89

 3. Dormant foreign affairs preemption95

 C. *“Normalization” Trend*101

 D. *Comparative Insights from Human Rights Law*105

IV. DORMANT FOREIGN COMMERCE CLAUSE.....108

 A. *Doctrine: Two-Pronged Test*108

 B. *Subnational Climate Analysis*111

 C. *Abandoning the Domestic Versus Foreign Distinction?*113

CONCLUSION.....115

INTRODUCTION

States and cities have long been leaders on global climate change. Since the 1990s, states and cities have developed active climate policies in response to the dearth of federal action, entered into transnational agreements, and participated actively in international climate meetings.¹ These subnational efforts have taken on a new importance in the wake of President Trump’s repudiation of the Paris Agreement on climate change.² But these actions raise an important question. How can states and cities engage on international climate issues given that the Supreme Court has often said that the nation should speak with “one voice” on foreign affairs?³

¹ See Part I.B.

² On November 4, 2019, the United States submitted a formal notification of withdrawal from the Paris Agreement to the United Nations. Press Statement, Michael R. Pompeo, Sec’y, Dep’t of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> [<https://perma.cc/SU3P-F8BP>]. Under the terms of the treaty, the United States remains a party to the Paris Agreement until November 4, 2020. U.N. Framework Convention on Climate Change Conference of Parties, 21st Session, Adoption of the Paris Agreement art. 28, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement]. See Part III.B for additional discussion.

³ See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (discussing the importance of the President’s capacity “to speak for the Nation with one voice in dealing with

The Constitution empowers the national government with exclusive power over certain aspects of foreign affairs, such as the authority to enter into treaties and appoint ambassadors under Article II.⁴ Congress and the President both have the power to expressly preempt state action.⁵ The federal government can regulate and limit state agreements with foreign nations; however, such state agreements are not treaties within the meaning of Article II.⁶ The federal government can also conclude Article II treaties on topics that would normally fall within the boundaries of traditional state power, and when it does, those treaties preempt inconsistent state law.⁷

The Constitution, however, does not expressly prohibit states from engaging in any and all activities that could impact foreign affairs.⁸ If the federal government fails to take affirmative action, the exact scope of state and local authority to engage in foreign affairs is unclear. Thus, although the Supreme Court has sometimes said that the federal government has exclusive authority over foreign affairs,⁹ in fact, no affirmative textual basis exists in the Constitution for that perception.¹⁰ Rather, it is more accurate to say that

other governments”); *Japan Line v. Los Angeles*, 441 U.S. 434, 449 (1979) (discussing the federal government’s need for a uniform voice given its role in regulating foreign commerce).

⁴ The Constitution at Article II, §2 sets out:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States

U.S. CONST. art. II, §2.

⁵ See Part III.A.

⁶ See Part II.A.

⁷ See Part III.C.

⁸ For example, Congress has the power to declare war, U.S. CONST. art. I, §8, but states are not completely prohibited from engaging in war. Rather, the Constitution states that “[n]o state shall, without the Consent of Congress, . . . engage in war, unless actually invaded, or in such imminent Danger as will not admit of delay.” *Id.* art. I, §10; see also MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 87 (2016) (recognizing that “the Constitution does not tell us what states may do in the realm of foreign affairs—either categorically or without congressional consent”).

⁹ See, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the President as having “exclusive power” over “international relations”).

¹⁰ GLENNON & SLOANE, *supra* note 8, at 87–89, 131; see also Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633, 653–56 (2019) (making a historical and textual argument that Article III of the Constitution puts cases between states and foreign nations within the original jurisdiction of the Supreme

the federal government theoretically has plenary power over foreign affairs,¹¹ but that neither Congress nor the President have exercised this authority to its fullest potential.¹² The federal government's failure to assert this authority has created the grey zone of foreign affairs federalism, where states and cities can engage globally but the scope of that power is not entirely clear.

As scholars have observed, a bright line does not necessarily exist between "foreign" and "domestic" activities.¹³ This Article focuses on two kinds of subnational action on climate change that implicate foreign affairs: agreements that states and cities enter into with other national or subnational governments (which can range from nonbinding pledges to more formal agreements), and domestic coalitions that seek to participate in international treaty forums.¹⁴

Legal scholars began to question the constitutional limits of state actions on global climate change in the 2000s after the United States failed to join the Kyoto Protocol and states like California began to adopt ambitious greenhouse gas regulation policies and regional emissions trading programs.¹⁵ A large literature has since developed on the topic,¹⁶ and the subject has also

Court, which arguably suggests that the framers contemplated that states would continue to have important relationships with foreign governments).

¹¹ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1619 (1997).

¹² GLENNON & SLOANE, *supra* note 8, at 89 n.10.

¹³ See, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1907 n.28 (2015) (discussing the lack of clarity between activities that are uniquely foreign or domestic).

¹⁴ See Part I.B. In either instance, state and local governments may publicly aspire to achieve, or even directly incorporate elements of, international law. These actions could be understood as a "download" of international law, Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745–46 (2006), or as a "retroactive download" of international norms. Sharmila L. Murthy, *States and Cities as "Norm Sustainers": A Role for Subnational Actors in the Paris Agreement on Climate Change*, VA. ENVTL. L.J. 1, 31 (2019).

¹⁵ See, e.g., Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 ENVTL. F. 50 (2008) (identifying potential constitutional hurdles to California's greenhouse gas mitigation efforts); Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621 (2008) (discussing the constitutionality of California's greenhouse gas emissions trading system); Thomas W. Merrill, *Global Warming As a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005) (discussing foreign policy preemption implications of a climate change lawsuit brought on public nuisance grounds).

¹⁶ See, e.g., Danny Cullenward, *California's Foreign Climate Policy*, 3 GLOBAL SUMMITRY 1 (2017) (discussing California's climate change measures as a kind of foreign policy); David Sloss, *California's Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507 (2017) (analyzing California's cap-and-trade agreement with Quebec under the Dormant Foreign Commerce Clause, the Compact Clause, and dormant foreign affairs preemption); Shelley Welton, *State Dynamism, Federal Constraints: Possible Constitutional Hurdles to Cross-Border Cap-and-Trade*, 27 NAT. RESOURCES & ENV'T. 36 (2012) (analyzing the

garnered interest from students writing law review notes.¹⁷ This Article builds on that scholarship but makes a unique contribution to the existing analyses of cross-border climate actions by states and cities in three distinct ways.

First, the scope of this analysis is much broader than any in the existing literature. In contrast to articles that have only examined one aspect of state and local action on global climate change,¹⁸ I consider the constitutionality of a wide range of activities, including transnational subnational climate networks, domestic coalitions that pledge to uphold the Paris Agreement, and bilateral agreements between states and foreign governments. I include an analysis of the cap-and-trade program between California and Quebec, which the Trump administration recently challenged.¹⁹ I suggest that all of these activities are “norm sustaining” of

constitutionality of potential cross-border cap-and-trade programs); Augusta Wilson, *Linking Across Borders: Opportunities and Obstacles for a Joint Regional Greenhouse Gas Initiative-Western Climate Initiative Market*, 43 COLUM. J. ENVTL. L. 227 (2018) (examining the potential for linking two regional cap and trade programs, the Regional Greenhouse Gas Initiative and the Western Climate Initiative); David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 ENVTL. L. REP. 10,478 (2016) (probing potential legal challenges to the California-Quebec cap-and-trade program).

¹⁷ See, e.g., Jessie A. Cammack, *California, Climate, and Dormant Foreign Affairs Preemption (Again)*, 65 UCLA L. REV. 1642 (2018) (discussing dormant foreign affairs preemption precedent in the Supreme Court and the Ninth Circuit); Peter R. Jenetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO. INT'L ENVTL. L. REV. 141 (1995) (discussing the foreign affairs powers of the states in light of the Compact Clause); Jeremy Lawrence, *The Western Climate Initiative: Cross-Border Collaboration and Constitutional Structure in the United States and Canada*, 82 S. CAL. L. REV. 1225 (2009) (examining the possible constitutional infirmities of the Western Climate Initiative); Kristin McCarthy, *An American (State) in Paris: The Constitutionality of U.S. States' Commitments to the Paris Agreement*, 48 ENVTL. L. REP. 10977 (2018) (arguing that state participation in the Paris Agreement does not violate the Supremacy Clause or Treaty Clause); Aaron Messing, *Nonbinding Subnational International Agreements: A Landscape Defined*, 30 GEO. ENVTL. L. REV. 173 (2018) (discussing four varieties of “nonbinding subnational international agreements” that are open to states following the Paris Agreement); Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006) (arguing that state limits on greenhouse gases are not preempted by the federal foreign affairs power); Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958 (2007) (discussing a categorical approach to the Compact Clause and its implications for the Regional Greenhouse Gas Initiative).

¹⁸ Many articles have focused only on the cap-and-trade agreement between California and Quebec. See e.g., Sloss, *supra* note 16. Other analyses only consider “nonbinding” state commitments. See, e.g., McCarthy, *supra* note 17.

¹⁹ Amended Complaint, United States v. California, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Nov. 19, 2019), ECF No. 7. This Article was written and accepted for publication before this lawsuit was filed. The litigation began to unfold as this Article was being finalized for

international climate law, a term I previously developed to explain how states and cities can strengthen global legal norms when they take action consistent with international agreements, such as the Paris Agreement.²⁰ In addition, because I examine these norm sustaining actions under the Compact and Treaty Clauses, the Supremacy Clause, the dormant foreign affairs power, and the dormant Foreign Commerce Clause, the depth and breadth of the constitutional analysis is greater than in the existing scholarship.²¹

Second, I situate subnational climate change activities in a wider context by engaging with scholarly debates on foreign affairs federalism. Historically, foreign affairs law—defined as the intersection between constitutional law and international relations—has been perceived as unique, with the Supreme Court applying greater scrutiny to activities of states that have an international impact. Some scholars of foreign affairs federalism have argued that foreign affairs law is increasingly becoming “normalized,” i.e. that foreign affairs are being treated more like domestic matters.²²

publication. Just before publication, the district court issued a decision rejecting the United States’ summary judgment motion on the Treaty Clause and the Compact Clause causes of action and granting California’s and other defendant’s cross-motions on the same issues. Memorandum and Order re: Cross-Motions for Summary Judgment, *United States v. California*, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663 (E.D. Cal. Mar. 12, 2020). It also issued an order rejecting the United States’ summary judgment motion on the foreign affairs doctrine and granting the defendants’ cross-motions on that issue. Memorandum and Order re: Cross-Motions for Summary Judgment, No. 2:19-cv-02142 WBS EFB, 2020 WL 4043034 (E.D. Cal. July 17, 2020). The analysis in this Article is largely consistent with these court decisions, but a full analysis of these opinions was not possible given the late stage of the editing process of this Article.

²⁰ Murthy, *supra* note 14. For example, by publicly benchmarking their own progress on U.S. targets under the Paris Agreement, states and cities can signal to other nation-states that a significant portion of the United States is still committed to the goals of the Paris Agreement. This prior article focused exclusively on international law and assumed, for the purposes of argument, that subnational global climate activity was constitutional. This theory of “norm sustaining” draws heavily on Harold Koh’s theory of transnational legal process. *Id.* at 24–31; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

²¹ Some articles only address one constitutional doctrine. *See, e.g.*, Cammack, *supra* note 17. Even those that consider a range of activities and doctrines do not have the same level of depth of analysis as this Article. *See, e.g.*, Welton, *supra* note 16.

²² *See* Sitaraman & Wuerth, *supra* note 13 (arguing that normalization of foreign affairs scrutiny is due in part to the breakdown in distinct categories of domestic versus foreign affairs); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999) (arguing that the “exclusivity principle, under which the federal government alone enjoys the capacity to conduct the nation’s foreign relation” is becoming obsolete); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649–730 (2002) (questioning the so-called “foreign affairs differential” in light of globalization); Peter J. Spiro, *Normalizing Foreign Relations Law After Zivotofsky II*, 109 AM. J. INT’L L. UNBOUND 22 (2015) (discussing *Zivotofsky II* as emblematic of the traditional approach to foreign affairs

Although the existence of such a trend has been questioned and it may not apply where national security or the recognition of a foreign power is concerned,²³ the legal and historical justifications for foreign affairs exceptionalism may make less sense in today's society than at our nation's founding. I consider how a possible trend towards judicial normalization impacts the constitutional susceptibility of state and local climate action under the Supremacy Clause. I also consider countervailing views of the dormant Foreign Commerce Clause²⁴ and of the Compact Clause.²⁵

Third, I analyze other ways that cities and states have engaged in foreign affairs to demonstrate that cross-border subnational climate activities are not unique. States and local governments have entered into hundreds, perhaps thousands, of agreements with foreign national and subnational governments in the last half-century on a wide range of topics.²⁶ In addition, many subnational governments have engaged in the international human rights system, which offers comparable insights for the climate context. Set against this backdrop, the recent climate activities by states and cities do not seem extraordinary. If the Supreme Court was to determine that certain types of subnational global climate actions were unconstitutional, then a whole host of other activities by states and cities would also be called into question. In short,

exceptionalism in which the national government is held to have exclusive rights and powers over foreign affairs) [hereinafter Spiro, *Normalizing Foreign Relations Law*].

²³ As discussed in Part III.C, the normalization theory is not without criticism. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 576 U.S. 1059 (2015); Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112 (2015) (arguing that the normalization trend is not viable given *Zivotofsky II*); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (lifting a preliminary injunction against an executive order restricting entry by people from several countries into the United States because the government's national security justification was sufficient to survive mere rational basis review).

²⁴ *See, e.g.*, GLENNON & SLOANE, *supra* note 8, at 176–77 (arguing that judicial review of state law under the dormant Foreign Commerce Clause should be less exacting than review under the dormant interstate Commerce Clause); Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1265 (arguing that the potential for targeted retaliation against subnational actors makes the “one voice” theory less compelling in the context of the dormant Foreign Commerce Clause).

²⁵ *See, e.g.*, Duncan B. Hollis, *The Elusive Foreign Compact Symposium: Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 1071 (2008) (examining why federal scrutiny of international state compacts has been so historically rare) [hereinafter Hollis, *Return to Missouri v. Holland*]; Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 769 (2010) (arguing that a different standard should apply to cross-border compacts as compared to interstate compacts).

²⁶ *Compare* EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 5 (1998) (stating that “state and local governments have entered into thousands of accords, compacts, and agreements” in the past quarter of a century), *with* Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 744 (determining from an empirical analysis of public records between 1955 to 2008 that forty-one U.S. states concluded over 340 agreements with foreign powers).

this Article is the first comprehensive constitutional evaluation of state and local action on global climate change, and the first one to consider those foreign policy efforts in light of broader trends in foreign relations law generally.

The analysis of state and local action on global climate change raises some constitutional concerns, both for agreements like California's linked cap-and-trade program with Quebec and for pledges to uphold the Paris Agreement. Under the Compact Clause, the presumed constitutionality of existing agreements between states and foreign governments largely turns on an assumption: that the interstate doctrine applies to foreign agreements. Given the Supreme Court's broad reading of executive power under the Supremacy Clause and under the dormant foreign affairs power, President Trump's repudiation of the Paris Agreement could be interpreted as preempting all subnational action on global climate change. The dormant Foreign Commerce Clause could also present challenges for California's emissions trading program with Quebec because the Supreme Court has underscored that the nation must speak with one voice on international commerce. In fact, these concerns largely form the basis of the Trump administration's legal challenge to the agreement between California and Quebec that links their emissions trading program.²⁷

However, two developments—one legal and one factual—indicate that subnational action on international climate change would likely survive constitutional scrutiny. First, the possible trend towards judicial normalization suggests that state and local action on global climate change would not be scrutinized more strictly than purely domestic laws and policies, at least where national security is not directly implicated. Second, cities and states have engaged in a wide variety of activities that arguably fall within the grey zone of foreign affairs law, such as conducting trade and investment missions, entering into agreements to facilitate cross-border legal processes, and participating in human rights treaty processes. Set against this backdrop, subnational climate actions do not seem unique. Even the agreement creating the California-Quebec emissions trading program is arguably similar to other cross-border activities, such as an agreement between New York and Quebec on driver's licenses and an agreement between states and provinces on the Great Lakes. Through an innovative analysis that situates state and local climate change agreements within a broader legal and factual context, this Article posits that cross-border subnational climate action is likely to be found constitutional.

The organizational structure of this Article is as follows. Part I provides an overview of the range of agreements that states and cities have

²⁷ Amended Complaint, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7.

entered into with foreign governments, describes the global climate efforts of states and cities, and explains why these activities can be described as norm sustaining of international climate law. In general, I use the phrase “state and local action on global climate change” or “subnational action on global climate change” to refer to activity that could possibly implicate foreign affairs.²⁸ Parts II, III, and IV, respectively, discuss the Compact and Treaty Clauses, preemption under the Supremacy Clause and the dormant foreign affairs power, and the dormant Foreign Commerce Clause. In each Part, I examine key Supreme Court cases and then apply the law to a range of subnational climate activity. Each Part concludes with a discussion of the scholarly debates and considers how a potential change in the law would impact the constitutional susceptibility of state and local action on global climate change. The Conclusion provides a detailed summary of the entire argument.

I. STATES AND CITIES AS GLOBAL ACTORS

A. Foreign Engagement by States and Cities

Over the last half-century, states and cities have become increasingly active on the global stage.²⁹ They have entered into a range of agreements on topics, from those that seem like ordinary contracts to others that seem like they would be governed by treaties concluded by the federal government.³⁰ Although early agreements largely concerned border disputes, interstate compacts became more widespread after the New Deal as a way to jointly address problems.³¹ States and cities have also concluded agreements with foreign national and subnational governments on a range of topics, including trade, tourism, transportation, family issues, sister-state relations, security, the environment, and agriculture.³² No centralized system exists for reporting or tracking agreements with foreign national and subnational governments.³³

²⁸ Like other scholars writing in this area, I recognize it is difficult to draw precise boundaries between “domestic” and “foreign” and purposefully adopt a broad definition of foreign relations. For example, as Sitaraman and Wuerth note:

“[F]oreign” and “domestic” are not so clear anymore. For this reason, we largely bracket the question of what exactly fits into *foreign relations* exceptionalism. We mean to include national security law, foreign affairs law, and immigration law, though each of these areas is contested as to its scope and [degree] . . .

Sitaraman & Wuerth, *supra* note 13, at 1907 n.28.

²⁹ See GLENNON & SLOANE, *supra* note 8, at 35–75.

³⁰ Fabien Gelinas, *The Constitution of Agreement: A Brief Look at Sub-Federal Cross-Border Cooperation*, 2006 MICH. ST. L. REV. 1179, 1189.

³¹ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 763.

³² *Id.* at 754.

³³ *Id.* at 750.

Estimates of the number of such agreements range from the hundreds to the thousands over the last half-century.³⁴

A variety of factors motivate states and cities to enter into agreements that arguably implicate foreign affairs.³⁵ They may seek to establish a common position, create an ongoing relationship, develop a project, or harmonize their regulations.³⁶ Certain problems, such as transboundary pollution, can only be effectively addressed through cross-border collaboration. On our northern border, U.S. states and Canadian provinces have long cooperated on environmental issues, such as water pollution, acid rain, and other issues.³⁷

Having states be involved on the international stage often inures to the benefit of the nation. For example, President Eisenhower encouraged the creation of sister cities to promote cross-border economic and diplomatic ties.³⁸

States and cities often offer tax incentives and land use concessions to attract foreign business, which gives them the opportunity to influence international commercial relations. In addition, governors and mayors have routinely engaged in trade missions to other countries since the first such mission to Europe by North Carolina's governor in 1959.³⁹

States and cities may also view international agreements as a way to fill voids left by the national government or to signal opposition to national policy.⁴⁰ With global travel becoming easier and international news readily available, more Americans want to maintain connections to other countries. Constituents may put pressure on public officials, including local officials, to take stands on trade, investment, and other foreign policy issues.⁴¹

The sheer size of the populations and economies of some of our states and metropolises provides added impetus to become involved. For example, if California was a sovereign state, it would have the fifth largest economy in

³⁴ Compare FRY, *supra* note 26, at 5 (estimating the number of state agreements in the “thousands”), with Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 744 (estimating the number of agreements with foreign governments as 340 between 1955 and 2008).

³⁵ As noted earlier, the lines between “domestic” and “foreign” are not entirely clear. I purposefully adopt a broad definition because many topics cross domestic and foreign lines.

³⁶ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 755.

³⁷ GLENNON & SLOANE, *supra* note 8, at 60–61.

³⁸ *Id.* at 285.

³⁹ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 749.

⁴⁰ GLENNON & SLOANE, *supra* note 8, at 46.

⁴¹ The increasingly significant role of local and state governments in international relations is well-documented. See Peter Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 585–85 (1997) (discussing the normalization of state commitments to international human rights, and advocating for a doctrine of subnational responsibility); see also GLENNON & SLOANE, *supra* note 8, at 41–42, 45 (noting that such advocacy has “led to the establishment of new state offices and institutions, such as the Secretary of Foreign Affairs in California, the Office of International Affairs in Hawaii, and the Office of Federal and International Relations in Kentucky).

the world.⁴² The widespread nature of these activities belies a common understanding of which level of government is responsible for foreign affairs and under what circumstances.

B. Global Climate Action

Since the 1990s, U.S. states and cities have engaged in global climate action,⁴³ and these efforts have gained momentum to fill a perceived void in national policy.⁴⁴ Climate change is a multi-scalar collective action problem that demands coordinated solutions at all levels, from the local to the global.⁴⁵ Given that many states and cities are feeling the direct impacts of climate change,⁴⁶ some find it advantageous to engage internationally on climate change issues.⁴⁷ This rise has been fostered by the international climate treaty regime, which has welcomed the participation of state and local governments,

⁴² Associated Press, *California Now Has the World's 5th Largest Economy*, CBS NEWS (May 4, 2018), <http://www.cbsnews.com/news/california-now-has-the-worlds-5th-largest-economy> [<https://perma.cc/WAX4-R7W>].

⁴³ Michele M. Betsill & Harriet Bulkeley, *Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program*, 48 INT'L STUD. Q. 471, 472 (2004); Heike Schroeder & Harriet Bulkeley, *Global Cities and the Governance of Climate Change: What is the Role of Law in Cities?*, 36 FORDHAM URB. L.J. 313, 317 (2009).

⁴⁴ For example, in 2017, Hawaii enacted a law designed to implement the Paris Agreement. 2017 Haw. Sess. Laws 101 (S.B. 559). This is an example of the “downloading” of international law that Koh describes. See also Cinnamon Carlarne, *On Localism and the Persistent Power of the State*, 112 AM. J. INT'L L. UNBOUND 285, 285–86 (2018) (noting state initiatives which pledge support for the goals of the Paris Agreement); Jean Galbraith, *Two Faces of Foreign Affairs Federalism and What They Mean for Climate Change Mitigation*, 112 AM. J. INT'L L. UNBOUND 274, 274–75 (2018) (noting support from “various states, Indian tribes, counties, and cities” to meet the goals of the Paris Agreement); James Salzman, *Introduction to the Symposium on Climate Change Localism*, 112 AM. J. INT'L L. UNBOUND 266, 266–67 (2018) (tallying the number of subnational American entities pledging to the Paris Agreement as “ten states, nine tribes, and 278 cities and counties”).

⁴⁵ See, e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–60 (2008) (discussing the unique problems that environmentalists face in stopping climate change related to “enormous interdependencies, uncertainties, circularities, and conflicting shareholders implicated by any effort to develop a solution”); Hari M. Osofsky, *The Complexities of Multipolar Approaches to Climate Change: Lessons from Litigation and Local Action Divergent Responses to Climate Change in a Multipolar World*, 107 AM. SOC'Y INT'L L. PROC. 73, 73–74 (2013) (suggesting that international treaties and domestic litigation fail to meet the needs of climate change activism and reform).

⁴⁶ See, e.g., *New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018) (“Given New York City’s particular vulnerability to climate change, the City has been forced to take proactive steps to protect itself and its residents from the dangers and impacts of global warming.”).

⁴⁷ See Murthy, *supra* note 14 (discussing how and why states and cities have pledged to uphold the Paris Agreement).

along with other non-state actors.⁴⁸ The global climate efforts of states and cities are diverse but can be loosely referred to as transnational networks, domestic coalitions, or bilateral agreements.⁴⁹

Transnational climate networks of subnational governments began to develop in the 1990s. An early example, Cities for Climate Protection, was formed in 1992 by the International Council for Local Environmental Initiatives,⁵⁰ and is now a broader campaign under the auspices of the United Nations. The C40 network was created in 2006 and now includes ninety-four of the world's megacities committed to addressing climate change.⁵¹ A more recent example, discussed in greater detail below, is the Under2 Coalition, which brings together state, local and regional governments committed to keeping the Earth's temperature rise to well below two degrees Celsius, in line with the goals of international climate law.⁵²

Other coalitions are comprised of solely U.S. actors that seek to engage with the global community on climate change. For instance, in 2005, the United States Conference of Mayors adopted a Climate Protection Agreement.⁵³ In 2014, a new network called "Climate Mayors" was created to demonstrate local leadership on climate change.⁵⁴ In the wake of President Trump's announcement that he would withdraw the United States from the Paris Agreement, over 400 U.S. mayors involved with Climate Mayors pledged to uphold the treaty.⁵⁵

Several additional coalitions were also created to demonstrate their opposition to a U.S. withdrawal from the Paris Agreement. A bipartisan group of governors called the U.S. Climate Alliance was founded specifically to support the goals of the Paris Agreement; it is discussed in greater detail below.⁵⁶ Although the validity of the U.S. Climate Alliance has not been directly challenged in court, the Trump administration describes it in its legal

⁴⁸ United Nations Framework Convention on Climate Change Paris Agreement arts. 7(2), 11(2), Jan. 29, 2016, 34 U.N.T.S 243.

⁴⁹ See Messing, *supra* note 17 (dividing state climate change agreements into four similar categories: "near-binding arrangements, memoranda of understanding, third-party representation, and unilateral declarations").

⁵⁰ Schroeder & Bulkeley, *supra* note 43, at 316.

⁵¹ *About*, C40 CITIES, <https://www.c40.org/about> [<https://perma.cc/XT4V-4Y55>] (last visited Aug 23, 2018); Schroeder & Bulkeley, *supra* note 43, at 317–18.

⁵² *About the Under2 Coalition*, UNDER2 COAL., <https://www.under2coalition.org/about> [<https://perma.cc/9LCD-XRZT>] (last visited Aug 23, 2018).

⁵³ Schroeder & Bulkeley, *supra* note 43, at 317.

⁵⁴ *City Officials: Paris Agreement Adoption Toolkit*, CLIMATE MAYORS, <http://climatemayors.org/get-involved/city-officials/> [<https://perma.cc/G4FR-WC2D>] (last visited Aug 31, 2017).

⁵⁵ *Paris Climate Agreement*, CLIMATE MAYORS, <http://climatemayors.org/actions/paris-climate-agreement/> [<https://perma.cc/22UK-ZJ6A>] (last visited Aug 14, 2019).

⁵⁶ *Alliance Principles*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/alliance-principles> [<https://perma.cc/83E5-5QAU>] (last visited Aug 31, 2017).

challenge to California's cap-and-trade program with Quebec to help build its case against California.⁵⁷

A broader domestic coalition of states, corporations, non-profits and organizations known as "We Are Still In" was created "as a promise to world leaders that Americans would not retreat from the global pact to reduce emissions and stem the causes of climate change."⁵⁸ It includes 3500 representatives from all 50 states, including 287 cities and counties as well as ten states.⁵⁹ These domestic networks are supported by a separate initiative known as America's Pledge, which is quantifying the climate actions of U.S. non-state actors in a manner that will facilitate reporting under the Paris Agreement.⁶⁰

These categories are not necessarily rigid and national coalitions often participate in transnational networks. For example, the above-mentioned U.S. Climate Alliance has joined Canada and Mexico to create the North American Climate Leadership Dialogue.⁶¹ Consistent with other networks, the parties have committed to a series of nonbinding pledges, such as "advancing improvements in efficiency, electrification and greenhouse gas emission performance of vehicles through information exchanges and collaboration."⁶²

U.S. states have also entered into bilateral agreements with national and subnational leaders of foreign governments. For example, during the mid-2000s, after the United States refused to ratify the Kyoto Protocol, numerous states signed agreements with the United Kingdom.⁶³ More recently, California has led the way with fifty-seven agreements on climate change with sixteen different countries.⁶⁴ Forty percent of these agreements

⁵⁷ Amended Complaint ¶ 55, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7.

⁵⁸ *About, WE ARE STILL IN*, <https://www.wearestillin.com/about> [<https://perma.cc/4GXX-HND7>] (last visited Aug 23, 2018).

⁵⁹ *Id.*

⁶⁰ *About America's Pledge, AMERICA'S PLEDGE ON CLIMATE*, <https://www.americaspledgeonclimate.com/about/> [<https://perma.cc/PD9G-5A8C>] (last visited Aug 16, 2018).

⁶¹ Press Release, U.S. Climate All., North American Climate Leaders Statement (Nov. 13, 2017), <https://www.governor.wa.gov/news-media/us-climate-alliance-joins-canada-and-mexico-new-north-american-climate-leadership> [<https://perma.cc/69ZS-3VFM>].

⁶² Press Release, U.S. Climate All., Joint Statement on North American Climate Leadership (Sept. 13, 2018), <https://www.usclimatealliance.org/publications/2018/9/26/joint-statement-on-north-american-climate-leadership> [<https://perma.cc/99RT-M8G5>].

⁶³ *See, e.g.*, Press Release, Timothy M. Kaine, Governor of Va., Governor Kaine, United Kingdom Forge New Agreement to Address Climate Change Issues (Feb. 12, 2009), <https://wayback.archive-it.org/263/20090314121936/http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease-print.cfm?id=876> [<https://perma.cc/Y9PN-MPDA>] (serving as an example of one of the states that signed such an agreement with the United Kingdom).

⁶⁴ *See Climate Change Partnerships, CAL. ENERGY COMM'N*, https://www.climatechange.ca.gov/climate_action_team/partnerships.html [<https://perma.cc/9BVD-TY42>] (last visited Aug 8, 2019).

are with Chinese government actors, including national ministries, provinces, and municipalities.⁶⁵ Interestingly, in its complaint challenging California's emissions trading program with Quebec, the Trump administration highlights the bilateral agreements between California and China as evidence of California's efforts to develop a foreign policy that is counter to the President's goals; the actual bilateral agreements, however, are not challenged.⁶⁶

Many of the bilateral agreements with foreign governments take the form of memoranda of understanding (MOU), joint statements of purpose, commitments to collaborate, pledges, and other informal declarations. They might aptly be described as soft law or "best practices" because they usually declare that they are not binding commitments.⁶⁷ For example, in 2018 California signed an MOU with the Chinese Ministry of Ecology and Environment that outlines various areas of cooperation; this MOU is discussed in greater detail below.⁶⁸

Not all state climate agreements with foreign nations can be classified merely as nonbinding MOUs. For example, in 2013, California entered into an agreement with Quebec to harmonize and link their cap-and-trade programs ("2013 Cap-and-Trade Agreement").⁶⁹ After Ontario expressed interest in joining the emissions trading program, California, Ontario and Quebec entered into a new agreement in 2017;⁷⁰ the prior agreement between

⁶⁵ *Id.*; see also Associated Press, *China and California Sign Deal to Work on Climate Change Without Trump*, GUARDIAN (June 6, 2017), <https://www.theguardian.com/us-news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump> [<https://perma.cc/88RA-4YA9>] (detailing one of the many climate agreements California has signed with China).

⁶⁶ Amended Complaint ¶ 54, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7.

⁶⁷ Kysar & Meyler, *supra* note 15, at 1637–38.

⁶⁸ Memorandum of Understanding to Enhance Cooperation on Climate and Environment Between the Ministry of Ecology and Environment of the People's Republic of China and the State of California of the United States art. 1, Cal.-China, Nov. 8, 2018, https://www.energy.ca.gov/sites/default/files/2019-12/China_MOU-Ministry_of_Ecology_ada.pdf [<https://perma.cc/T7A6-757K>] [hereinafter California-China MOU].

⁶⁹ Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Que., Sep. 27, 2013, https://ww3.arb.ca.gov/cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf [<https://perma.cc/9A58-FU97>] [hereinafter 2013 Cap-and-Trade Agreement].

⁷⁰ Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between the Gouvernement du Québec, the Government of California and the Government of Ontario, Sep. 22, 2017, <https://www.icta.org/resources/News/California/Agreement%20on%20the%20Harmonization%20and%20Integration%20of%20CapTrade-22Sept.pdf> [<https://perma.cc/32WK-JZ5T>] [hereinafter 2017 Harmonization and Integration Agreement].

California and Quebec was then terminated.⁷¹ However, shortly thereafter, due to a change in provincial leadership in 2018, Ontario subsequently withdrew.⁷² The 2017 Cap-and-Trade Agreement survived the withdrawal of Ontario and it still governs the relationship between California and Quebec (hereinafter, “Cap-and-Trade Agreement”). However, on October 23, 2019, the Trump administration sued California over this cross-border emissions trading program and the litigation was unfolding as this Article was being finalized for publication.⁷³

A cap-and-trade program is a market-based form of environmental regulation.⁷⁴ It sets a “cap” or limit on greenhouse gas emissions and provides “emissions allowances” to regulated parties, which gives them the right to produce a certain amount of emissions.⁷⁵ The regulated parties are then able to “trade” their emissions allowances, which enables companies that are able to achieve emissions reductions at low cost to sell their excess allowances to entities that face higher compliance costs. The Cap-and-Trade Agreement links two distinct cap-and-trade programs by creating reciprocal obligations: California accepts compliance instruments for emissions reductions in Quebec, and vice-versa, because the two jurisdictions enacted similar laws,

⁷¹ Amendment to the Agreement between the California Air Resources Board and the Gouvernement du Quebec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Ont., Oct. 4, 2017, https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_amendment_ca-qc_linkage_agreement.pdf [<https://perma.cc/B8N4-KWA9>].

⁷² See Cindy Vaillancourt, Joanna Rosengarten & Selina Lee-Andersen, *Love Them and Leave Them: Taking a Closer Look at the Implications of Ontario’s Announcement to Cancel Its Cap-and-Trade Program*, LEXOLOGY (June 22, 2018), <https://www.lexology.com/library/detail.aspx?g=98845668-cc2f-4da2-a9b7-70149d13583f> [<https://perma.cc/YA78-KYN4>] (discussing the consequences of Ontario’s exit from the 2017 Cap-and-Trade agreement).

⁷³ The United States filed an amended complaint less than one month after filing the initial complaint. Amended Complaint ¶¶ 1–5, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7. As this Article was being finalized, the litigation was still ongoing. Just before publication, the Eastern District of California had issued an order rejecting the summary judgment motion of the United States on its Treaty Clause and Compact Clause causes of action, *United States v. California*, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663 (E.D. Cal. Mar. 12, 2020), and another order rejecting the United States government’s challenge on dormant foreign affairs grounds, *United States v. California*, No. 2:19-cv-02142 WBS EFB, 2020 WL 4043034 (E.D. Cal. July 17, 2020).

⁷⁴ *Cap and Trade Basics*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <https://www.c2es.org/content/cap-and-trade-basics/> [<https://perma.cc/D3SJ-LQF2>] (last visited Sep 7, 2019).

⁷⁵ See Sloss, *supra* note 16, at 511 (discussing the economic mechanisms that govern cap-and-trade agreements).

regulations and guidance documents.⁷⁶ This agreement is discussed and analyzed in greater detail below.

It is perhaps no surprise that this emissions linkage occurred between California and Quebec—two subnational governments that have been active globally. California’s expertise in air policy innovation is due in part to the distinct legal authority that the state has under the Clean Air Act,⁷⁷ and to the efforts it has made to fill a void in national climate policy.⁷⁸ In Canada,

⁷⁶ *Linkage*, CAL. AIR RES. BD., <https://www.arb.ca.gov/cc/capandtrade/linkage/linkage.htm> [<https://perma.cc/59K2-VRN2>] (last visited Jan 30, 2019); see also Wright, *supra* note 16, at 10,484 (discussing how California and Quebec’s cap-and-trade programs are linked).

⁷⁷ Section 209 of the Clean Air Act allows the EPA Administrator to waive the general prohibition against states setting standards for new motor vehicles under certain conditions. 42 U.S.C. § 7543 (2018). In 2013, the Obama Administration granted California’s waiver pursuant to section 177 of the Clean Air Act. Thirteen states have since adopted California’s standards. Coral Davenport, *Trump to Revoke California’s Authority to Set Stricter Auto Emissions Rules*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/climate/trump-california-emissions-waiver.html> [<https://perma.cc/PK5H-V3HF>]; see also *Vehicle Emissions California Waivers and Authorizations*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations> [<https://perma.cc/XJ2B-L3K2>] (last visited Apr. 19, 2020) (providing the EPA’s public policy on states’ abilities to set stricter emissions regulations). The Trump Administration has proposed revoking California’s waiver under the Clean Air Act and preempting its ability to set stricter greenhouse gas emissions and zero-emission vehicle standards. Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,999 (Aug. 24, 2018); U.S. ENVTL. PROT. AGENCY, THE SAFER AFFORDABLE FUEL EFFICIENT (SAFE) VEHICLES PROPOSED RULE FOR MODEL YEARS 2021–2026 (2019), <https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-proposed> [<https://perma.cc/RQV6-8YYM>]. These events were unfolding as this Article was being written and the final rule has been challenged in court. Complaint, *California v. Chao*, No. 1:19-cv-02826 (D.D.C. Sept. 20, 2019); see also Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part I: History and Current Challenge*, 49 ENVTL. L. REP. 11,037, 11,037 (2019) (finding that the EPA’s “expansive theory of preemption . . . poses significant practical problems and logical flaws”); Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 30 GEO. ENVTL. L. REV. (forthcoming 2020) (reviewing the statutory and legislative history of greenhouse gas emission regulations); Juliet Eilperin & Brady Dennis, *Trump Administration to Revoke California’s Power to Set Stricter Auto Emissions Standards*, WASH. POST (Sept. 17, 2019), https://www.washingtonpost.com/climate-environment/trump-administration-to-revoke-californias-power-to-set-stricter-auto-emissions-standards/2019/09/17/79af2ee0-d97b-11e9-a688-303693fb4b0b_story.html [<https://perma.cc/PV3Y-JVGH>] (detailing the Trump Administration’s plans to revoke California’s long-standing right to set its own air pollution standards). In the event such preemption of California’s authority is upheld in court, this change would certainly impact the way in which its emissions standards and trading program are structured. However, it does not necessarily affect the question of whether the Cap-and-Trade Agreement with Quebec is constitutionally suspect from a foreign affairs perspective.

⁷⁸ Cullenward, *supra* note 16, at 3; Carlarne, *supra* note 44, at 288.

Quebec is the most vocal proponent of provincial rights and it even claims the power to enter international agreements.⁷⁹

Of course, not all states and cities support climate change policies, domestically or internationally. For example, before it was repealed, twenty-four states had sued to block the Clean Power Plan, which was a key feature of President Obama's climate agenda.⁸⁰ As Jean Galbraith has observed, these dynamics reflect the "outer face" and "inner face" of federalism.⁸¹ The "outer face" is represented by the direct ways that states and cities engage internationally, and the "inner face" is illustrated by the ways they interact with the federal government.⁸² Nevertheless, the significant subnational support for the Paris Agreement is noteworthy and merits closer attention.

C. States and Cities as "Norm Sustainers"

Scholars have perceived this rise in state and local engagement on foreign affairs as part of a broader change in international law. While the Westphalian model of international law is premised on state consent, scholars increasingly recognize that it is a legal fiction to conceive of nation-states as simply unitary actors.⁸³ For example, Koh's theory of transnational legal process posits that international law "has evolved into a hybrid body of international and

⁷⁹ An Act Respecting the Ministère des Relations Internationales, R.S.Q., c. M-25.1.1 (Can.) (establishing the Minister of International Relations); *see also* Gelin, *supra* note 30, at 1187 (discussing the historical division of national foreign affairs authority between Canada and Quebec on provincial matters); Wright, *supra* note 16, at 10,489 (detailing Quebec's claims that it has the authority under the Canadian constitution to enter into agreements with foreign jurisdictions on matters that fall under provincial authority). In other countries, such as Austria, Germany, Switzerland, Belgium, Russia, and Mexico, substate components are able to enter into treaties, although in most instances, some level of state supervision is required. *See also* Duncan B. Hollis, *Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 148-49 (2005) (explaining the limited powers of subnational divisions to enter into treaties in these countries).

⁸⁰ Petition for Review at 2, *West Virginia v. Env'tl. Prot. Agency*, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

⁸¹ Galbraith, *supra* note 44, at 274.

⁸² *Id.* at 274.

⁸³ *See, e.g.*, DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 112-13 (2010) (stating that "states are not unitary actors"); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 12 (2004) (discussing unitary states versus disaggregated states as units for analysis in international law); Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 415 (2017) (discussing how the transnational legal process school is premised on the idea that international law is "no longer just for nation-states or national governments"); Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MD. J. INT'L L. 64, 76 (2010) (contrasting strict Westphalians and "modified" Westphalians' approaches to subnational contributions to international law and treaty-making).

domestic law developed by a large number of public and private transnational actors.”⁸⁴ Scholars have explored international cooperation between subnational actors, offering a variety of terms to describe these activities, such as “bottom-up lawmaking,”⁸⁵ “gubernatorial foreign policy,”⁸⁶ “transnational translocalism,”⁸⁷ “paradiplomacy,”⁸⁸ and “climate localism.”⁸⁹

When states and cities pledge to uphold a global treaty, like the Paris Agreement on climate change, they act as “norm sustainers,” a term I developed in an earlier article.⁹⁰ The norm sustaining concept draws on Harold Koh’s transnational legal process theory,⁹¹ and is analogous to the way in which non-governmental organizations are often described as “norm entrepreneurs”⁹² and nations as “norm sponsors.”⁹³ States and cities are not necessarily doing something “new” nor are they “officially” acting under international law. Rather, they are sustaining key norms of international environmental law at the subnational level. In doing so, they can contribute to the transnational legal process in three key ways.

First, by publicly benchmarking their own progress on the U.S. targets under the Paris Agreement, subnational norm sustainers can signal to other nations that a significant portion of the United States is still committed to the goals of the Paris Agreement. States and cities are not permitted to disclose their progress on behalf of the United States through the formal Paris reporting mechanisms. Rather, they are able to report their progress to Non-State Actor Zone for Climate Action (NAZCA), a specially created forum for recording climate change commitments by non-state actors.⁹⁴ They may also be able to participate in a “global stocktake” that will take place every five years.⁹⁵ Scholars have also pushed for the creation of a more formal structure in

⁸⁴ Koh, *supra* note 83, at 415.

⁸⁵ Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 408–10 (2007); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT’L L. 409, 429 (2007).

⁸⁶ Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2414 (2006).

⁸⁷ Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 40 (2007).

⁸⁸ Joanna Setzer, *Testing the Boundaries of Subnational Diplomacy: The International Climate Action of Local and Regional Governments*, 4 TRANSNAT’L ENVTL. L. 319, 325 (2015).

⁸⁹ Salzman, *supra* note 44; Carlarne, *supra* note 44.

⁹⁰ Murthy, *supra* note 14.

⁹¹ Koh, *supra* note 20, at 206.

⁹² BODANSKY, *supra* note 83, at 146, 193.

⁹³ Koh, *supra* note 14, at 746 n.4.

⁹⁴ Paris Agreement, *supra* note 2, ¶¶ 117, 133–34.

⁹⁵ See *Global Stocktake (Referred to in Article 14 of the Paris Agreement)*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/topics/science/workstreams/global-stocktake-referred->

order to facilitate the tracking of pledges by subnational governments.⁹⁶ By demonstrating that a significant portion of the United States is on track to meet the original targets under the Paris Agreement, states and cities could encourage other countries to maintain and even increase the ambition of their own targets.⁹⁷

Second, when states and cities rebrand their domestic activities in support of international law, they can sustain and strengthen key norms of international environmental law that are embedded within the Paris Agreement. For instance, by connecting their domestic climate actions to the Paris Agreement, subnational actors reinforce key principles of international environmental law, such as common but differentiated responsibilities and respective capabilities.⁹⁸

Third, as norm sustainers, states and cities can also demonstrate the feasibility of climate actions, which can serve as models for national policy, as the literature on cooperative federalism in the United States has long recognized.⁹⁹ For example, California developed its cap-and-trade program with the hope of participating in a future federal program.¹⁰⁰

These efforts allow states and cities to act as norm sustainers of the Paris Agreement,¹⁰¹ but they also potentially raise constitutional concerns—questions that have been unanswered to date. Given that President Trump has repudiated the Paris Agreement on climate change, how can states and cities continue to engage globally on climate change without violating the U.S. Constitution and the notion that the nation should speak with “one voice”? Indeed, the very names of these coalitions, such as the U.S. Climate Alliance and America’s Pledge, suggest that they are attempting to “stand in” for the U.S. national government.

In the following Parts, I discuss the key questions this subnational global climate activity raises under the Compact and Treaty Clauses, under the Supremacy Clause and the dormant foreign affairs power, and under the

to-in-article-14-of-the-paris-agreement [https://perma.cc/N4EQ-NJWE] (last visited Aug. 24, 2018) (describing the Paris Agreement’s command for the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to assess compliance with the Paris Agreement’s goals periodically).

⁹⁶ Daniel C. Esty & Dena P. Adler, *Changing International Law for A Changing Climate. Symposium on Climate Change Localism*, 112 AM. J. INT’L L. UNBOUND 279, 281–82 (2018).

⁹⁷ Murthy, *supra* note 14, at 12.

⁹⁸ *Id.* at 7–8, 37–44.

⁹⁹ *Id.* at 8, 45–50.

¹⁰⁰ *See generally* CAL. AIR RES. BD. FOR THE STATE OF CAL., CLIMATE CHANGE PROPOSED SCOPING PLAN: A FRAMEWORK FOR CHANGE (2008), <https://ww3.arb.ca.gov/cc/scopingplan/document/psp.pdf> [https://perma.cc/S6JS-JMLL] [hereinafter CLIMATE CHANGE PROPOSED SCOPING PLAN].

¹⁰¹ Murthy, *supra* note 14, at n.19.

dormant Foreign Commerce Clause. The in-depth analysis can be briefly summarized as follows.

In Part II, I argue that if the doctrine that applies to interstate compacts also applies to cross-border agreements, as most experts believe is the case, then the kinds of subnational action on global climate change discussed above would likely survive constitutional scrutiny. While most experts do not find nonbinding MOUs to be problematic, the California-Quebec Cap-and-Trade Agreement has been identified as susceptible. However, those earlier analyses analyzed the 2013 agreement, and not the 2017 one, which is better positioned to withstand scrutiny. Moreover, as this Article was being finalized for publication, the Eastern District of California sustained the constitutionality of the agreement under the Treaty Clause and the Compact Clause.¹⁰² In addition, I suggest that the Cap-and-Trade Agreement is similar to other cross-border agreements, such as the one between U.S. states and Canadian provinces on the Great Lakes. Against this comparative backdrop, it is difficult to see how the Cap-and-Trade Agreement is constitutionally deficient without calling into question a whole host of other agreements.

Subsequently, in Part III, I posit that neither Congress nor the President have taken constitutionally sufficient steps to preempt state and local action on global climate change under the Supremacy Clause. At best, the President would have to rely on his own powers to conduct foreign affairs, but this is a very weak argument, especially in the climate context. This argument is buttressed by the trend towards judicial normalization and by a comparative analysis of how states and cities engage with international human rights law.

Finally, in Part IV, I suggest that the dormant Foreign Commerce Clause does not raise serious concerns. Although the Supreme Court has underscored the need to speak with one voice in international commerce, only state tax laws creating the risk of multiple taxation have been struck down and only under particular circumstances. Although it is theoretically possible to conceive of the California-Quebec Cap-and-Trade Agreement as a tax, it is actually a market-based form of environmental regulation. As such, this subnational action on global climate change does not present risks of multiple taxation that compromise the ability of the nation to speak with one voice.

¹⁰² *United States v. California*, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663 (E.D. Cal. Mar. 12, 2020).

II. COMPACT CLAUSE AND TREATY CLAUSE

A. Doctrine: Functional Test

The first question is how can the agreements discussed in the prior Part survive the Treaty Clause’s prohibition against states entering into a “Treaty” or “Alliance,”¹⁰³ and the Compact Clause’s requirement of Congressional consent for “any Agreement or Compact” that a state enters into “with a foreign power”?¹⁰⁴

Congress has historically provided explicit consent to only a small fraction of state agreements with foreign nations, which generally concerned coordinated action between U.S. border states and Canada or Mexico in four categories: bridges, highways, firefighting and emergency management.¹⁰⁵ In fact, the exact number of agreements between states and foreign governments is unknown because Congress has not taken any initiative to develop a repository of all state and local actions that involve a foreign actor.¹⁰⁶ Instead, “Congress has done remarkably little to define or execute its own Compact Clause power,” instead letting the judiciary and executive branch define the scope.¹⁰⁷

Congress has never withheld its consent to a state agreement with a foreign government on the grounds that it was a prohibited treaty.¹⁰⁸ However, in one instance in 1968,¹⁰⁹ Congress gave only partial consent to an agreement on the Great Lakes that had originally been entered into by U.S.

¹⁰³ U.S. CONST. art. I, §10, cl. 1 (“No State shall enter into any Treaty, Alliance or Confederation . . .”).

¹⁰⁴ *Id.* art. I, §10, cl. 3 (“No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”).

¹⁰⁵ Hollis, *Return to Missouri v. Holland*, *supra* note 25, at 1076.

¹⁰⁶ GLENNON & SLOANE, *supra* note 8, at 285.

¹⁰⁷ Hollis, *Return to Missouri v. Holland*, *supra* note 25, at 1073. However, the Supreme Court has underscored that Congress is the relevant branch of the federal government with constitutional authority:

Congress’s approval serves to ‘prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.’ . . . It also ensures that the Legislature can “check any infringement of the rights of the national government.” 3 J. Story, *Commentaries on the Constitution of the United States* § 1397, p. 272 (1833) (in subsequent editions, § 1403). So, for example, if a proposed interstate agreement might lead to friction with a foreign country or injure the interests of another region of our own, Congress may withhold its approval.

Texas v. New Mexico, 138 S. Ct. 954, 958 (2018).

¹⁰⁸ GLENNON & SLOANE, *supra* note 8, at 280.

¹⁰⁹ Great Lake Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

states and Canadian provinces.¹¹⁰ Due to concerns raised by the State Department,¹¹¹ Congress withheld consent from provisions allowing Ontario and Quebec to become members of the compact and from sections that “purport[ed] to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies.”¹¹² Because Congress clearly had the authority to grant consent to the entire agreement,¹¹³ the State Department’s concerns were not really about constitutional power, but about turf.¹¹⁴ The “solution to Congress’[s] dilemma—the desire to consent to the covenant in the face of objections by the executive branch—was to grant partial consent.”¹¹⁵ This bifurcated approach informed future negotiations on the Great Lakes, as discussed below in Part II.B.4.a.

The first opportunity that the Supreme Court had to consider the Treaty Clause and the Compact Clause arose in 1840 in the context of an agreement with a foreign state. In *Holmes v. Jennison*, the Court struck down an informal extradition arrangement between Vermont’s governor and the British colony of “Lower Canada,” which is present-day Quebec.¹¹⁶ The

¹¹⁰ COUNCIL OF STATE GOV’TS, INTERSTATE COMPACTS AND AGENCIES 48 (1983) (citing ratification of the Great Lakes Basin Compact by Illinois, ILL. REV. STAT., ch. 127, § 192.1–192.4 (1965); Indiana, Laws of 1955, ch. 220 (Ind. 1955) (H.B. 216); Michigan, 1955 Mich. Pub. Acts 28; Minnesota, 1995 Minn. Laws 28; and Wisconsin, 1995 Wis. Sess. Laws, ch. 275; see also Jennetten, *supra* note 17, at 165 (describing national opposition to the full Great Lakes Basin Compact).

¹¹¹ *The Great Lakes Basin: Hearings Before a Subcomm. of the S. Comm. on Foreign Relations*, 84th Cong. 17–18 (1956).

¹¹² Pub. L. No. 90-419, § 2, 82 Stat. 414, 419 (1968); Great Lake Basin Compact art. IX, § 2, Mar. 12, 1995–Oct. 9, 1963, <https://www.glc.org/wp-content/uploads/GLC-GreatLakes-Basin-Compact-2019.pdf> [<https://perma.cc/E7NY-CS2Y>].

¹¹³ Under existing Compact Clause jurisprudence, discussed below, the 1955 Great Lakes agreement that was partially approved as a compact in 1968 arguably did not need congressional approval. Instead, the parties thought it wise to seek congressional consent because of the Canadian participation. Similar to the facts of *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 464–65 (1978), the Great Lakes Agreement created a commission with extensive administrative powers. However, “each State retain[ed] complete freedom to adopt or reject the rules and regulations of the Commission,” *id.* at 473, because the parties only agreed to “consider the action the Commission recommends” Great Lake Basin Compact, *supra* note 112, art. VII. In addition, each state was “free to withdraw at any time” *U.S. Steel*, 434 U.S. at 473, because each state could renounce the agreement via a legislative act, although such renunciation would not be effective under six months after notice. Great Lake Basin Compact, *supra* note 112, art. VIII; see also Jennetten, *supra* note 17, at 167 (arguing that Congressional consent was unnecessary for the Great Lakes agreement).

¹¹⁴ See Jennetten, *supra* note 17, at 167.

¹¹⁵ *Id.*

¹¹⁶ *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 578–79 (1840).

Court found that because the Framers had intended to cut off communications between states and foreign powers,¹¹⁷ the agreement was invalid under the Compact Clause unless it was “made under the supervision of the United States”¹¹⁸ Justice Taney’s plurality opinion determined that the Vermont agreement with Canada violated Article 1, §10, at least in substance if not form.¹¹⁹ However, the Court as a whole did not agree whether the arrangement triggered clause 1 (the Treaty Clause) or clause 3 (the Compact Clause) of Article 1, §10.¹²⁰

In subsequent opinions, the Supreme Court observed that *Holmes* was “inconclusive” as to the scope of the Compact Clause and retreated from such a plain-meaning interpretation of the clause.¹²¹ Although the framers of the Constitution ascribed particular meaning to the terms “treaty,” “agreement,” and “compact,” the Court acknowledged that these distinctions have been lost to history.¹²² The Court looked to the writings of Justice Story:

Treaties, alliances, and confederations . . . generally connote military and political accords and are forbidden to the States. Compacts and agreements, on the other hand, embrace “mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other.”¹²³

¹¹⁷ *Id.* at 568–79.

¹¹⁸ *Id.* at 578.

¹¹⁹ See also GLENNON & SLOANE, *supra* note 8, at 281 (discussing the plurality’s holding in *Holmes v. Jennison*).

¹²⁰ *Holmes*, 39 U.S. (14 Pet.) 540, 580 (Thompson, J., dissenting) (“Nor is there any treaty . . . of the United States, or any particular part of the Constitution alluded to in the record, with which the power exercised by the governor is brought in conflict or decided against.”).

¹²¹ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 464–65 (1978). *But see* Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 779–82 (suggesting that the “Supreme Court might accept different constitutional standards for agreements impacting foreign relations and interstate arrangements”).

¹²² See *U.S. Steel*, 434 U.S. at 460–64 (describing how Justice Story fashioned his own definitions in his book of *Commentaries on the Constitution of the United States*); *Virginia v. Tennessee*, 148 U.S. 503, 519–20 (1893) (suggesting there is no “difference in the meaning” of compacts or agreements “except that the word ‘compact’ is generally used with reference to more formal and serious engagements than is usually implied in the term ‘agreement’”); see also GLENNON & SLOANE, *supra* note 8, at 281 (discussing the lack of clarity regarding what constitutes a prohibited foreign state compact); Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 760–62 (providing a history of the interstate compact clause).

¹²³ *U.S. Steel*, 434 U.S. at 464 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 264 (Thomas M. Cooley ed., 4th ed. 1873)); see also *Virginia*, 148 U.S. at 519 (suggesting that under Justice Story’s logic, the following kinds of agreements might be of such a “political character” that they should be considered to be

Although the Supreme Court has not defined the precise contours of the Treaty Clause,¹²⁴ it has had numerous occasions to consider the Compact Clause. The Court has rejected a literal interpretation of the Compact Clause, which would require congressional approval for all interstate agreements.¹²⁵ Instead, it has reasoned that “not all agreements between States are subject to the strictures of the Compact Clause.”¹²⁶

The Supreme Court has adopted a functional test to determine what agreements need congressional approval:

Looking at the clause in which the terms “compact” or “agreement” appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.¹²⁷

treaties within the meaning of Article I: “treaties of alliance for purposes of peace and war, and treaties of confederation, . . . , and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges”).

¹²⁴ This area of the law may evolve because in its lawsuit against California over its linkage agreement with Quebec, the Trump administration has raised a Treaty Clause cause of action. The Eastern District of California sustained the constitutionality of the agreement under the Treaty Clause, *United States v. California*, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663, at *9 (E.D. Cal. Mar. 12, 2020), but this decision may be appealed. The one Supreme Court case directly involving the Treaty Clause offers little guidance on its scope. In a case arising after the U.S. Civil War, the Supreme Court observed that the Confederate government had “[no] legal existence” because “the Constitution of the United States prohibits any treaty, alliance, or confederation by one state with another.” *Williams v. Bruffy*, 96 U.S. 176, 182 (1877).

¹²⁵ *U.S. Steel*, 434 U.S. at 459–60. Such a literal interpretation would mean that a whole host of state agreements with foreign governments, including those on climate, would be unconstitutional.

¹²⁶ *Id.* at 469; see also *Virginia*, 148 U.S. at 518 (identifying several hypothetical agreements that would not concern the United States, such as an agreement between states to acquire land for a public building); GLENNON & SLOANE, *supra* note 8, at 279 (highlighting many questions that still remain regarding the scope of the Compact Clause).

¹²⁷ *U.S. Steel*, 434 U.S. at 467–68; *Virginia*, 148 U.S. at 519. Interestingly, the genesis of this functional test for the Compact Clause appears to be Justice Story’s description of the Treaty Clause. *U.S. Steel*, 434 U.S. at 465–66. As recounted in *U.S. Steel*, the Supreme Court of Georgia “[w]ithout explanation” simply transferred “[Justice] Story’s observation that the words ‘treaty, alliance, and confederation’ generally were known to apply to treaties of a political character” to the Compact Clause. *Id.* at 465–66 (citing *Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, 14 Ga. 327, 339 (1853)). Apparently, this approach “formed the basis in 1893 for Mr. Justice Field’s interpretation of the Compact Clause in *Virginia v. Tennessee*,” *id.* at 467, even though the Georgia case is not referenced explicitly in *Virginia*.

In applying this functional test in a variety of cases, the Court has never invalidated an interstate compact.¹²⁸ It has also been willing to find implied congressional consent.¹²⁹

The Supreme Court expanded on its functional test in *U.S. Steel Corp. v. Multistate Tax Commission*, which upheld an interstate agreement that created an active administrative body with extensive powers delegated to it by the States, but that lacked congressional consent.¹³⁰ The Court found it important that “each State retain[ed] complete freedom to adopt or reject the rules and regulations of the Commission” and that each state was “free to withdraw at any time.”¹³¹ In *U.S. Steel*, the Supreme Court also underscored that the Compact Clause should be viewed through the prism of federalism:

The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution.¹³²

In *Northeast Bancorp v. Board of Governors of the Federal Reserve*, the Court reinforced this standard when it held that reciprocal banking legislation in two New England states was not “an agreement amounting to a compact” because “several of the classic indicia of a compact [were] missing.”¹³³ It applied the “classic indicia” as follows:

No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most

¹²⁸ GLENNON & SLOANE, *supra* note 8, at 281.

¹²⁹ See *Cuyler v. Adams*, 449 U.S. 433, 440–42 (1981) (finding that a federal crime act constituted advance consent to an agreement between Pennsylvania and New Jersey on detainers); *New Hampshire v. Maine*, 426 U.S. 363, 369–70 (1976) (upholding an interstate agreement locating an ancient boundary line that did not have explicit congressional consent); *Virginia*, 148 U.S. at 525 (finding Congress gave implicit consent to the running of a boundary between the two States).

¹³⁰ *U.S. Steel*, 434 U.S. at 473.

¹³¹ *Id.*

¹³² *Id.* at 470 (quoting *New York v. O’Neill*, 359 U.S. 1, 6 (1959), a case upholding the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings, FLA. STAT. §§ 942.01-942.06 (1957), which forty-one states and Puerto Rico had enacted).

¹³³ *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985); see *Hollis, Unpacking the Compact Clause*, *supra* note 25, at 766 (observing that the Court articulated these four criteria “without citation”).

importantly, neither statute requires a reciprocation of the regional limitation.¹³⁴

In applying whether there has been an infringement on the “just supremacy” of federal law, courts have also examined whether the subject matter of the agreement has been preempted¹³⁵ or is wholly within the historical powers of the states.¹³⁶ Because I separately address questions of preemption under the Supremacy Clause and the dormant foreign affairs doctrine in Part III, I do not discuss these issues here.

The Supreme Court has not ruled on whether the test for interstate compacts applies to agreements between states and foreign nations. However, scholars, experts, and some lower courts believe that the Court’s interstate compact doctrine applies to agreements that states enter into with foreign governments.¹³⁷ On the assumption that this view is

¹³⁴ *Bancorp*, 472 U.S. at 175; see also *Seattle Master Builders Ass’n v. Pac. Nw. Elec.*, 786 F.2d 1359, 1363 (9th Cir. 1986) (“Even if all these indicia of compacts are present, the only interstate agreements which fall within the scope of the compact clause are those ‘tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.’” (quoting *Cuyler v. Adams*, 449 U.S. 433, 440 (1981))).

¹³⁵ See, e.g., *Abrams v. Trans World Airlines*, 728 F. Supp. 162, 182–83 (S.D.N.Y. 1989) (finding that because Congress had not preempted state regulation of airline advertising, “coordinated state action poses no threat to federal supremacy and therefore does not violate the Compact Clause”), *dismissed on different grounds*, *Pan Am. World Airways v. Abrams*, 764 F. Supp. 864 (S.D.N.Y. 1991). But see *U.S. Steel*, 434 U.S. at 476–77 (finding that the facial validity of the Multistate Tax Compact was not implicated by any alleged contravention of foreign policy). In the ongoing litigation over the constitutionality of the California-Quebec Cap-and-Trade Agreement, the federal government raises preemption-like arguments in its motion for summary judgment on the Compact Clause. See Plaintiff United States of America’s Notice of Motion, Motion for Summary Judgment, and Brief in Support Thereof at 10, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Dec. 11, 2019), ECF No. 12 (arguing that the California-Quebec Cap-and-Trade Agreement conflicts with existing national law because, “[b]eing ratified by the President with the advice and consent of the Senate, the UNFCCC is law of the land”).

¹³⁶ See, e.g., *Ghana v. Pearce*, 159 F.3d 1206, 1208 (9th Cir. 1998) (holding that the Interstate Corrections Compact, which governs the interstate transfer of state prisoners, is “a purely local concern and there is no federal interest absent some constitutional violation in the treatment of these prisoners”); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (holding that the Interstate Compact on Placement of Children did not require Congressional consent because “[it] focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states”).

¹³⁷ See, e.g., GLENNON & SLOANE, *supra* note 8, at 282 (arguing that the interstate compact clause applies to international state agreements); Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 766–67 (noting that “the U.S. Department of State, at least one state court, the Restatement (Third) of the Foreign Relations Law, and most scholars have all assumed that the Court’s interstate compact doctrine does apply” to agreements between states and foreign governments); Sloss, *supra* note 16, at 522–24 (noting that while the Supreme Court

correct,¹³⁸ in the next Part, I apply the functional test and the classic indicia of a compact that the Supreme Court has articulated to four different examples of state and local action on climate change. At the same time, the following analysis challenges the prevailing view that nonbinding MOUs present few concerns and considers strong arguments for returning to a literal interpretation of the Compact Clause in the foreign context. Nevertheless, I ultimately conclude that the cross-border climate agreements would survive the interstate compact test. At a pragmatic level, if these agreements were struck down, a whole host of other subnational activity would also be called into question.

B. Subnational Climate Analysis

1. Transnational networks: Under2MOU

One of the most prominent transnational networks of subnational governments is the Under2 Coalition. Each state, local or regional government participating in the Under2 Coalition signs and endorses a memorandum of understanding (MOU), which sets forth a number of actions that the subnational governments “agree to” or “will” do with respect to climate change action. For example, the Parties “agree to share information and experience” and they “agree to collaborate” on a wide variety of activities, including methods for reducing emissions and pollutants, scientific assessments, communications, promoting adaptation and resilience, and advancing climate targets. The Parties “will” share best practices and “will” work together. Taken together, these provisions describe an overarching plan to cooperate, but the agreement “does not prescribe a specific path” forward because it “recogniz[es]

has not heard a case on foreign state compacts since 1840, there is good reason to think they would do so under the Compact Clause). In the California-Quebec Cap-and-Trade litigation, the Eastern District of California also applied the domestic interstate compact clause test to cross-border agreement and observed the following:

Other courts to consider agreements between foreign governments and states have applied the tests from *Virginia* and *Northeast Bancorp*. See, e.g., *McHenry v. Brady*, 163 N.W. 540, 545–47 (N.D. 1917) (finding drainage agreement between North Dakota and Monitoba [sic] did not implicate the Compact Clause under *Virginia*); *In re Manuel P.*, 215 Cal. App. 3d 48, 66–69 (4th Dist. 1989) (finding program used to return nonresident minor aliens to Mexico was not an Article I compact between California and Mexico under *Northeast Bancorp* and did not encroach on federal supremacy in violation of *Virginia*).

United States v. California, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663, at *11 n.13 (E.D. Cal. Mar. 12, 2020) (emphasis omitted).

¹³⁸ If this view is correct, then it could also be understood as illustrating the “normalization” concept discussed below in Part III.C.

that each party has unique challenges and opportunities.” The MOU also explicitly states that it is “neither a contract nor a treaty.”¹³⁹

Does the Under2 MOU violate the functional test of the Compact Clause by increasing the power of the states in a way that interferes with the just supremacy of the United States?¹⁴⁰ Applied literally, the answer could be yes because through this type of coordination and collaboration, a state does become more politically powerful and better positioned to take a stand on climate change, which may be at odds with that of the national government. However, the agreement has no legally binding language and does not purport to give a subnational government any additional power or authority. In addition, this agreement does not have the “classic indicia of a compact” because it does not establish a joint organization, does not condition action by the states on other actors, and does not impose constraints on laws.¹⁴¹ Rather, the MOU is intended to inspire policy action and does not impose penalties for non-compliance.

Assuming that the Compact Clause analysis is the same for foreign cases as in the interstate context and that no affirmative steps have been taken to prevent or preempt this type of activity, then a transnational agreement like the Under2 MOU would not violate the Constitution.

2. Domestic coalitions: U.S. Climate Alliance

An interesting example of a domestic coalition created specifically in opposition to President Trump’s repudiation of the Paris Agreement is the U.S. Climate Alliance, “a bipartisan coalition of governors committed to reducing greenhouse gas emissions consistent with the goals of the Paris Agreement.”¹⁴² As of this writing, it includes twenty-four states plus Puerto Rico.¹⁴³ In joining the Alliance, the states make several commitments, including to “[i]mplement policies that advance the goals of the Paris Agreement, aiming to reduce greenhouse gas emissions by at least 26-28 percent below 2005 levels by 2025” and to “[t]rack and report progress to the global community in appropriate settings, including when the world convenes to take

¹³⁹ GLOBAL CLIMATE LEADERSHIP, MEMORANDUM OF UNDERSTANDING (MOU) ¶ IV.D (n.d.), <https://www.theclimategroup.org/sites/default/files/under2-mou-with-addendum-english-a4.pdf> [<https://perma.cc/2KDY-PWF2>] (last accessed Apr. 19, 2020). The Under2 Coalition’s website also explicitly states that, “[a]lthough not legally binding, the Under2 MOU demonstrates a clear and lasting commitment from signatories to reduce emissions in the decades to come.” *The Under2 MOU*, UNDER2, <https://www.under2coalition.org/under2-mou> [<https://perma.cc/PTW5-439M>] (last visited June 1, 2020).

¹⁴⁰ *U.S. Steel*, 434 U.S. at 467–68; *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

¹⁴¹ *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

¹⁴² *Alliance Principles*, *supra* note 56.

¹⁴³ *Id.*

stock of the Paris Agreement.”¹⁴⁴ The states do not formally sign an agreement. Rather, the Alliance helps to coordinate and publicize their activities.

The U.S. Climate Alliance is clearly seeking to assert a form of political power that is designed to serve as a counterweight to the national government’s repudiation of the Paris Agreement. As the earlier discussion of norm sustaining activities suggests, this type of domestic coalition potentially enables U.S. states to influence the success of the Paris Agreement by demonstrating to other nations that a large portion of the country is making progress towards the original U.S. targets. The very name of this coalition seems at odds with the clear constitutional prohibition against a state entering into an “Alliance.”¹⁴⁵

However, it is unlikely that the Supreme Court would ascribe particular meaning to the name of the coalition, given that it has acknowledged that the exact meaning of the terms used in these constitutional clauses has been lost to history.¹⁴⁶ Moreover, despite this potential for international influence, the power of the U.S. Climate Alliance resonates more in politics and not in terms of legal authority. Without a joint organization or binding rules, the U.S. Climate Alliance also does not have the classic indicia of a compact. Unless there is an affirmative action by federal government to preempt such action, it is improbable that this activity would be held to interfere with the just supremacy of the federal government.

3. MOU between California and China

One prominent type of climate cooperation takes the form of bilateral memoranda of understanding. To illustrate one example, in 2018, California signed a MOU with the Chinese Ministry of Ecology and Environment that outlines various areas on which the parties “agree to cooperate.”¹⁴⁷ These areas of cooperation include activities to mitigate carbon emissions, to enhance air pollution control, to implement market-based instruments, and to increase the usage of electrified transportation, to name a few.¹⁴⁸ The MOU further explains that cooperation between the parties can take many forms, including sharing information and experiences, exchange visits, joint organization of seminars, and other similar activities.¹⁴⁹ Through the MOU, the parties further agree to inform and consult one another on a regular basis and to designate a point for future

¹⁴⁴ *Id.*

¹⁴⁵ U.S. CONST. art. I, §10, cl. 1.

¹⁴⁶ U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460–64 (1978); *Virginia v. Tennessee*, 148 U.S. 503, 519–20 (1893). See Part II.A for further discussion.

¹⁴⁷ California-China MOU, *supra* note 68, art. 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* art. 2.

coordination.¹⁵⁰ The MOU, which lasts for two years, explicitly states that it “does not constitute or create any legally binding or enforceable rights or obligations, expressed or implied.”¹⁵¹

Assuming that the interstate compact clause functional test applies to this agreement with a foreign government, then the analysis of this agreement between California and the Chinese Ministry is almost identical to the prior examples. There can be little doubt that California entered into this agreement as a way to reinforce its subnational leadership on climate change in the absence of national leadership.¹⁵² As former Governor of California Jerry Brown said after a meeting with President Xi Jinping of China in 2017, “California’s leading, China’s leading It’s true I didn’t come to Washington, I came to Beijing.”¹⁵³ Such bilateral agreements surely contribute to California’s role as a norm sustainer of international climate law. At first glance, it also seems to increase the political power of the state in a way that arguably could “encroach upon or interfere with the just supremacy of the United States.”¹⁵⁴

However, unless the federal government affirmatively takes steps to prevent or preempt this activity,¹⁵⁵ it is unlikely that this nonbinding agreement would be interpreted to be an infringement on the “just supremacy” of federal law.¹⁵⁶ The bilateral agreement does not purport to give California any authority that it cannot already exercise. There is no joint organization or other classic indicia of a compact.¹⁵⁷ As an explicitly nonbinding agreement, the legal power of California is not enhanced as compared to the national government.

¹⁵⁰ *Id.* art. 3.

¹⁵¹ *Id.* art. 4.

¹⁵² See Associated Press, *supra* note 65 (suggesting that Governor Brown’s decision to go to Beijing was motivated by a desire to “fill the gap left by the federal [government]”).

¹⁵³ Orville Schell & David Hochschild, Opinion, *How California and China Are Collaborating to Fight Climate Change*, L.A. TIMES (Sept. 9, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-schell-hochschild-climate-summit-brown-china-20180909-story.html> [<https://perma.cc/TR7S-675W>].

¹⁵⁴ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 467–68 (1978); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

¹⁵⁵ As will be discussed in Part III, state and local action can be preempted by congressional and/or executive branch action under certain circumstances. As this discussion has already established, Congress has not exercised its authority under the Compact Clause to regulate these kinds of cross-border agreements.

¹⁵⁶ *U.S. Steel*, 434 U.S. at 467–68; *Virginia*, 148 U.S. at 519.

¹⁵⁷ See *Ne. Bancorp, Inc. v. Bd. Of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985) (discussing the criteria which define a compact). See also Part II.A for further discussion regarding the functional test to determine if a state agreement violates the Compact Clause or Treaty Clause.

4. Cap-and-trade agreement between California and Quebec

The Cap-and-Trade Agreement between California and Quebec has been repeatedly identified as the most constitutionally vulnerable of all its programs.¹⁵⁸ However, these prior analyses focused on the original 2013 version of the agreement; the more recent 2017 version is even better positioned to withstand judicial scrutiny, as I discuss below. In fact, as this Article was being finalized for publication, the Eastern District of California affirmed the constitutionality of this agreement under the Compact Clause and the Treaty Clause.¹⁵⁹

As described earlier in Part I.B, regulated entities that are subject to a greenhouse gas “cap” are able to “trade” their allocated emission allowances. This type of emissions trading is a form of market-based environmental regulation that enables compliance at the lowest possible cost.¹⁶⁰ The

¹⁵⁸ See Cullenward, *supra* note 16, at 20 (stating that the cap-and-trade agreement is “the most vulnerable component of the state’s policy portfolio”); Sloss, *supra* note 16, at 508 (declaring that unlike “[m]ost of the 54 international agreements posted on the California government website,” the cap-and-trade program “raise[s] significant constitutional issues under the Compact Clause”); Wright, *supra* note 16, at 10,491 (arguing that the binding language in the cap-and-trade program is uniquely problematic for purposes of surviving judicial review). California’s cap-and-trade program has also survived other legal challenges. See, e.g., Cal. Chamber of Comm. v. Nat’l Ass’n of Manuf., 216 Cal. Rptr. 3d 694 (Ct. App. 2017), *order denying pet. for review*, S241948 (Cal. June 28, 2017) (holding that regulations did not exceed statutory authority); Ass’n of Irrigated Residents v. State Air Res. Bd., 206 Cal. App. 1487, 1489 (Ct. App. 2012) (holding that appropriate procedural requirements with respect to environmental justice concerns were not followed).

¹⁵⁹ United States v. California, No. 2:19-cv-02142 WBS EFB, 2020 WL 1182663 (E.D. Cal. Mar. 12, 2020). The analysis in this Article is largely consistent with the district court’s opinion. However, given that this Article was already in the final stages of the publication process, a thorough discussion of the court’s analysis was not possible.

¹⁶⁰ Although it is beyond the scope of this Article to address, it is important to note that emissions trading can raise serious distributive justice concerns. Actions to reduce greenhouse gases usually have other environmental and health co-benefits. For example, shutting down a coal plant not only reduces the amount of carbon dioxide in the air. It also improves the overall air quality. However, a factory located in a minority community may decide that it is less expensive to purchase emissions allowances than to comply with the emissions cap. As a result, cap-and-trade programs can exacerbate environmental justice and equity concerns by exposing low-income and minority communities to disproportionately greater environmental health risks. See MICHAEL A. MEHLING, GILBERT E. METCALF & ROBERT N. STAVINS, HARV. PROJECT ON CLIMATE AGREEMENTS, LINKING HETEROGENEOUS CLIMATE POLICIES (CONSISTENT WITH THE PARIS AGREEMENT) 4 (2017), <https://www.belfercenter.org/sites/default/files/files/publication/mehling-metcalf-stavins-final171019-1020.pdf> [<https://perma.cc/JA79-7JL9>] (explaining how emissions trading minimizes compliance costs for carbon caps); see also Cullenward, *supra* note 16, at 11. Internationally, market mechanisms, such as emissions trading, have also faced resistance

California-Quebec Cap-and-Trade Agreement is premised on the mutual recognition of reciprocal legislation that was separately enacted in the two jurisdictions. California's comprehensive cap-and-trade program is a result of its 2006 Global Warming Solutions Act, which required that the state reduce emissions back to 1990 levels by 2020.¹⁶¹ By executive order, California now requires an eighty percent reduction of greenhouse gases from 1990 levels by 2050.¹⁶² The cap-and-trade system creates greenhouse gas allowances and offset credits, which are given to qualified projects that remove carbon dioxide from the atmosphere.¹⁶³ Quebec has enacted a similar regulatory program.¹⁶⁴

California was able to enter into an agreement with Quebec because California's cap-and-trade regulation expressly permits linkage with emissions trading programs in other jurisdictions.¹⁶⁵ Linkage expands the available market and thereby enables emissions reductions to take place in the most cost-effective manner.¹⁶⁶ Creating a linked market also helps to prevent leakage by discouraging firms from shifting production to jurisdictions with fewer restrictions.¹⁶⁷ This, in turn, can enhance the political will needed to address collective active problems and provide opportunities to share administrative procedures and best practices.¹⁶⁸ Thus, the Cap-and-

because they have been perceived as a way for rich countries to buy their way out of making emissions reductions. BODANSKY, *supra* note 83, at 152.

¹⁶¹ California Cap on Greenhouse Gas Emissions and Market-based Compliance Mechanisms, CAL. CODE REGS., tit. 17, §§ 95800-96023 (2020); California Global Warming Solutions Act of 2006, 2006 Cal. Stat. 3419 (codified at CAL. HEALTH & SAFETY CODE § 38500 (West 2020)). *See generally* CLIMATE CHANGE SCOPING PLAN, *supra* note 100, at ES-1; CAL. AIR RES. BD., FACTS ABOUT THE LINKED CAP-AND-TRADE PROGRAMS (2017), https://www.arb.ca.gov/cc/capandtrade/linkage/linkage_fact_sheet.pdf [<https://perma.cc/UF4C-E779>] (discussing relevant emissions targets).

¹⁶² CLIMATE CHANGE PROPOSED SCOPING PLAN, *supra* note 100, at ES-2.

¹⁶³ *See* CAL. CODE REGS., tit. 17, § 95820 (2020) (creating greenhouse gas emissions allowances and allowing the Air Resources Board to issue offset credits).

¹⁶⁴ The province of Quebec in Canada also has a legislative requirement to reduce emissions to twenty percent below 1990 levels. Concernant l'adoption de la cible de réduction des émissions de gaz à effet de serre du Québec à l'horizon 2020, G.O.Q. 2009, pt. 2, No. 1187-2009, at 5871(Can.). Quebec then established a cap-and-trade program in 2011. *See generally* Environment Quality Act, C.Q.L.R., c. Q-2, r. 46.1 (Can.) (setting "rules for the operation of the cap-and-trade system"). For more detailed context, see GOV'T OF QUEBEC, QUEBEC CAP-AND-TRADE SYSTEM FOR GREENHOUSE GAS EMISSION ALLOWANCES (C&T): TECHNICAL OVERVIEW (2018), <http://www.environnement.gouv.qc.ca/changements/carbone/documents-spede/technical-overview.pdf> [<https://perma.cc/FVH7-GBEH>].

¹⁶⁵ *See generally* CAL. CODE REGS. Tit. 17, §§ 95800-96023 (2020) (establishing the California cap-and-trade regulations, including express permission for linkage).

¹⁶⁶ MEHLING, METCALF & STAVINS, *supra* note 160, at 3.

¹⁶⁷ CLIMATE CHANGE PROPOSED SCOPING PLAN, *supra* note 100, at 31.

¹⁶⁸ Wright, *supra* note 16, at 10484.

Trade Agreement itself does not set emissions standards or regulate greenhouse gases. Rather, it links two separate regulatory systems, which in turn facilitates compliance and reduces costs by giving regulated entities access to a larger market of allowances.

With the goal of linking cap-and-trade programs across several states and Canadian provinces, California helped to develop a regional greenhouse gas emissions reduction platform called the Western Climate Initiative (WCI).¹⁶⁹ At the height of interest in 2010, seven U.S. states and four Canadian provinces were formal partners through WCI, with an additional fifteen parties in the U.S. and Mexico acting as observers.¹⁷⁰ Despite early interest from many states and provinces, only California and Quebec successfully developed cap-and-trade programs.¹⁷¹

The California and Quebec cap-and-trade programs were developed collaboratively in order to facilitate harmonization of processes and procedures, to enable cross-jurisdictional transfers, and to conduct joint auctions of emission allowances.¹⁷² California began its own in-state emissions trading program in 2013. Then, after a determination by Governor Jerry Brown on April 8, 2013, that the Quebec program met the requirements for linking with the California program,¹⁷³ the two jurisdictions formally linked their cap-and-trade programs on January 1, 2014.¹⁷⁴ The terms of the agreement were re-negotiated in 2017, and for a brief period of time, Ontario was also a party to the agreement.¹⁷⁵

The Cap-and-Trade Agreement between California and Quebec contains many “shall” clauses.¹⁷⁶ Most of these clauses relate to procedural matters, such as requiring the parties to “consult each other regularly and constructively”¹⁷⁷ and to “resolve differences by using and building on

¹⁶⁹ See generally *Frequently Asked Questions*, W. CLIMATE INITIATIVE, <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/faq> [<https://perma.cc/94Y2-NMZH>] (last visited Aug 2, 2018) (providing background information on the Western Climate Initiative); CLIMATE CHANGE PROPOSED SCOPING PLAN, *supra* note 100, at 30 app. D (discussing the Western Climate Initiative).

¹⁷⁰ Cullenward, *supra* note 16, at 8–9; CLIMATE CHANGE PROPOSED SCOPING PLAN, *supra* note 100, at ES-8.

¹⁷¹ For a brief period of time, the province of Ontario had also linked to the California-Quebec cap-and-trade system. However, due to a change in provincial leadership in 2018, Ontario subsequently withdrew. See Vaillancourt, Rosengarten & Lee-Andersen, *supra* note 72.

¹⁷² CAL. AIR RES. BD., *supra* note 161, at 1–2; Wright, *supra* note 16, at 10484.

¹⁷³ CAL. AIR RES. BD., *supra* note 161, at 1.

¹⁷⁴ 2013 Cap-and-Trade Agreement, *supra* note 69; CAL. AIR RES. BD., *supra* note 161, at 1.

¹⁷⁵ 2017 Harmonization and Integration Agreement, *supra* note 70.

¹⁷⁶ This was true of both the 2013 and 2017 agreements. See Wright, *supra* note 16, at 10,490–91 (pointing out that the word “shall” is used over thirty times in the text of the 2013 Cap-and-Trade Agreement).

¹⁷⁷ 2017 Harmonization and Integration Agreement, *supra* note 70, art. 3.

established working relationships.”¹⁷⁸ Rather than require specific substantive changes to either party’s program, the parties have procedural duties “to examine their respective regulations for the reporting of greenhouse gas emissions and for the cap-and-trade program in order to promote continued harmonization and integration of the Parties’ programs.”¹⁷⁹ The parties are also required to discuss potential changes and additions.¹⁸⁰ The agreement expressly states that it “does not modify any existing statutes and regulations.”¹⁸¹

These “shall” clauses have created concern for some scholars. For example, one observes that “in the U.S. context, where a cross-border agreement may be treated to more scrutiny than an interstate agreement, it is hard to see how these would not be seen by a court as *binding* terms that impinge government actions in a way tantamount to increasing state power and potentially interfering with U.S. supremacy.”¹⁸² If a stricter standard applies in the foreign context, then these provisions might be problematic, as I discuss below in Part II.C. However, if the interstate compact doctrine applies, then this agreement does not appear to cross the constitutional line.

Despite the number of “shall clauses,” California arguably does “retain[] complete freedom to adopt or reject the rules and regulations”¹⁸³ imposed by the agreement. The Cap-and-Trade Agreement expressly states that it does not limit either party’s “sovereign right and authority to adopt,” change, or repeal any of its regulations or enabling legislation.¹⁸⁴ Rather, the point of the agreement is to ensure that if changes need to be made, the parties work together so that each jurisdiction makes the same kinds of modifications and the regulations remain harmonized. This kind of reciprocal legislation does not seem so dissimilar from the reciprocal banking legislation sanctioned in *Northeast Bancorp*.¹⁸⁵ Moreover, the Cap-and-Trade

¹⁷⁸ *Id.* art. 20.

¹⁷⁹ *Id.* art. 4.

¹⁸⁰ *Id.* arts. 4, 5.

¹⁸¹ *Id.* art. 14.

¹⁸² Wright, *supra* note 16, at 10,491; *see also* Welton, *supra* note 16.

¹⁸³ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 452, 473 (1978).

¹⁸⁴ 2017 Harmonization and Integration Agreement, *supra* note 70, pmb1.

¹⁸⁵ *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175–76 (1985).

In *Northeast Bancorp*, several states passed “regionally restrictive statutes . . . to allow the growth of regional multistate bank holding companies which can compete with the established banking giants in New York, California, Illinois, and Texas.” *Id.* at 165. For example, Massachusetts passed a law that

specifically provides that an out-of-state bank holding company with its principal place of business in one of the other New England States . . . which is not directly or indirectly controlled by another corporation with its principal place of business located outside of New England, may establish

Agreement arguably imposes even fewer restrictions on the parties than the Multistate Tax Compact at issue in *U.S. Steel*, which the Supreme Court held did not require congressional consent under the Compact Clause.¹⁸⁶

Another important question to consider is whether California “is free to withdraw at any time.”¹⁸⁷ The 2017 Cap-and-Trade Agreement states that “[a] Party that intends to withdraw from this Agreement shall endeavour to give 12 months notice of intent to withdraw to the other Parties.”¹⁸⁸ Notably, this provision makes the agreement even more likely to withstand constitutional scrutiny than the 2013 version of the agreement, which required that “[a] Party may withdraw from this Agreement by giving 12 months prior written notice to the other Party.”¹⁸⁹ Some scholars studying the 2013 Cap-and-Trade Agreement had found this provision to be potentially problematic because the 12 month notice provision would arguably prevent a party from withdrawing “at any time.”¹⁹⁰ But, if the 2013 Agreement was interpreted in line with ordinary contract principles, then it would not be hard to imagine a court implying a reasonableness standard into the “at any time” phrase. In fact, the withdrawal clause itself explained that such advance notice is desirable due to the nature of the compliance period within each jurisdiction.¹⁹¹ Alternatively, a court could have severed that particular provision and maintained the integrity of the rest of the agreement. However, given that the newer 2017 Cap-and-Trade Agreement only requires that the

or acquire a Massachusetts-based bank or bank holding company, provided that the other New England State accords equivalent reciprocal privileges to Massachusetts banking organizations.

Id. at 164. The Supreme Court upheld the Massachusetts statute, and a similar one in Connecticut, finding that the arrangement lacked the “classic indicia of a compact.” *Id.* at 175. See Part II.A for further discussion.

¹⁸⁶ The Multistate Tax Compact created a Commission with the authority to study and recommend changes to state tax laws to promote uniformity. If a state adopted certain provisions of the Compact into state law, then the Commission’s regulations were not merely advisory but were binding. *U.S. Steel*, 434 U.S. at 457. The Commission’s power included the authority to conduct audits, and several transnational corporations sued after being threatened with audits by the Commission. *Id.* at 458 n.7. In its motion for summary judgment, the federal government also argued that the California-Quebec Cap-and-Trade Agreement is a compact requiring congressional approval in part because billions of dollars are at stake. Plaintiff United States of America’s Statement of Undisputed Facts in Support of Motion for Summary Judgment ¶ 9, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Oct. 23, 2019). This point seems irrelevant; enormous sums of money were also at stake in *U.S. Steel*, yet this issue did not factor into the court’s analysis. See *U.S. Steel*, 434 U.S. at 459–78.

¹⁸⁷ *U.S. Steel*, 434 U.S. at 473.

¹⁸⁸ 2017 Harmonization and Integration Agreement, *supra* note 70, art. 17.

¹⁸⁹ 2013 Cap-and-Trade Agreement, *supra* note 69, art. 16.

¹⁹⁰ Sloss, *supra* note 16, at 524.

¹⁹¹ 2013 Cap-and-Trade Agreement, *supra* note 69, art. 16.

parties “endeavour to give 12 months notice of intent to withdraw,”¹⁹² then California can in fact withdraw “at any time.”¹⁹³

The Cap-and-Trade Agreement does not create a joint commission, which is one of the “classic indicia” of a compact, at least in the interstate context.¹⁹⁴ The emissions trading program is administered by Western Climate Initiative, Inc. (WCI, Inc.), an independent non-profit group that was created to provide administrative and technical support for the harmonization of cap-and-trade programs in different states and provinces.¹⁹⁵ WCI, Inc. has developed a compliance tracking system that enables the market of tradeable allowances to work.¹⁹⁶ California has hired WCI, Inc. as a contractor since 2012.¹⁹⁷ This contractor relationship seems markedly different than the kinds of joint commissions that have been challenged under the Compact Clause. However, even if the WCI can be characterized as a joint commission, this factor alone does not mean that the agreement is a compact requiring congressional consent. In *U.S. Steel*, the U.S. Supreme Court upheld “a multilateral agreement creating an active administrative body with extensive powers delegated to it by the States, but lacking congressional consent.”¹⁹⁸

The Cap-and-Trade Agreement between California and Quebec is unique, but it is not that different from other examples of cross-border harmonization between the United States and Canada.¹⁹⁹ A comparative look

¹⁹² 2017 Harmonization and Integration Agreement, *supra* note 70, art. 17.

¹⁹³ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978).

¹⁹⁴ *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985). See Part II.A for further discussion.

¹⁹⁵ 2013 Cap-and-Trade Agreement, *supra* note 69, pmb., art. 11.; SEC’Y OF STATE, STATE OF DEL., CERTIFICATE OF INCORPORATION OF WESTERN CLIMATE INITIATIVE, INC. §3 (2011), http://www.wci-inc.org/docs/Certificate_of_Incorporation.pdf [<https://perma.cc/5G B9-AYR6>].

¹⁹⁶ *Compliance Instrument Tracking System Service (CITSS) Registration and Guidance*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/capandtrade/markettrackingsystem/markettrackingsystem.htm> (last visited Sept. 20, 2019) [<https://perm a.cc/RZ3D-2G56>].

¹⁹⁷ California has entered into consecutive two-year contracts with WCI, Inc. since 2012. *Id.*; STATE OF CAL., STANDARD AGREEMENT BETWEEN CALIFORNIA AIR RESOURCES BOARD (CARB OR STATE) AND WESTERN CLIMATE INITIATIVE, INC. (WCI, INC. OR CONTRACTOR), AGREEMENT NUMBER 17ISD011 (2018), http://www.wci-inc.org/docs/WCI%20Inc_California%20Funding%20Agreement_2018-2019.pdf [<https://perma.cc/82FY-CYF5>].

¹⁹⁸ *U.S. Steel*, 434 U.S. at 471; *see also* *Star Sci., Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (determining that the Master Settlement Agreement resolving claims against tobacco companies did not require congressional consent under the Compact Clause even though it created an administrative body to determine compliance questions); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1197–98 (C.D. Cal. 2000) (upholding the Master Settlement Agreement against a Compact Clause challenge brought by tobacco companies).

¹⁹⁹ In the ongoing litigation over the Cap-and-Trade Agreement, the Trump Administration argued in part that the linkage agreement between California and Quebec violates the Compact Clause because the two jurisdictions do not share a border. Motion for Summary

at cooperation between states and provinces in two different examples—one involving the Great Lakes and the other involving motor vehicle regulation—offer some important insights.

a. Analogy: Cross-border cooperation on the Great Lakes

The Great Lakes offer a useful analogy to the Cap-and-Trade Agreement. In 2000, Congress adopted amendments to the Water Resources Development Act of 1986, which encouraged the Great Lakes states to work with their Canadian counterparts to address water management.²⁰⁰ As a result, the eight U.S. states and two Canadian provinces bordering the Great Lakes entered into the Great Lakes-St. Lawrence River Basin Sustainable Water

Judgment at 12, 20, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Oct. 23, 2019). Although the seminal case, *Virginia v. Tennessee*, involved states that shared a border, the Supreme Court did not include geographic proximity as a requirement its functional test under the Compact Clause. 148 U.S. 503, 519–20 (1893). Indeed, the Multistate Tax Commission includes states from all across the United States. *See Member States*, MULTISTATE TAX COMM’N, <http://www.mtc.gov/The-Commission/Member-States> [<https://perma.cc/YGF2-WHKZ>] (last visited Feb. 7, 2020) (breaking down state affiliations by “Compact Members,” “Sovereignty Members,” and “Associate & Project Members”). Indeed, a requirement of geographic contiguity would necessarily mean that a state like Hawaii could never enter into an agreement with other jurisdictions without first seeking congressional approval. Courts have also upheld other interstate compacts that did not have congressional consent but that did include noncontiguous states. *See Breest v. Moran*, 571 F. Supp. 343, 345 (D.R.I. 1983) (upholding the New England Interstate Corrections Compact); *Gray v. N.D. Game & Fish Dep’t*, 706 N.W.2d 614, 622 (N.D. 2005) (upholding the Interstate Wildlife Violator Compact).

²⁰⁰ As the statute reads:

It is therefore declared to be the purpose and policy of the Congress in this section— . . . (2) to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.

Water Resources Development Act, 42 U.S.C. § 1962d-20(b)(2) (2018). In a related Senate hearing, Senator Russ Feingold said:

In 1998, Ontario’s issuance of a permit to ship water from Lake Superior to Asia served as a wake-up call that more was needed to protect the Great Lakes. Several proposals emerged in Congress and, ultimately in 2000, Congress directed the Great Lakes states to jointly develop, with the Canadian provinces, a common conservation standard for making decisions about the withdrawal and use of water from the Great Lakes Basin.

A Resolution Consenting to and Approving the Great Lakes–St. Lawrence River Basin Water Resources Compact: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 2 (2008) (statement of Sen. Russ Feingold) [hereinafter *Great Lakes–St. Lawrence River Basin Hearing*].

Resources Agreement on December 13, 2005 (“Great Lakes Agreement”). On the same day, the eight U.S. states also entered into Great Lakes-St. Lawrence River Basin Water Resources Compact, which was formally approved by Congress in 2008 (“Great Lakes Compact”).²⁰¹

Congress only consented to the interstate Great Lakes Compact and not to the cross-border Great Lakes Agreement made between U.S. states and Canadian provinces.²⁰² Why? This seems odd considering that the Agreement appears to impose binding obligations by requiring the parties to conform their water diversion policies to its terms.²⁰³ In structuring a domestic Compact with a cross-border Agreement with nearly identical terms, the parties clearly sought to avoid the situation that occurred in 1968, where Congress only gave partial consent to the Great Lakes Basin Compact.²⁰⁴ In 2008, Congress could have passed a law prohibiting the cross-border Agreement or withheld consent to the domestic Compact unless the Agreement with the Canadian provinces was rescinded. Neither of these actions took place.

The argument must be that the Great Lakes Agreement does not enhance the participating states’ power in a way that encroaches upon or

²⁰¹ See Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008); see also *Great Lakes–St. Lawrence River Basin Hearing*, *supra* note 200, at 15 (statement of Cameron Davis, President, All. for the Great Lakes, Chi., Ill.) (“The Compact represent[ed] the first time in history that all jurisdictions—the states and the two Canadian provinces through a mirror ‘Agreement’—[would have] ‘rules of the game’ for managing the Great Lakes.”).

²⁰² It could be argued that the Water Resources Development Act created a form of advance congressional consent, which negated the need for Congress to consent to the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement. See *Cuyler v. Adams*, 449 U.S. 433, 441 (1981) (“Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 523 (2d ed. 1988) (“*Cuyler* thus stands for the proposition that, if Congress enacts some kind of consent legislation, the Court will defer to Congress’ political judgment that the compact is good for the nation and simply ignore the *Multistate Tax Commission* test.”). If this is true, then the Great Lakes analogy seems rather different than the California-Quebec Cap-and-Trade Agreement. However, if advance congressional consent was sufficient for the cross-border Agreement, then why would the states have sought explicit congressional consent for the inter-state Compact? In other words, the Water Resources Development Act was not interpreted by Congress as creating sufficient consent; otherwise, there would have been no need for explicit consent to the Compact in 2008. Thus, I believe that the Great Lakes compact still offers a useful analogy to the California-Quebec agreement.

²⁰³ Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement art. 200, Dec. 13, 2005, https://gsgp.org/media/1332/great_lakes-st_lawrence_river_basin_sustainable_water_resources_agreement.pdf [<https://perma.cc/G9FM-4KWV>] (“The Parties shall adopt and implement Measures to prohibit New or Increased Diversions [of water from the Great Lakes], except as provided for in this Agreement.”); Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 758 n.69.

²⁰⁴ See Part II.A.

interferes with federal supremacy because the Great Lakes Compact and the Great Lakes Agreement have consistent terms.²⁰⁵ In fact, a lack of state power enhancement has led the Agreement to be described as “nonbinding,”²⁰⁶ even though it has many of the same characteristics as the Cap-and-Trade Agreement between California and Quebec. I suggest that both agreements simply ensure that domestic laws and regulations in the consenting U.S. states are consistent with those of their consenting Canadian counterparts. Similarly, the “shall” clauses of the Cap-and-Trade Agreement essentially ensure that California and Quebec have similar regulations, each of which apply only in their respective jurisdictions.

The cross-border Great Lakes Agreement created a regional body—one of the classic indicia of a compact. However, this regional body is only able to make recommendations to the interstate Council, which theoretically allows the states the freedom to reject those rules.²⁰⁷ In contrast, the interstate Great Lakes Compact created a Council to regulate water diversions,²⁰⁸ but because this compact has congressional approval, the states do not need to retain the freedom to adopt or reject the rules of the Council.²⁰⁹

²⁰⁵ See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (discussing the prohibition on interstate agreements that increase state political power and thus “encroach on or interfere with the just supremacy of the United States”); see also *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 467–68 (1978) (outlining examples of interstate agreements that do not interfere with the supremacy of the United States). See Part II.A for further discussion of the restrictions established by the Compact Clause and the Treaty Clause.

²⁰⁶ As noted in the Senate hearing:

[I]ncluding the Canadian provinces in the Great Lakes Compact could bring political and legal challenges. In an attempt to meet the goal of state-provincial cooperation without running afoul of constitutional treaty limitations, the Council of Great Lakes Governors proposed a companion nonbinding good faith agreement that includes the provinces of Ontario and Quebec

See *Great Lakes–St. Lawrence River Basin Hearing*, *supra* note 200, at 61, 69 (statement of Noah D. Hall, Great Lakes Env’tl. Law Ctr., Wayne State Univ. Law School).

²⁰⁷ *Id.* at 70 (“The Regional Body’s authority could be fairly described as procedural rather than substantive; and its determinations described as advisory rather than final. The Regional Body’s role includes notice, consultation, and public participation, but stops short of final decision making.”); see also *U.S. Steel*, 434 U.S. at 473 (asserting that “each State retains complete freedom to adopt or reject the rules and regulations of the commission” in support of the notion that there is no “delegation of sovereign power to the Commission”).

²⁰⁸ Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739, arts. 2–4 (2008).

²⁰⁹ *U.S. Steel*, 434 U.S. at 473 (“The test [for compatibility with the Compact Clause] is whether the Compact enhances state power *quoad* the National Government.”).

The cross-border Great Lakes Agreement also permits any party to withdraw twelve months after giving written notice to the other parties.²¹⁰ Congress knew about this Agreement because it gave its consent to the companion Compact.²¹¹ This implicitly suggests that a twelve month notice requirement would not run afoul of the requirement that a state be “free to withdraw at any time.”²¹² This further suggests that even the 2013 version of the Cap-and-Trade Agreement, which also contained a twelve month notice requirement before withdrawal, would have survived constitutional scrutiny. In many respects, the Cap-and-Trade Agreement is like the Great Lakes Agreement. Both are designed to harmonize regulatory systems across an international border and both provide the authority to withdraw and the theoretical ability to reject the rules. I use the word theoretical here because, in each case, the states and provinces have gone to great lengths to create consistent and reciprocal regulatory systems.

b. Analogy: Cross-border agreement on drivers licenses and traffic offenses

Another comparable example may be found in a reciprocal agreement concerning drivers’ licenses and traffic offenses that Quebec and New York entered into in 1988.²¹³ The goal of the agreement was to facilitate the issuing of licenses to residents of one jurisdiction from the other jurisdiction and to streamline the processes for addressing traffic violations.²¹⁴ For example, under this agreement, a person with a drivers’ license in Quebec would not

²¹⁰ Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement, *supra* note 203, at art. 707.

²¹¹ The congressional record includes references to the Agreement. See *Great Lakes–St. Lawrence River Basin Hearing*, *supra* note 200 (referencing the agreement in the Compact Senate Hearing).

²¹² *U.S. Steel*, 434 U.S. at 473.

²¹³ Highway Safety Code, C.Q.L.R., c. C-24.2, r. 16 (Can.) (“Regulation respecting the Reciprocal Agreement between the State of New York and Québec concerning Drivers’ Licences and Traffic Offenses”).

²¹⁴ *Id.* at sched. 1. At first glance, the N.Y.-Quebec agreement may seem less analogous because it involves jurisdictions that border one another. However, as I discuss, *supra* note 199, geographic proximity is not relevant to the functional test under the Compact Clause. In fact, a requirement of contiguity would necessarily discriminate against a state like Hawaii. Moreover, the fact that the N.Y.-Quebec agreement does not involve an environmental problem only underscores the fact that the California-Quebec Cap-and-Trade Agreement is not about greenhouse gas regulation but about enhancing market efficiencies and regulatory compliance.

need to re-take the drivers' license exam in New York, and vice-versa.²¹⁵ Because the laws of one state/province are sufficient to meet the standards in the other, an even exchange is possible—which is arguably similar to the reciprocity in the trading of emission allowances between California and Quebec under the Cap-and-Trade Agreement.

As the power to issue drivers' licenses and prosecute traffic violations already falls within the jurisdiction of the state of New York, it is hard to see how the Traffic Agreement increases its power at the expense of the national government. Like the Cap-and-Trade Agreement, the Traffic Agreement has several “shall” clauses that relate to reciprocal acceptance²¹⁶ and procedural matters, such as notification.²¹⁷ The Traffic Agreement permits either jurisdiction to withdraw at any time, but the withdrawal is effective ninety days after receipt of written notice.²¹⁸ The ninety days period is not long, but the agreement would still fail a strict interpretation of the “at any time” phrase unless that language is given a reasonable understanding.

Like the California-Quebec linked cap-and-trade program, the New York-Quebec drivers' licenses agreement is an example of a cross-border agreement involving reciprocal legislation that meets certain standards that are acceptable to the other jurisdiction. Both agreements seek to improve administrative efficiencies and promote regulatory compliance. The New York-Quebec agreement does not concern an environmental issue—a fact that underscores the widespread nature of these kinds of cross-border agreements. As the foregoing analysis suggests, in some ways, the global climate engagement of states and cities is not particularly unique. Even the most unusual and innovative arrangement—the linkage between California and Quebec—does not seem functionally different than other forms of regulatory harmonization between U.S. states and Canadian provinces achieved through the Great Lakes or U.S.-Quebec drivers' license agreement.²¹⁹ The fact that states have already been engaging in these kinds

²¹⁵ *Id.* at sched. 1, arts. 2.1, 2.2. Perhaps because the jurisdictions already had similar standards, the Drivers' License Agreement does not discuss the need for harmonization and conformity of regulation.

²¹⁶ Highway Safety Code, C.Q.L.R., c. C-24.2, r. 16, art. 3.3 (Que.), <http://legisquebec.gouv.qc.ca/en/pdf/cr/C-24.2,%20R.%2016.pdf> [<https://perma.cc/LX43-Q73J>].

²¹⁷ *Id.* art. 3.2.

²¹⁸ *Id.* art. 8.

²¹⁹ The Cap-and-Trade Agreement is also functionally similar to the cross-border reciprocity that exists in securities laws. The issuers of securities in Canada and the U.S. who meet certain requirements are able to issue securities in the other jurisdiction under the Multijurisdictional Disclosure System. Of course, this is a legally imperfect analogy because securities law is a creature of federal law, so it does not raise the same concerns about state involvement in foreign affairs. *See, e.g.,* Ruth O. Kuras, *Harmonization of Securities*

of activities does not resolve the constitutional questions, but it does provide important context.

C. A Different Standard for Foreign Agreements?

The foregoing analysis was premised on applying the functional test developed by the Supreme Court in cases involving interstate compacts, consistent with most expert and scholarly opinions and lower court decisions.²²⁰ However, this is not a uniform view.

Duncan Hollis argues that agreements between U.S. states and foreign governments should be treated differently than interstate agreements. He makes a compelling case that by “looking at the text, history, doctrine, functional justifications, and structural purposes of [foreign-state agreements], it becomes clear that foreign agreements warrant entirely different treatment than that accorded to interstate agreements.”²²¹ He would return to a literal reading of the compact clause and require congressional consent for all agreements that states and cities enter into with foreign governments.²²²

Hollis argues that it is wrong to dismiss agreements with foreign states as legally meaningless because they do not impose binding obligations.²²³ This argument is not without merit. As the discussion of norm sustaining in Part I.C suggests, states and cities can participate in the transnational legal process and contribute to the success of a treaty even when

Regulation Standards between Canada and the United States, 81 U. DETROIT MERCY L. REV. 465, 468 n.19 (2004) (discussing the benefits of cross-border reciprocation of securities laws between the United States and Canada). See generally U.S. Sec. & Exch. Comm’n, *Multijurisdictional Disclosure System*, in FINANCIAL REPORTING MANUAL (2013), <https://www.sec.gov/corpfin/cf-manual/topic-16> [<https://perma.cc/MP9Z-CMQG>] (discussing the securities disclosure system for cross-border transactions).

²²⁰ See *United States v. California*, No. 2:19-cv-02142-WBS-EFB, 2020 WL 1182663, at *11 n.13 (E.D. Cal. Mar. 12, 2020) (citing other district court opinions); GLENNON & SLOANE, *supra* note 8, at 282 (discussing the functional test as a matter of whether interstate compacts “interfere with federal power”); Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 766–67 (discussing the functional test for judicial review of state compacts under the Compact Clause, as opposed to the literal text of the clause); Sloss, *supra* note 16, at 522–24 (“The Court has adhered to this functional interpretation of the Compact Clause ever since [*Virginia v. Tennessee*].”).

²²¹ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 769.

²²² *Id.* at 779–83.

²²³ *Id.* at 787. As a case in point, Hollis cites to an agreement between Kansas and Cuba, where Cuba agreed to buy certain agricultural products from Kansas in exchange for lobbying efforts on behalf of the island nation. *Id.* at 788.

engaging in activities that are deemed purely political.²²⁴ Moreover, as made clear by the analysis in the prior Part, a transnational agreement like the Under2 MOU, a domestic coalition like the U.S. Climate Alliance, and a nonbinding bilateral MOU can all be said to enhance the power of the states. Each of these agreements enable states and cities to exert global influence and to act as norm sustainers of international climate law.

Congressional supervision of agreements between U.S. states and foreign nations does not necessarily mean preemption. Hollis suggests that Congress could develop a procedure for approving such agreements *en masse*, for example, if they meet certain criteria or if a certain amount of time elapses without congressional action.²²⁵ The practical challenge here is that Congress has been so rife with political discord that it is hard to fathom the legislative body developing an appropriate mechanism for such approval. Unless Congress exercises its authority to regulate such agreements, it is hard to envision the Supreme Court imposing a different test in the cross-border context than it applies interstate.

Given that Supreme Court has held that the distinctions between the terms “treaty,” “agreement,” and “compact” have been lost to history,²²⁶ the Court may be inclined to follow precedent and skirt the issue of what exactly is the difference between these terms. However, if the Supreme Court was to either determine that the Cap-and-Trade Agreement is a treaty or adopt a literal test for foreign agreements under the Compact Clause, a whole host of agreements that states and cities have entered into with foreign governments would be constitutionally suspect.

In contrast to Hollis, other scholars studying the Compact Clause argue that there should not be a presumptive need for Congressional approval of state agreements with foreign governments.²²⁷ Michael Glennon and Robert Sloane posit that in today’s globalized world, the original purpose of the Compact Clause—to prevent the diplomatic anarchy that resulted during the Articles of Confederation—seems less apt.²²⁸ Moreover, Congress has the authority to regulate agreements that states enter into with foreign governments, if it chooses.²²⁹ Whereas under the Case-Zablocki Act,

²²⁴ See Part I.B; Murthy, *supra* note 14, at 2 (“Although U.S. states and cities cannot be parties to the treaty, their actions as norm sustainers can help to ensure the treaty’s success and heighten international ambition on climate change.”).

²²⁵ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 800–01.

²²⁶ U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460–64 (1978).

²²⁷ GLENNON & SLOANE, *supra* note 8, at 282, 289 n.59.

²²⁸ *Id.* at 284–85.

²²⁹ *Id.* at 278.

Congress has a reporting mechanism for sole Executive Agreements,²³⁰ no similar repository has been developed for agreements between states and foreign governments. The onus is on Congress to take the lead.

Nevertheless, if Hollis is correct in asserting that compacts between U.S. states and foreign governments need congressional approval, then transnational climate networks, bilateral climate MOUs, and agreements promoting regulatory harmonization, such as the California-Quebec emissions trading program, would all fail constitutional scrutiny because none have received congressional consent. Only a domestic coalition, like the U.S. Climate Alliance, would survive the functional test applied in interstate contexts.

The Cap-and-Trade Agreement between California and Quebec is symbolically important because it was the first such linkage between subnational governments located in different countries.²³¹ As a practical matter, however, even if the Cap-and-Trade Agreement was struck down as a violation of the Compact Clause, a finding that California's linked program with Quebec is unconstitutional would perhaps have less impact than at first glance.

Even if the cross-border agreement with Quebec is struck down, California can continue to operate its cap-and-trade program domestically. Moreover, although California promotes its cap-and-trade system as a key feature of its "foreign policy," the bulk of emissions reductions actually occur through its regulatory program.²³² In addition, there is little probability that U.S. states will develop other cross-border linked emissions trading programs. Linkage can theoretically occur between different types of emissions reduction programs,²³³ but, in reality, linkage is most likely to occur between jurisdictions with similar political and economic systems, and thus, similar carbon markets.²³⁴ The most likely candidate for linkage with California would be other U.S. states, such as those involved with the Regional Greenhouse Gas Initiative.²³⁵ Nevertheless, any linkage scheme, even an interstate one, helps to create soft linkages between different programs, which can harmonize carbon prices and enhance market

²³⁰ *Id.* at 285. The Case-Zablocki Act of August 22, 1972 requires consultation with the Secretary of State before any international agreement may be signed or concluded on behalf of the United States. 1 U.S.C. § 112b (2018).

²³¹ Wright, *supra* note 16, at 10483; see also INTERNATIONAL EMISSIONS TRADING ASSOCIATION, QUEBEC: AN EMISSIONS TRADING CASE STUDY 3 (2015), <https://www.edf.org/sites/default/files/79quebec-case-study-may2015.pdf> [<https://perma.cc/282V-VKKH>].

²³² Cullenward, *supra* note 16, at 22; Michael Wara, *California's Energy and Climate Policy: A Full Plate, but Perhaps Not a Model Policy*, 70 BULL. ATOMIC SCIENTISTS 26, 28 (2014).

²³³ MEHLING, METCALF & STAVINS, *supra* note 160, at 5–6, 8.

²³⁴ Cullenward, *supra* note 16, at 21; Wara, *supra* note 232, at 32.

²³⁵ Cullenward, *supra* note 16, at 21; Wilson, *supra* note 16.

stability.²³⁶ This could better enable countries to achieve their targets under the Paris Agreement, which permits countries to meet their mitigation targets through carbon trading.²³⁷

Another valuable service that California provides is sharing its lessons learned with other jurisdictions. For instance, the 2018 MOU between California and the Chinese Ministry of Ecology and the Environment described above includes “activities to implement carbon emissions trading systems” as one of the areas in which the parties agree to cooperate.²³⁸

In summary, because the functional test applied in the interstate context would likely be used to analyze a cross-border agreement, the nonbinding agreements and coalitions on global climate change discussed in this Article would likely survive constitutional scrutiny.

In the next Part, I consider whether subnational global climate action could be preempted under the Supremacy Clause or the dormant foreign affairs power given that President Trump has expressly repudiated the Paris Agreement and has taken steps to withdraw the United States from the treaty.

III. PREEMPTION

A. Doctrine

Under the Supremacy Clause,²³⁹ state law can be preempted by treaties, congressional-executive agreements, and, in limited situations, by sole executive agreements or related executive actions.²⁴⁰ Despite opportunities to do so, neither Congress nor the Executive Branch, however, have explicitly preempted or purported to preempt the transnational networks, domestic coalitions, or bilateral agreements that were discussed

²³⁶ MEHLING, METCALF & STAVINS, *supra* note 160, at 5.

²³⁷ Paris Agreement, *supra* note 2, art. 6.2. *See generally* Andrei Marcu, *Governance of Carbon Markets Under Article 6 of the Paris Agreement*, in *THE PARIS AGREEMENT AND BEYOND: INTERNATIONAL CLIMATE CHANGE POLICY POST-2020*, at 47 (Robert N. Stavins & Robert C. Stowe eds., 2016) (discussing Article 6 of the Paris Agreement, which allows for carbon trading); BENITO MULLER, *ARTICLE 6: MARKET APPROACHES UNDER THE PARIS AGREEMENT* (2018) (analyzing the genesis and function of Article 6); Mehling, Metcalf, & Stavins, *supra* note 160 (discussing facilitation of linkages in Article 6).

²³⁸ California-China MOU, *supra* note 68, art. 1.

²³⁹ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁴⁰ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416–17 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372, 381 (2000); *see also* GLENNON & SLOANE, *supra* note 8, at 132, 315–16.

earlier. When Congress was considering climate change legislation around 2010, industry advocated for preemption to ensure national uniformity and avoid a patchwork of regulation across the states.²⁴¹ However, Congress did not ultimately enact any kind of national climate legislation, preemptive or otherwise.²⁴² Even California's cap-and-trade program with Quebec has not been explicitly preempted by congressional or executive action.²⁴³ The Obama-era Clean Power Plan, which required states to take action to reduce greenhouse gas emissions, had expressly permitted emissions trading between states.²⁴⁴ Under the Trump administration, the EPA repealed the Clean Power Plan and issued the Affordable Clean Energy (ACE) rule, which does not expressly permit states to engage in emissions trading.²⁴⁵ Although the EPA reported to the media that states are still permitted to adopt these strategies voluntarily on their own,²⁴⁶ the Trump administration has since sued California over its Cap-and-Trade Agreement with Quebec.

When President Trump announced his intention to withdraw the United States from the Paris Agreement on Climate Change, he did not make any reference to state and local policies on climate change.²⁴⁷ Is it possible

²⁴¹ William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1067–70 (2017).

²⁴² *Id.* at 1097, 1099.

²⁴³ See Wright, *supra* note 16, at 10,491.

²⁴⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 C.F.R. pt. 60 (2018), *repealed by* Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units, 40 C.F.R. pt. 60 (2019); see also Sloss, *supra* note 16, at 509 (discussing the Trump Administration's recent steps to end the Clean Power Plan); Wright, *supra* note 16, at 10,491–92 (discussing the Obama-era Clean Power Plan and its allowance of state-based emissions trading).

²⁴⁵ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 40 C.F.R. pt. 60 (2019). This rule has since been challenged in and out of court by a number of states and cities. Petition for Review, *New York v. EPA*, No. 19-1165 (D.C. Cir. Aug. 13, 2019); Att'y Gen. of N.Y. et al., Comments on the Environmental Protection Agency's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program 1 (Oct. 31, 2018), https://www.marylandattorneygeneral.gov/News%20Documents/110118_cpp_replacement_comments.pdf [<https://perma.cc/F5DV-UNKN>]; Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Leads Fight Against Trump's Dirty Power Rule (Aug. 13, 2019) (on file with New York State Attorney General).

²⁴⁶ Niina H. Farah, Jean Chemnick & Nick Sobczyk, *Wheeler Rolls out Carbon Rule, Girds for Lawsuits*, E&E NEWS, <https://www.eenews.net/stories/1060632821> [<https://perma.cc/GZ89-YZWV>] (last visited Jul 26, 2019).

²⁴⁷ President Donald Trump, Statement by President Trump on the Paris Climate Accord in the White House Rose Garden (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [<https://perma.cc/78TJ-GAWZ>].

that Trump could officially withdraw the United States from the Paris Agreement but still intend to leave intact state-level policies? It would seem plausible that if the elected representatives of a state decided to invest in renewable energy as an economic growth opportunity, then President Trump would not necessarily be inclined to oppose such action. However, the recent litigation over the Cap-and-Trade Agreement suggests otherwise.

1. Implied preemption

Where neither Congress nor the Executive Branch has clearly preempted state and local agreements on global climate change, the question turns on whether there is implied preemption. In the domestic context, there is a presumption against the preemption of historic state powers, unless Congress has explicitly spoken.²⁴⁸ In contrast, in the foreign affairs context, the presumption goes in the other direction, and it is assumed that Congress intended to preempt potentially conflicting state law.²⁴⁹

Implied preemption involves two sub-doctrines: field preemption and conflict preemption.²⁵⁰ Field preemption may be found when Congress intends federal law “to occupy the field,”²⁵¹ by making “a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room . . . to supplement it”²⁵² Even if the field has not been occupied

²⁴⁸ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (explaining “Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).

²⁴⁹ *United States v. Locke*, 529 U.S. 89, 108 (2000) (“The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”); see also GLENNON & SLOANE, *supra* note 8, at 294 (stating that the Supreme Court sometimes reverses the presumption against preemption); *Sitaraman & Wuerth*, *supra* note 13, at 1928 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941), as an example of when the Supreme Court has reversed the presumption against preemption in the foreign affairs context); Spiro, *Globalization and the (Foreign Affairs) Constitution*, *supra* note 22, at 674, 686–97 (discussing a number of presumptions which the Supreme Court upends in the foreign affairs context).

²⁵⁰ The boundaries between field and conflict preemption are not always clear, and field preemption is sometimes recognized as a form of conflict preemption. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000).

²⁵¹ *Id.* at 372.

²⁵² *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983); see also GLENNON & SLOANE, *supra* note 8, at 293 (discussing field preemption as a kind of conflict preemption).

by Congress, state laws are preempted if there is a clear conflict with a federal policy.²⁵³ Such conflicts can manifest where it is impossible to comply with both state and federal law, or, where the state law impedes Congress's entire purpose and objectives.²⁵⁴ In the foreign affairs context, courts have typically applied the standard for conflict preemption.²⁵⁵

a. Preemption by statute

To understand whether conflict preemption could exist, it is instructive to consider the “quintessential example”²⁵⁶ of foreign-affairs preemption, *Crosby v. National Foreign Trade Council*.²⁵⁷ In *Crosby*, the Supreme Court struck down a Massachusetts law that prevented state entities from procuring goods or services from anyone “doing business” with the government of Myanmar.²⁵⁸ The Court found the Massachusetts law to be “an obstacle to the accomplishment of Congress’s full objectives”²⁵⁹ under a federal statute, which imposed sanctions against Burma, authorized the President to impose additional sanctions under certain conditions, and directed the President to develop a comprehensive strategy to improve the human rights situation in the country.²⁶⁰ As a result, the President’s power was at a maximum because his authority “include[d] all that he possesse[d] in his own right plus all that Congress [could] delegate.”²⁶¹ Relying on the bargaining chip theory, the Court found that the President’s ability to engage in diplomatic negotiations was compromised by the state law and that the state law threatened the President’s ability to speak with “one voice” in dealing with other governments.²⁶²

b. Preemption by executive action

Even where executive action has not been expressly supported by congressional statute, the Supreme Court has found that executive agreements entered into by the President also have the ability to preempt state

²⁵³ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003).

²⁵⁴ *Garamendi*, 539 U.S. at 372–73.

²⁵⁵ *Id.*

²⁵⁶ GLENNON & SLOANE, *supra* note 8, at 299.

²⁵⁷ *Crosby*, 530 U.S. at 363.

²⁵⁸ *Id.* at 366–68.

²⁵⁹ *Id.* at 373.

²⁶⁰ *Id.* at 368–69.

²⁶¹ *Id.* at 375 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

²⁶² *Id.* at 377, 381.

law.²⁶³ During the twentieth century, the Supreme Court was most inclined to find preemption in “claims-settlement cases involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.”²⁶⁴ In *Dames & Moore v. Regan*, for example, the executive agreement clearly extinguished the underlying state claims, and the source of executive power was supported by implicit congressional authorization,²⁶⁵ as well as history and practice.²⁶⁶ The Supreme Court has since broadly interpreted executive power to allow for a finding of conflict preemption even where an executive agreement does not directly preempt state law and where Congress has not spoken on the issue.²⁶⁷ In *American Insurance Ass’n v. Garamendi*, the Court struck down a California law designed to help Holocaust victims recover from insurance companies²⁶⁸ on the grounds that the state law threatened the national government’s efforts to resolve such claims.²⁶⁹ Expressing “concern for uniformity in this country’s dealings with foreign nations,”²⁷⁰ the Court found that the California law conflicted with “the very capacity of the President to speak for the Nation with one voice in dealing with other governments to resolve claims against European companies arising out of World War II.”²⁷¹ The Court found that California’s law deprived the President of the flexibility he needed “in wielding ‘the coercive power of the national economy’ as a tool of diplomacy,” and as a result, gave the President “less economic and diplomatic leverage.”²⁷² With colorful language, the

²⁶³ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (citing *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

²⁶⁴ *Medellin v. Texas*, 552 U.S. 491, 531 (2008); see, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (upholding an executive agreement made after the Iran hostage crisis, which had the effect of extinguishing claims pending in state and federal courts on the basis of longstanding custom and congressional acquiescence); *United States v. Pink*, 315 U.S. 203 (1942) (finding an executive agreement fell within the scope of the president’s plenary power to recognize foreign nations under the power to receive ambassadors expressly set forth in the Constitution); *United States v. Belmont*, 301 U.S. 324, 327 (1937) (requiring New York to recognize legal claims of the Soviet Union, the validity of which turned on an executive agreement that President Roosevelt had entered into with the new country in 1933).

²⁶⁵ *Dames & Moore*, 453 U.S. at 680.

²⁶⁶ *Id.* at 686.

²⁶⁷ *Garamendi*, 539 U.S. at 427, 429.

²⁶⁸ California’s Holocaust Victim Insurance Relief Act of 1999 required any insurer doing business in the state to reveal information about all policies sold between 1920 and 1945 in Europe by the company itself or any “related” to it. *Id.* at 401, 409–10.

²⁶⁹ *Id.* at 411.

²⁷⁰ *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

²⁷¹ *Id.* at 416–17, 424 (internal citations omitted).

²⁷² *Id.* at 424 (internal citations omitted).

Court observed that “California seeks to use an iron fist where the President has consistently chosen kid gloves.”²⁷³

2. Dormant foreign affairs preemption

Garamendi, however, was not a straightforward preemption case because the executive agreements in question did not preempt the kind of disclosure of information mandated by the California law.²⁷⁴ To support its analysis, the Court turned to the dormant foreign affairs doctrine²⁷⁵ and reinvigorated a much-criticized doctrine with Cold War era roots.²⁷⁶ The *Garamendi* court relied on *Zschernig v. Miller*,²⁷⁷ and held that “state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”²⁷⁸ *Zschernig* involved an anti-Communist Oregon probate statute designed to prevent nonresident aliens from inheriting property unless they could show that their home country would not confiscate the property and that American citizens would enjoy reciprocal inheritance rights.²⁷⁹ The facts were unusual for a preemption analysis; not only did the case involve an area of traditional state competence, but the U.S. government represented to the Court that the statute did not interfere with its ability to conduct foreign relations.²⁸⁰ Nevertheless, the Court determined that Oregon’s statute intruded “into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”²⁸¹

The expansive interpretation of executive power in *Garamendi* and its resurgence of the dormant foreign affairs doctrine, however, has been cabined by *Medellin v. Texas*.²⁸² In that case, the Supreme Court held that a judgment from the International Court of Justice was not directly enforceable

²⁷³ *Id.* at 427; see also Merrill, *supra* note 15, at 324 (discussing the “bargaining chip theory” the Supreme Court endorsed in *Garamendi* and *Zschernig*).

²⁷⁴ *Garamendi*, 539 U.S. at 416–17. The executive branch simply agreed “to file precatory statements advising courts that dismissing Holocaust-era claims accords with American foreign policy,” but these statements had no legally binding effect. *Id.* at 440–41 (Ginsburg, J., dissenting); GLENNON & SLOANE, *supra* note 8, at 127, 132–33.

²⁷⁵ *Garamendi*, 539 U.S. at 418.

²⁷⁶ See, e.g., GLENNON & SLOANE, *supra* note 8, at 85, 90, 103–13, 124–25 (discussing the history of the Dormant Foreign Affairs doctrine); Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1241 (describing the backdrop of the Cold War in the development of the Dormant Foreign Affairs doctrine).

²⁷⁷ *Garamendi*, 539 U.S. at 417 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

²⁷⁸ *Id.* at 418.

²⁷⁹ *Zschernig*, 389 U.S. at 430–31.

²⁸⁰ *Id.* at 434.

²⁸¹ *Id.* at 432.

²⁸² 552 U.S. 491 (2008).

law in the United States because it did not stem from a self-executing treaty.²⁸³ As a result, the President did not have the power to issue a directive overturning a state court decision denying a habeas corpus petition.²⁸⁴ The *Medellin* decision returned to the framework in Justice Jackson's concurring opinion from *Youngstown Steel*, where he discussed the President's authority to act as deriving either from the text of the Constitution or Congress.²⁸⁵ Compared to the assertions of executive power in *Garamendi* or *Dames & Moore*, the claim to presidential authority in *Medellin* was more modest and derived directly from an Article II treaty.²⁸⁶ Thus, *Medellin* suggests that *Garamendi* should be read narrowly and that presidential actions alone cannot preempt state law.²⁸⁷

The continuing validity of the doctrine of dormant foreign affairs has been critiqued and debated by scholars.²⁸⁸ For example, Glennon and Sloane argue that the doctrine of dormant foreign affairs should be abandoned except in the most exigent and unforeseeable circumstances.²⁸⁹ Because the federal government has the constitutional authority to affirmatively preempt state law under the Supremacy Clause, it will step in if there is an egregious case.²⁹⁰ Relying on judges to overturn state laws on the basis of dormant foreign affairs preemption places too much responsibility on the judicial branch.²⁹¹ Nevertheless, some lower courts have continued to apply the doctrine of dormant foreign affairs preemption.²⁹²

²⁸³ *Id.* at 523–30.

²⁸⁴ *Id.* at 504–06.

²⁸⁵ *Id.* at 524 (“The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’” (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))).

²⁸⁶ *Id.* at 523 n.13; Sitaraman & Wuerth, *supra* note 13, at 1930.

²⁸⁷ See Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915, 929–30, 936–38 (2010) (arguing that *Garamendi* should be read more narrowly after *Medellin* and, more broadly, that “the displacement of state law at the hands of the federal executive” is in tension with the text of the Supremacy Clause, “principles of federalism,” and the “core structural attributes of the Constitution”).

²⁸⁸ GLENNON & SLOANE, *supra* note 8, at 85, 90, 103–113, 124–125; Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1241.

²⁸⁹ GLENNON & SLOANE, *supra* note 8, at 129.

²⁹⁰ *Id.* at 136–44.

²⁹¹ *Id.* at 175.

²⁹² See, e.g., *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072, 1075 (9th Cir. 2012) (applying the dormant foreign affairs doctrine to find California Code of Civil Procedure section 354.4 preempted).

B. Subnational Climate Analysis on Conflict and Dormant Preemption

This Part applies the foregoing preemption doctrines raised in foreign affairs contexts to the kinds of globally-oriented state and local climate action discussed earlier. State and local climate policies have also faced a number of domestic preemption challenges, but it is beyond the scope of this Article to address these issues.²⁹³ Thus, when discussing subnational global climate action, I intend to refer to the kind of transnational networks, bilateral agreements, and domestic coalitions described in Part I.

1. Field preemption

When state and local action on global climate change is examined from the perspective of field preemption, it seems unlikely that these actions would be struck down on this basis. Because many federal environmental statutes are explicitly premised on a cooperative federalism model,²⁹⁴

²⁹³ A large body of scholarship examines constitutional challenges to state and local climate policy and questions of preemption. *See, e.g.*, Michael Burger, *It's Not Easy Being Green: Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CINCINNATI L. REV. 835 (2009) (discussing the market participant exception as an opportunity to protect state environmental law from federal preemption); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005) (arguing in favor of regional climate initiatives); Steven Ferrey, *State Refusal Triggers Constitutional Crisis: Past Is Prologue on Energy and Infrastructure*, 34 REV. LITIG. 423 (2015) (detailing significant legal challenges to state sustainable energy policies); Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925 (2008) (arguing that *Chevron* principles caution against aggressive preemption of state environmental laws); Felix Mormann, *Constitutional Challenges and Regulatory Opportunities for State Climate Policy Innovation*, 41 HARV. ENVTL. L. REV. 189 (2017) (exploring “constitutional limits and regulatory openings for innovative state policies to mitigate climate change”); Michael S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387 (2007) (suggesting that the Regional Greenhouse Gas Initiative, in its current form, should pass judicial review); Juliet Howland, Comment, *Not All Carbon Credits are Created Equal: The Constitutional and the Cost of Regional Cap-and-Trade Market Linkage*, 27 UCLA J. ENVTL. L. & POL'Y 413 (2009) (discussing the future consequences of a possible federal cap-and-trade system on regional cap-and-trade markets); Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, *supra* note 17 (arguing in part that the Regional Greenhouse Gas Initiative does not implicate federal preemption).

²⁹⁴ *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7431 (2018) (stating in §7401(c) that “[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention”); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2018) (stating in §1251(b) that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution”); *see also* ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT:

Congress arguably never intended to occupy the entire field of climate change law. For example, the Clean Air Act specifically gives each state responsibility for meeting National Ambient Air Quality Standards and for developing State Implementation Plans.²⁹⁵ The Clean Air Act also expressly preserves the authority of states to implement stricter air pollution standards, with certain exceptions for the regulation of moving sources.²⁹⁶ Both the now-repealed Clean Power Plan and the Affordable Clean Energy rule purport to give states great discretion in meeting their compliance obligations. At the same time, it has been suggested that the Clean Air Act is really not that “cooperative” because states do not exercise much discretion in meeting national targets and face potential penalties for non-compliance.²⁹⁷ Nevertheless, the fact that states play a role in implementation of federal statutes suggests that the field of environmental law has not been completely preempted by Congress.

States have also traditionally exercised concurrent power over certain kinds of environmental regulation.²⁹⁸ For example, many features of climate policy, such as zoning, land use, and public transportation decisions, fall within the ambit of state and local authority.²⁹⁹ Katrina Wyman and Danielle Spiegel-Feld have also demonstrated how cities, which played an important role in environmental protection in the 1800s and 1900s, are now re-emerging as key

CASES AND MATERIALS 12 (4th edition ed. 2016) (stating that most federal environmental laws encourage state regulation in this area).

²⁹⁵ 42 U.S.C. § 7407 (2018) (mandating that states develop plans to achieve national air quality standards).

²⁹⁶ *Id.* at § 7416. Even the preemption of certain state regulation, however, has exceptions. For example, § 209 of the Clean Air Act specifically allows California to be granted a waiver by the EPA to set its own standards for the control of emissions from new motor vehicles provided that certain requirements are met. *Id.* at § 7543(b). Although the Trump Administration has sought to revoke California’s existing waiver, the grounds for doing so are contested and legal challenges are being filed.

²⁹⁷ See Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional?: Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 *ECOL. L.Q.* 671, 673 (2016) (discussing how states have “chafed” under the CAA and arguing that non-compliance sanctions, such as the withholding of highway funds, may result in unconstitutional coercion).

²⁹⁸ See Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 *NW. U.L. REV.* 1097, 1099–1101 (2009) (discussing the history of state-federal collaboration on environmental regulation); Kysar & Meyler, *supra* note 15, at 1639 (noting that “the U.S. Supreme Court has acknowledged [that] states have traditionally exercised substantial powers with regard to various kinds of environmental regulation—a history of state activity that Congress has repeatedly condoned”).

²⁹⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (speaking of the “[r]egulation of land use” as “a quintessential state and local power” and an “area of traditional state authority”).

actors in environmental lawmaking.³⁰⁰ In addition, when Congress was considering climate change legislation around 2010, industry advocated for preemption to ensure national uniformity and avoid a patchwork of regulation across the states.³⁰¹ However, Congress did not ultimately enact any kind of national climate legislation, preemptive or otherwise.³⁰² Thus, it is hard to see how Congress intended to occupy the entire field of law relevant to climate change.

2. Conflict preemption

The kinds of state and local action on global climate change discussed earlier—transnational networks, domestic coalitions, and bilateral agreements—do not appear to impede Congress’ entire purpose and objectives.³⁰³ Despite the failure to enact comprehensive climate legislation, Congress has enacted other laws that would support efforts to tackle climate change, and thus be broadly consistent with state and local action on global climate change. As *Massachusetts v. EPA* makes clear, the Clean Air Act authorizes the federal government to regulate emissions of carbon dioxide and other greenhouse gases because they qualify as “air pollutant[s]” within the plain meaning of the statute.³⁰⁴ As noted previously, the Clean Air Act also expressly permits states to implement more stringent air pollution standards, with certain exceptions for the regulation of moving sources.³⁰⁵ In addition, Congress took steps to address climate change in 1978 when it enacted the National Climate Program Act and again in 1987, when it enacted the Global Climate Protection Act.³⁰⁶

The U.S. Senate also provided the necessary consent for the United States to ratify the United Nations Framework Convention on Climate Change (UNFCCC), which entered into force in 1994.³⁰⁷ Under the

³⁰⁰ See generally Katrina Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. (forthcoming 2020) (detailing historic and more recent revivals in city based environmental reform).

³⁰¹ Buzbee, *supra* note 241, at 1067–70.

³⁰² *Id.* at 1097 (noting that, had climate legislation been passed with a preemptive “federal only” structure, President Trump and his allies in Congress could have precluded all of the existing state efforts without any additional action).

³⁰³ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (“We will find preemption where . . . ‘under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

³⁰⁴ *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

³⁰⁵ Clean Air Act, 42 U.S.C. § 7416 (2018).

³⁰⁶ *Massachusetts*, 549 U.S. at 507–08.

³⁰⁷ United Nations Framework Convention on Climate Change, *agreed on* May. 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

international legal doctrine of *pacta sunt servanda*, the United States must perform its treaty obligations in good faith.³⁰⁸ Among other obligations, the United States committed to “adopt[ing] national policies and tak[ing] corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.”³⁰⁹ In light of these obligations, it is hard to see how state and local actions on climate change are inconsistent with national policy. In fact, in rejecting a foreign affairs challenge to state-based regulation of greenhouse gases from motor vehicles, a U.S. District Court held that “state and local efforts in concert with federal programs contribute to the UNFCCC’s ultimate objective.”³¹⁰

The United States never became a party to the Kyoto Protocol.³¹¹ President Bill Clinton did not send the Kyoto Protocol to the U.S. Senate for advice and consent to ratification after the legislative body made clear in the Byrd-Hagel resolution that it would not give its approval.³¹² However, these

³⁰⁸ Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. Although the United States signed the Vienna Convention in 1970, it never ratified the treaty. *Status of Ratification of the Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=_en [<https://perma.cc/2YHH-FHES>] (last visited Mar. 30, 2020). However, the doctrine of *pacta sunt servanda* is considered to be part of customary international law. *See generally* Anthony Aust, *Pacta Sunt Servanda*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2007) (explaining the customary international law doctrine of *pacta sunt servanda*).

³⁰⁹ United Nations Framework Convention on Climate Change, *supra* note 307, art. 4(2).

³¹⁰ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 394–95 (D. Vt. 2007).

³¹¹ The United States signed the Kyoto Protocol on November 12, 1998, but never became a party to the treaty. *Status of Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-7-a&chapter=27&clang=_en [<https://perma.cc/G98M-JFZR>] (last visited Sept. 7, 2019).

³¹² Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997). It states in part:

That it is the sense of the Senate that—

(1) the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would—

(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or

(B) would result in serious harm to the economy of the United States

Id.

facts should not be interpreted as a rejection of U.S. participation in the international climate system. As the Byrd-Hagel resolution indicates, the U.S. Senate did not oppose action on global climate change; rather, it did not want the United States to face binding greenhouse gas emission limitations unless developing countries, like India and China, faced restrictions within the same compliance period.³¹³

The Paris Agreement is consistent with the Byrd-Hagel resolution,³¹⁴ a fact that even Senator Chuck Hagel has acknowledged at a congressional hearing.³¹⁵ However, because the treaty was not submitted to the Senate for ratification, it cannot be said that the Paris Agreement has explicit congressional approval. Instead, President Obama entered into the Paris agreement as an executive agreement. Yet, as Daniel Bodansky and Peter Spiro explain, the agreement is better conceived of as an “Executive Agreement + (EA+).”³¹⁶ Because the Paris Agreement did not impose binding legal obligations beyond what was required by the UNFCCC, it has a form of prior congressional approval.³¹⁷ Although both an ordinary executive agreement and an EA+ fall within Category 2 of Justice Jackson’s famous tripartite categorization in the *Youngstown* case, they occupy different ends of the spectrum. An EA+ is closer to Category 1, which is “pursuant to an express or implied authorization of Congress.”³¹⁸ In contrast, an ordinary executive agreement is at the other end of the spectrum, in what Justice Jackson described as the “twilight zone,” where there is no obvious congressional support.³¹⁹ In other words, the Paris Agreement arguably has implicit *ex ante*

³¹³ *Id.*

³¹⁴ See SUSAN BINIAZ, WHAT HAPPENED TO BYRD-HAGEL? ITS CURIOUS ABSENCE FROM EVALUATIONS OF THE PARIS AGREEMENT 14–17 (2018), <http://columbiaclimatelaw.com/files/2018/01/Biniaz-2018-1-Byrd-Hagel-article-Working-Paper.pdf> [<https://perma.cc/Z5P2-T69G>] (discussing the relationship of the Byrd-Hagel Senate resolution and the Paris Agreement).

³¹⁵ *The Need for Leadership to Combat Climate Change and Protect National Security: Hearing Before the H. Comm. on Oversight and Reform*, 116th Congress 11–12 (2019) (statement of Hon. Chuck Hagel, Former Sec’y, U.S. Dep’t of Defense and Senator) (“I supported the 2015 Paris Peace Climate Agreement that Secretary Kerry negotiated because it met the requirements of the Byrd-Hagel resolution, ensuring that all nations—all nations—take measurable, reportable, and verifiable steps to reduce emissions.”).

³¹⁶ Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. 885, 887 (2016).

³¹⁷ In fact, the negotiations almost derailed at the last minute because of a typo that arguably could have created new legal obligations. John Vidal, *How a “Typo” Nearly Derailed the Paris Climate Deal*, GUARDIAN (Dec. 16, 2015), <https://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal> [<https://perma.cc/GP5P-J9GS>].

³¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); see also Bodansky & Spiro, *supra* note 316, at 898.

³¹⁹ Bodansky & Spiro, *supra* note 316, at 898.

congressional approval because it is consistent with the UNFCCC.³²⁰ Not all experts agree with the characterization of the Paris Agreement as an Executive Agreement.³²¹ Regardless, there is little dispute that it was negotiated within the scope of the UNFCCC, a duly ratified Article II treaty.³²²

President Trump has indicated that he would like to re-negotiate the terms of the Paris Agreement.³²³ Notably, his withdrawal announcement did not question climate science, the climate problem, or even having an international agreement on climate change. Nevertheless, given President Trump's stated goal of re-negotiation, does independent climate action by states undermine the United States' ability to speak with one voice and reduce the value of the "bargaining chips" in international negotiations?³²⁴ At first glance, the answer seems to be yes. A President that seeks to pull out of the Paris Agreement could argue that by already making pledges to reduce carbon emissions, states and cities engaged in global climate action are reducing the federal government's bargaining authority. Writing a decade ago, Hollis suggested that state participation in the International Climate Action Plan risked unwarranted interference in the U.S. climate negotiations by influencing how other nations engaged with the United States.³²⁵ As the discussion of norm sustaining earlier makes clear, domestic coalitions like the U.S. Climate Alliance are publicly benchmarking their emissions reductions against the U.S. targets under the Paris Agreement as a way to demonstrate their support for a treaty that President Trump has repudiated.³²⁶

³²⁰ See also Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1740 (2017) ("Obama made the Paris Agreement mainly on his own constitutional authority, but he was buttressed in doing so by the fact that this Agreement furthers both the preexisting UNFCCC and the goals underlying the Clean Air Act.").

³²¹ See, e.g., Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. FORUM 338, 345 (2017) ("Nor do I think the problem is adequately solved by creating new pigeonholes like 'executive agreement plus.'").

³²² *Id.* at 350.

³²³ The notice deposited with the U.N. in 2017 states that "[u]nless the United States identifies suitable terms for reengagement," the country will withdraw from the treaty. Depository Notification from the Representative of the United States of America to the United Nations, Nikki R. Haley, addressed to the Secretary-General of the United Nations, C.N.464.2017.TREATIES-XXVII.7.d (Aug. 4, 2017).

³²⁴ See Kysar & Meyler, *supra* note 15, at 1640 (applying the bargaining chip theory to the context of climate change).

³²⁵ Hollis, *Unpacking the Compact Clause*, *supra* note 25, at 786. Hollis's analysis was in the context of the Compact Clause, but the rationale applies equally well here.

³²⁶ See Part I.C. In its legal challenge to California's Cap-and-Trade Agreement with Quebec, the Trump Administration appears to be making this argument, even though it does not explicitly rely on the bargaining chip theory. See Amended Complaint ¶¶ 51–56, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Nov. 19, 2019), ECF No. 7

Surely, if a large fraction of the United States has already taken steps to decarbonize their economies, then the President would not be able to wield “the coercive power of the national economy’ as a tool of diplomacy”³²⁷

However, times have changed. The bargaining chip theory made more sense prior to the seminal case on greenhouse gas regulation from mobile sources, *Massachusetts v. EPA*. One of the reasons that the Environmental Protection Agency under the administration of the second President Bush gave for not regulating greenhouse gases from motor vehicles was that “unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President’s ability to persuade key developing countries to reduce greenhouse gas emissions.”³²⁸ The Supreme Court rejected this argument.³²⁹

Prior to *Massachusetts*, a U.S. District Court had sustained a challenge to state motor vehicle regulations of greenhouse gases on foreign affairs preemption grounds.³³⁰ However, after the Supreme Court’s decision in *Massachusetts*, the district court reversed course and held that “speaking with one voice” in the climate negotiations did not constitute an actual “policy” because it was “nothing more than a commitment to negotiate under certain conditions and according to certain principles.”³³¹ It found that the “‘bargaining chip’ theory of interference only [made] logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise.”³³² Another district court came to a similar conclusion in considering a comparable challenge to state regulation of greenhouse gases from mobile sources.³³³

If the “bargaining chip” theory made little sense after *Massachusetts*, then it makes even less sense given the “bottom-up” approach of the Paris Agreement, where every party makes commitments that are nationally

(arguing that California has been asserting its own foreign policy by engaging in agreements with foreign governments).

³²⁷ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000)).

³²⁸ *Massachusetts v. EPA*, 549 U.S. 497, 513–54 (2007).

³²⁹ *Id.* at 523–24.

³³⁰ *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1183 (E.D. Cal. 2006). The challenged regulations promulgated under the authority of section 43018.5 of the Cal. Health & Safety Code, which required the California Air Resources Board to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.” *Id.* at 1163.

³³¹ *Central Valley Chrysler-Jeep v. Goldstene*, 528 F. Supp. 2d 1151, 1186 (E.D. Cal. 2007).

³³² *Id.* at 1187.

³³³ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 395–96 (D. Vt. 2007).

determined.³³⁴ As a result, when Trump criticized the “burdens” and “restrictions” of the Paris Agreement,³³⁵ he was actually criticizing the Nationally Determined Contribution (NDC) that the United States submitted under the Obama administration. Moreover, the Trump administration has complained that the Paris Agreement sets “unrealistic targets” for the United States while “allowing China to increase such emissions until 2030,” when in fact, this discrepancy exists simply because the United States had voluntarily agreed to adopt stricter targets than China.³³⁶ The only internationally mandated rules relate to the disclosure and monitoring of these targets, not the actual substance of them. The United States could in fact remain a party to the Paris Agreement but submit a less ambitious NDC that is more in line with the goals of China.³³⁷

Due to the length of time it took to negotiate the Paris Agreement and the very flexible framework that it adopted, it is unlikely that the United States would be able to push the international community to re-negotiate the terms of the treaty. Every nation in the world signed the Paris Agreement or became a party to it.³³⁸ In the wake of President Trump’s announcement, other global leaders pledged to continue their efforts to uphold the Paris Agreement and reduce greenhouse gas emissions.³³⁹ According to President Trump’s logic, other countries must increase their own voluntary targets in order for the United States to make any effort at all. However, this flies against the theory of mutual disclosure and ratcheting up that is at the heart of the Paris Agreement. As I have argued elsewhere, when states and cities publicly disclose their progress towards the Paris goals or engage in

³³⁴ Murthy, *supra* note 14, at 14, 40–43.

³³⁵ Trump, *supra* note 247.

³³⁶ Amended Complaint ¶ 48, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Nov. 19, 2019), ECF No. 7; *see* Paris Agreement, *supra* note 2, art. 4(2) (stating in part that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve”); Murthy, *supra* note 14, at 10, 15–16 (discussing how these nationally determined contributions are basically voluntary targets that each country pledges to achieve and that the U.S. could have submitted a weaker target, instead of withdrawing).

³³⁷ Murthy, *supra* note 14, at 15.

³³⁸ The Paris Agreement has 195 signatories, and as of September 7, 2019, 186 countries are parties. The countries that signed the Agreement but did not subsequently become parties are: Angola, Eritrea, Iran, Iraq, Kyrgyzstan, Libya, The Russian Federation, South Sudan, Turkey, and Yemen. *Status of the Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en [<https://perma.cc/QY8A-TMQ3>] (last visited Sept. 7, 2019).

³³⁹ *See, e.g.,* Daniel Boffey & Arthur Neslen, *China and EU Strengthen Promise to Paris Deal with U.S. Poised to Step Away*, *GUARDIAN* (June 1, 2017), <https://www.theguardian.com/environment/2017/may/31/china-eu-climate-lead-paris-agreement> [<https://perma.cc/GZS5-WCKV>] (describing global efforts to uphold the Paris Agreement).

international coalitions, they encourage other nations to heighten the ambition of their own climate policies.³⁴⁰

3. Dormant foreign affairs preemption

The foregoing analysis suggests that state and local actions on global climate change would not be subject to foreign affairs preemption based on either congressional action or the bargaining chip theory. Although *Garamendi* has arguably been limited by *Medellin*,³⁴¹ an argument could be made that under *Garamendi*'s expansive interpretation of executive power,³⁴² subnational efforts on global climate change conflict with President Trump's stated goal of withdrawing the United States from the Paris Agreement and/or re-negotiating the terms. Alternatively, President Trump would have to rely on the much-criticized doctrine of dormant foreign affairs power. These are difficult arguments to make for several reasons.

First, this is not a situation where an executive agreement expressly preempts state claims, or is even supported by implicit congressional authorization, or history and practice.³⁴³ Rather, the statements of President Trump and other officials would have to be the basis for the preemption and demonstrate a "clear conflict."³⁴⁴

Second, the President would have to assert that his independent constitutional powers encompass environmental regulation, which is not a very plausible argument.³⁴⁵ Congress has the power to enact environmental statutes, which in turn can delegate authority to the executive branch and to the states.³⁴⁶ However, with a few exceptions, states can enact more stringent air pollution control laws under the Clean Air Act—including on greenhouse gases.³⁴⁷ State and local governments also have independent authority in some areas, such as land use and zoning.³⁴⁸ The Supreme Court has long

³⁴⁰ Murthy, *supra* note 14, at 31–37.

³⁴¹ See Part III.A.2; Wuerth, *supra* note 287, at 936–38.

³⁴² See generally *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that California's Holocaust Victim Insurance Relief Act of 1999 interfered with the President's exercise of foreign policy and was thus preempted).

³⁴³ *But cf. Dames v. Regan*, 453 U.S. 654, 680, 686 (1981) (holding that "Congress has implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act).

³⁴⁴ *Garamendi*, 539 U.S. at 421; *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp.2d 1151, 1182–84 (E.D. Cal. 2007).

³⁴⁵ *Bodansky & Spiro*, *supra* note 316, at 906.

³⁴⁶ See generally Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (1972); Clean Air Act, 42 U.S.C. §§ 7401–7671q (1970).

³⁴⁷ See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

³⁴⁸ *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1187–88.

recognized that a “[s]tate has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”³⁴⁹

Although *Garamendi* involved insurance regulation,³⁵⁰ the Court characterized the goal of the state law as related to foreign policy, i.e., that the real purpose of the California law was not the “evaluation of corporate reliability” but the vindication of Holocaust survivor claims—which seems to fall more squarely within traditional executive power.³⁵¹ Similarly, in *Zschernig*, the Supreme Court was concerned that state court judges were using probate cases to cast aspersions on communist countries at the height of the Cold War.³⁵²

In contrast, states and cities are motivated to take action on climate change for the health and welfare of their own citizens³⁵³ and because it is a “wicked” multi-level problem that demands coordinated action across all scales of government and sectors of the economy.³⁵⁴ With the rise of extreme weather patterns, state and local officials are increasingly shouldering the challenges of addressing wildfires, floods, and other catastrophic events, and many state and local governments are motivated to enact policies about climate change simply for their own benefit.³⁵⁵ In this respect, the nature of the climate activity is incredibly broad and singularly different from the kinds of activities that have faced conflict preemption. When state and local governments enter into transnational networks, domestic coalitions, or bilateral agreements on climate change, they are not singling out a particular country, as in *Crosby*, or a set of policies issued by particular nations during wartime hostilities, as in *Garamendi*.³⁵⁶

The Cap-and-Trade Agreement, however, arguably creates a situation where California is judging the integrity of another jurisdiction’s regulations, and by extension, its broader economic and political system.³⁵⁷ Prior to linking with another jurisdiction, the governor must ensure that the linked

³⁴⁹ *Massachusetts*, 549 U.S. at 518–19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

³⁵⁰ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 409–11 (2003).

³⁵¹ *Id.* at 426.

³⁵² The state court statements were rather outlandish: “This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists If you want to say that I’m prejudiced, you can, because when it comes to Communism I’m a bigoted anti-Communist.” *Zschernig v. Miller*, 389 U.S. 429, 437 n.8 (1968) (internal citations omitted).

³⁵³ *Massachusetts*, 549 U.S. at 518–19; *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1187–88.

³⁵⁴ Lazarus, *supra* note 45; Osofsky, *supra* note 45.

³⁵⁵ See, e.g., CLIMATE CHANGE PROPOSED SCOPING PLAN, *supra* note 100, at ES8–ES12 (discussing the economic benefits of climate policies for California).

³⁵⁶ *Garamendi*, 539 U.S. at 420; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366–67 (2000).

³⁵⁷ Chemerinsky, *supra* note 15, at 52; Kysar & Meyler, *supra* note 15, at 1657–58.

cap-and-trade system would have environmental and enforcement requirements that are “equivalent to or stricter than” the California program, and that there be no “significant liability” imposed on California for any “failure” associated with the linkage.³⁵⁸ However, this regulation is fundamentally about ensuring that the quality of California’s domestic emissions trading market is not compromised by linking to another market. If the *Garamendi* balancing test is applied,³⁵⁹ California’s state interest in addressing climate change is surely stronger than a possible national concern about offending Canada, especially since California and Quebec developed their cap-and-trade regulations cooperatively to ensure harmonization.

Consider, instead, if California passed a law that prevented the state procurement of goods from India on the grounds that India had not done enough to switch from coal to renewable energy. If the United States was in negotiations with India on its renewable energy policy,³⁶⁰ such nation-specific legislation would more likely be perceived as a conflict with U.S. diplomacy. This is the kind of activity that would be more likely to face credible preemption grounds under *Garamendi* because the state law is targeted action *against a particular country*. For example, during the 1980s, many states adopted divestment laws targeting the apartheid regime of South Africa. At the time, these statutes were widely believed to be a constitutional exercise of power.³⁶¹ However, the Supreme Court’s holdings in 2000 striking

³⁵⁸ CAL. GOV’T CODE § 12894(f) (West 2020); CAL. AIR RES. BD., *supra* note 161, at 1; *see also* Wright, *supra* note 16, at 10,485 (describing the confirmation that these requirements had been met prior to the California and Quebec linkage).

³⁵⁹ *Garamendi*, 539 U.S. at 420.

³⁶⁰ Hypothetically, if the United States and India entered into an executive agreement that arguably conflicted with the state law, then it would be important to examine any preemption arguments that could also be made under the Supremacy Clause, and not just the dormant foreign affairs power.

³⁶¹ The Department of Justice determined that state divestment statutes aimed at the apartheid South Africa regime would survive constitutional scrutiny because states were legitimately exercising their rights to spend and invest their own funds. *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. O.L.C. 49, 54–55 (1986). The one state supreme court to rule on the matter also determined that the city ordinance in question was not preempted, did not violate the Foreign Commerce Clause, and did not otherwise intrude on the federal government’s power to regulate foreign policy. *See Bd. of Trs. v. Baltimore*, 562 A.2d 720, 757 (Md. 1989) (upholding Baltimore city ordinance mandating that city pension funds divest from companies doing business with South Africa); *see also* MARTHA F. DAVIS, JOANNA KALB & RISA E. KAUFMAN, *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES* 422 (2014); Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in *BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 261–63 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2009) (discussing the history of local anti-apartheid measures and federal acquiescence to their constitutionality).

down a Massachusetts statute directed at Burma in *Crosby*,³⁶² and in 2003 striking down a California law directed at insurance companies who had issued policies to Holocaust victims in *Garamendi*,³⁶³ suggest that the South African divestment laws could possibly cross the constitutional line.³⁶⁴ In contrast, states and cities participate in international climate networks, domestic coalitions, or bilateral agreements because climate change is a real problem in which they have a legitimate interest.³⁶⁵

National security is one area where the Supreme Court is more deferential to executive assertions of power.³⁶⁶ Thus, in an important strategic move in its recent litigation, the Trump administration has framed the California-Quebec Cap-and-Trade Agreement as an issue “interwoven” with economic growth and national security matters.³⁶⁷ There is little doubt that many aspects of climate change present real national security threats; for example, increased droughts and floods contribute to civil instability in

³⁶² *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

³⁶³ *Garamendi*, 539 U.S. at 401.

³⁶⁴ Even state and local activity that goes beyond what is constitutionally permissible, however, could be helpful in shaping national policy on a global issue. For example, *Crosby* and *Garamendi* could also be understood as examples of the “norm sustaining” of international human rights values by subnational actors. Murthy, *supra* note 14, at 7. The Massachusetts law at issue in *Crosby* was a central focus of U.S. discussions with European Union officials and no doubt influenced the international dialogue about Burma. *Crosby*, 530 U.S. at 384. Moreover, Congress enacted a statute imposing sanctions on Burma only three months after the Massachusetts law was enacted. *Id.* at 368. Similarly, the California legislature adopted the Holocaust Victims Insurance Recovery Act at issue in *Garamendi* in part “to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.” *Garamendi*, 539 U.S. at 434 (citation omitted). U.S. negotiations were also directly impacted by California’s law. *Id.* at 411. This kind of norm sustaining, however, distinguishes the human rights and climate contexts because states and cities have not adopted climate legislation that is targeted against a particular country.

³⁶⁵ *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (holding that Massachusetts had standing to challenge the EPA’s failure to regulate greenhouse gases because the state’s “well-founded desire to preserve its sovereign territory” was threatened by climate change).

³⁶⁶ *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the President’s broad authority to restrict entry into the U.S. by foreign nationals on national security grounds); *see also* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 26–27, 59–61 (2019) (discussing the Supreme Court’s opinion in *Trump v. Hawaii* as an exercise in deference to the President’s national security interests).

³⁶⁷ *See* Amended Complaint ¶ 33, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7 (seeking injunctive and declaratory relief against the State of California for its cap-and-trade agreement with the provincial government of Quebec).

regions of the world where the United States has strategic interests.³⁶⁸ However, it is not clear exactly how a policy tool to address climate change, such as California's market-based approach to greenhouse gas reductions, creates national security concerns.

If the President is correct that his power over the California-Quebec Cap-and-Trade Agreement stems from his authority to “reconcil[e] protection of the environment, promotion of economic growth, and maintenance of national security,”³⁶⁹ then, arguably, all state and local actions on climate change could fall within his executive power. As a result, every single state or local action to address climate change, including state-based emissions trading programs, zoning decisions, investments in public transportation and changes in building codes, would potentially fall within presidential power. In other words, an assertion of executive authority based on national security would likely prove too much in the climate change context. Such an argument would violate the basic tenets of federalism and separation of powers on which our government was founded.

Finally, the global context of climate change is also distinct from other kinds of foreign affairs problems. Climate change is a multi-scalar problem and the international community has embraced state and local action on climate change.³⁷⁰ The United States has agreed to decisions of the Conference of the Parties of the UNFCCC specifically endorsing the participation of subnational governments and creating the NAZCA platform for the recording of pledges by all non-state actors.³⁷¹

³⁶⁸ See generally *The Need for Leadership to Combat Climate Change and Protect National Security*, *supra* note 315 (discussing the security costs imposed by climate change); U.S. DEP'T OF DEFENSE, REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE (2019), https://climateandsecurity.files.wordpress.com/2019/01/sec_335_ndaa-report_effects_of_a_changing_climate_to_dod.pdf [<https://perma.cc/786L-PAD2>] (explaining the impact that climate change has and will have on the Department of Defense).

³⁶⁹ Amended Complaint ¶ 33, *United States of America v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. CA. Nov. 19, 2019), ECF No. 7.

³⁷⁰ See Paris Agreement, *supra* note 2, pmb., ¶¶ 116–23, 133–36, arts. 7.2, 11.2 (establishing a global goal on reducing vulnerability to climate change and meeting the temperature target outlined in art. 2); see also Harro van Asselt & Stefan Bößner, *The Shape of Things to Come: Global Climate Governance After Paris*, 10 CARBON & CLIMATE L. REV. 46, 56–57 (2016) (discussing climate action taken by states since the Paris Agreement); Susan Biniaz, *Trump vs. International Law: Thoughts on the Paris Agreement and U.S. Climate Diplomacy*, OPINIOJURIS (Mar. 10, 2018), <http://opiniojuris.org/2018/10/03/trump-vs-international-law-thoughts-on-the-paris-agreement-and-u-s-climate-diplomacy> [<https://perma.cc/JRJ8-RD2W>] (discussing nonstate actors and subnational actors who remain committed to climate reform despite the United States's withdrawal from the Paris Agreement).

³⁷¹ Paris Agreement, *supra* note 2, at ¶¶ 117, 133, 134.

In contrast, in both *Crosby* and *Garamendi*, the United States faced significant diplomatic pressure to stop the state action.³⁷² Although the U.S. government did not oppose the probate law at issue in *Zschernig*, the Court found that the state law “as construed”³⁷³ had “more than ‘some incidental or indirect effect in foreign countries,’” and, in fact, had “great potential for disruption or embarrassment.”³⁷⁴ Given the support that other countries have shown for climate action by states and local governments everywhere, including in the United States, it is difficult to see how these subnational contributions to climate change would result in the kind of diplomatic embarrassment at issue in the earlier cases.³⁷⁵

Given that the Clean Air Act has been interpreted to cover greenhouse gases, that the United States has ratified the UNFCCC, and that there is almost no chance that the terms of the Paris Agreement would be renegotiated, it is difficult to say what actions the President alone could take that would be constitutionally sufficient to preempt the kinds of state and local action on global climate change discussed in this Article. This probably explains why the Trump administration has sought to frame the California-Quebec Cap-and-Trade Agreement as a national security matter in its legal challenge because that gives the executive branch a basis for asserting greater authority.

The President’s actions would be on stronger ground if he were acting closer to Category 1 of Justice Jackson’s framework, which is “pursuant to an express or implied authorization of Congress.”³⁷⁶ Congress has the authority to preempt state and local action on global climate change, but for the time being, Congress has not taken such action. Thus, at least for the moment, it is unlikely that the transnational networks, domestic coalitions, and

³⁷² *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 382–83 (2000).

³⁷³ *Zschernig v. Miller*, 389 U.S. 429, 440 (1968). The “as construed” language allowed the Court to distinguish *Zschernig* from a similar case decided several decades earlier, where the Court had upheld a nearly identical state inheritance statute from California, in *Clark v. Allen*, 331 U.S. 503 (1947); see also GLENNON & SLOANE, *supra* note 8, at 115, 118–20 (discussing the Office of Legal Counsel’s opinion that anti-apartheid divestment laws would pass judicial review under the Dormant Foreign Affairs doctrine as elaborated on in *Zschernig*).

³⁷⁴ *Zschernig*, 389 U.S. at 434–35 (quoting *Clark*, 331 U.S. at 516–17).

³⁷⁵ Similarly, in *Medellin*, some diplomatic embarrassment would have occurred when the state of Texas took a position that was inconsistent with the executive branch concerning the enforceability of a decision of the International Court of Justice interpreting the Vienna Convention on Consular Relations. See *Medellin v. Texas*, 552 U.S. 491, 520 (2008) (noting that the “dissent worries that our decision casts doubt on some seventy-odd treaties under which the United States has agreed to submit disputes to the ICJ”). However, the Supreme Court still held that the treaty was not self-executing, and that it was up to Congress to pass implementing legislation. *Id.* Likewise, it is Congress, not the President, who has the authority to preempt the kinds of state action on global climate change discussed in this Article.

³⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring).

bilateral agreements on climate change discussed in this Article would be struck down on preemption grounds under either the Supremacy Clause or the dormant foreign affairs doctrine. This argument is buttressed by more recent cases, which suggest a trend towards the “normalization” of foreign affairs law.

C. “Normalization” Trend

Historically, foreign affairs law has been seen as exceptional, with greater power attributed to the federal government than in domestic cases.³⁷⁷ However, scholars have posited that there is now a trend towards the “normalization” of foreign affairs law, with cases being treated more like domestic law. Ganesh Sitaraman and Ingrid Wuerth argue that “[o]ver the last twenty-five years, in a series of decisions on the core areas of exceptionalism—justiciability, federalism, and executive power—the Supreme Court has rejected the idea that foreign affairs are different from domestic affairs.”³⁷⁸ This legal trend is supported by the reality that, in many instances, it is difficult to distinguish between purely domestic and foreign activity.³⁷⁹

Medellin v. Texas,³⁸⁰ for example, is often understood as a decision on treaty self-execution, but it is also a case about the limits of executive preemption of state law.³⁸¹ As discussed earlier,³⁸² the Supreme Court held that the President lacked the authority to overturn a state court decision denying a habeas corpus petition. Sitaraman and Wuerth suggest that the “outcome and reasoning in *Medellin* represented a major step in normalizing foreign relations law. The Court did not rely on the unique needs of the President or the federal government, but instead applied basic separation of powers and federalism principles.”³⁸³

³⁷⁷ See Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51 (1999) (explaining that the usual constitutional restraints on the federal government’s exercise of power do not apply to foreign affairs); see also Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999) (describing “foreign affairs exceptionalism” as “the view that the federal government’s foreign affairs powers are subject to a . . . more relaxed set of constitutional restraints than those that govern its domestic powers”); Spiro, *Globalization and the (Foreign Affairs) Constitution*, *supra* note 22, at 652–53 (noting the historical exceptionalism of foreign affairs law).

³⁷⁸ Sitaraman & Wuerth, *supra* note 13, at 1901.

³⁷⁹ GLENNON & SLOANE, *supra* note 8, at 131.

³⁸⁰ 552 U.S. 491 (2008).

³⁸¹ Sitaraman & Wuerth, *supra* note 13, at 1929.

³⁸² See Part III.A.2.

³⁸³ Sitaraman & Wuerth, *supra* note 13, at 1930.

Similarly, in *U.S. v. Bond*,³⁸⁴ the Court applied standard statutory interpretation to a preemption issue involving the Chemical Weapons Implementation Act. The Court might have reasoned that statutes related to foreign policy presumptively preempt state law, but it did not. In *Bond*, the Court refused to find that the Chemical Weapons Treaty could be used to prosecute the actions of a woman in a romantic triangle who had tried to poison her former friend.³⁸⁵ In reaching this holding, the Court carefully avoided overturning *Missouri v. Holland*, a seminal case from 1920, which held that the federal government could execute a treaty in an area that would otherwise fall within the states' reserved power under the Tenth Amendment.³⁸⁶ In holding that the Migratory Bird Treaty Act was a valid exercise of federal power, the *Holland* court had determined that the scope of the Treaty Power was greater than that of the Commerce Clause.³⁸⁷ In side-stepping the constitutional questions at issue in *Holland*, the *Bond* court returned to the kind of federalism analysis seen in domestic cases.³⁸⁸

For some scholars, the normalization trend could go even further. For example, Peter Spiro argues that the rationale for the “exclusivity doctrine” is becoming obsolete.³⁸⁹ In addition to constitutional doctrinal shifts, he points to globalization and changes in international law to support his argument that power over foreign relations should be devolved to subnational states.³⁹⁰ Such subnational participation in an international treaty regime would not be that unusual when one considers that some nations have expressly consented to allow subnational states to become parties to a treaty³⁹¹ or participate in treaty processes.³⁹² Although such action would not be constitutionally permissible in the United States, the United States has implicitly recognized that subnational states have a legal relevance to international law. For example, Spiro points out that the World Trade Organization Agreement on Government Procurement only requires national

³⁸⁴ 572 U.S. 844 (2014).

³⁸⁵ *Id.* at 866.

³⁸⁶ *Missouri v. Holland*, 252 U.S. 416, 432–35 (1920). However, this view of the relationship between *Bond* and *Holland* is not universal. See GLENNON & SLOANE, *supra* note 8, at 186–87 (claiming that the Court “abandoned *Holland*,” but failed at its attempt to “avoid the constitutional issues raised by *Holland*”).

³⁸⁷ *Holland*, 252 U.S. at 435.

³⁸⁸ See Sitaraman & Wuerth, *supra* note 13, at 1928 n.173.

³⁸⁹ Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1225–27.

³⁹⁰ *Id.* at 1260–61.

³⁹¹ See Hollis, *supra* note 79, at 146–47 (discussing the participation of various subnational entities in international treaties).

³⁹² See Spiro, *The States and International Human Rights*, *supra* note 41, at 593–94 (discussing limited state participation in treaty processes before the World Trade Organization and an appearance by Quebec before the Human Rights Committee).

accession to the extent that it is consistent with subsequent subnational agreement.³⁹³ In other words, the national government only accepts treaty responsibility for those states that have accepted these specific obligations.

However, not all scholars subscribe to the “normalization” view, especially in light of several other recent decisions by the Supreme Court. For example, in *Zivotofsky ex rel. Zivotofsky v. Kerry* (“*Zivotofsky II*”),³⁹⁴ the Supreme Court held recognition of foreign governments is a “topic on which the Nation “must ‘speak ... with one voice’” and “[t]hat voice must be the President’s.”³⁹⁵ The majority opinion offered some caveats, stating “whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law”³⁹⁶ and that the scope of the President’s power is “quite narrow.”³⁹⁷ However, the decision has been interpreted as an extensive expansion of executive power. As Justice Roberts observed in his dissent, “[n]ever before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”³⁹⁸

Jack Goldsmith has argued that “*Zivotofsky II* is the most important Supreme Court decision ever on the sources and scope of the President’s independent and exclusive powers to conduct foreign relations—powers that fall in Justice Jackson’s *Youngstown* Categories Two and Three, respectively.”³⁹⁹ He predicts that executive branch attorneys will interpret the decision very broadly to expand presidential power in foreign affairs.⁴⁰⁰ Even Spiro, who otherwise subscribes to the normalization theory, acknowledges that *Zivotofsky II* “fits the conventional, exceptionalist approach to foreign relations.”⁴⁰¹ But he finds a way to reconcile the normalization and exceptionalism debates by pointing to the unique facts of the case and

³⁹³ *Id.* at 592. This approach is similar to the “federalism understandings” approach taken by the United States with respect to human rights treaties, as discussed in Part III.D.

³⁹⁴ 135 S. Ct. 2076 (2015). The *Zivotofsky* case concerned whether Israel could be placed next to Jerusalem on the birthplace line of a U.S. passport. The U.S. State Department had a longstanding position that the United States does not recognize any country as having sovereignty over Jerusalem. However, when Congress passed the Foreign Relations Authorization Act, it specifically allowed citizens born in Jerusalem to list their birthplace as Israel. The first time that the case went before the Supreme Court, the Court held that the constitutional dispute between the Executive branch and Congress was justiciable rather than a political question. *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 132 S. Ct. 1421, 1425 (2012). *Zivotofsky I* supports the normalization argument. See Sitaraman & Wuerth, *supra* note 13, at 1925.

³⁹⁵ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (*Zivotofsky II*), (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

³⁹⁶ *Id.* at 2090.

³⁹⁷ *Id.* at 2095.

³⁹⁸ *Id.* at 2113 (Roberts, J., dissenting).

³⁹⁹ Goldsmith, *supra* note 23, at 114.

⁴⁰⁰ *Id.* at 146.

⁴⁰¹ Spiro, *Normalizing Foreign Relations Law*, *supra* note 22, at 23.

observing that the “Israel-Palestine dynamic is a throwback to the twentieth century if not a much earlier one.”⁴⁰²

In addition, Stephen Vladeck points out that even if the Supreme Court has embraced normalization, lower courts have not necessarily followed suit.⁴⁰³ The denial of certiorari in those cases raises questions about the strength and duration of any perceived trend towards normalization.

*Trump v. Hawaii*⁴⁰⁴ is another recent “exceptional” foreign affairs case. On national security grounds, the Supreme Court upheld the President’s broad authority to issue a “Muslim ban” to restrict entry into the United States by foreign nationals. The Court applied rational basis review because national security concerns provided an independent justification for the travel ban,⁴⁰⁵ even though the evidence of discrimination would likely have been sufficient to establish a violation of the Establishment Clause.⁴⁰⁶ As noted earlier, the Trump Administration has sought to frame the California-Quebec Cap-and-Trade Agreement in terms of national security, presumably as a way to open the door to greater deference to executive power under *Trump v. Hawaii*.

Moreover, whether climate change-related foreign affairs issues would likely be treated as “normal” or “exceptional” may also depend on the degree of climate change skepticism that remains on the Court, as evidenced by the dissenting opinion in *Massachusetts v. EPA*.⁴⁰⁷ A recent email exchange between U.S. federal judges that was leaked to the public further reveals that some judges are even hostile to receiving “neutral, objective information” about climate change from the judiciary.⁴⁰⁸ Such distrust about climate science may mean that at least some courts would subject subnational action on global climate change to a stricter preemption standard. However, judges more concerned about federalism may be inclined to apply the same

⁴⁰² *Id.* at 25.

⁴⁰³ See Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322, 323 (2014).

⁴⁰⁴ 138 S. Ct. 2392 (2018).

⁴⁰⁵ *Id.* at 2420–21.

⁴⁰⁶ *Id.* at 2433 (Sotomayor, J., dissenting); see also Ray, *supra* note 366, at 19 (arguing that “courts should use a mixed motives analysis to review an exclusion law where plaintiffs have direct evidence of animus”).

⁴⁰⁷ 549 U.S. 497, 560 (2007) (Scalia, J., dissenting).

⁴⁰⁸ After a U.S. district court judge forwarded an email about an upcoming climate-change seminar co-sponsored by the research and education agency of the judiciary branch, a judge on the U.S. Court of Appeals for the D.C. Circuit chastised him, writing: “The jurisdiction assigned to you does not include saving the planet. . . The supposedly science and stuff you are now sponsoring is nothing of the sort.” Ann E. Marimow, *A Federal Judge in D.C. Hit ‘Reply All,’ and Now There’s a Formal Question About His Decorum*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/local/legal-issues/a-federal-judge-in-dc-hit-reply-all-and-now-theres-a-formal-question-about-his-decorum/2019/08/15/551155b4-ba17-11e9-b3b4-2bb69e8c4e39_story.html [https://perma.cc/K83J-SZNN].

preemption standards to foreign affairs and domestic activities, despite their concerns about the perceived uncertainty of climate science.

In short, if the normalization theory is applied to the climate change activities of states and cities, then it suggests that global-oriented activities are more likely to survive constitutional scrutiny. Even if the broader trend towards normalization does not continue, it is possible that climate change challenges could be treated differently. The nature of climate change is multi-level and multi-scalar, which distinguishes it from more recent “exceptional” cases involving the recognition of a foreign state⁴⁰⁹ or national security.⁴¹⁰ Given the inherently global nature of climate change, it is hard to articulate a justification for stricter treatment of internationally-oriented subnational action, as compared to purely domestic activities.

D. Comparative Insights from Human Rights Law

Questions of foreign affairs federalism within the human rights system offer comparative insights for analyses of subnational climate action. Just as states and cities have declared their support for the Paris Agreement, numerous cities have declared themselves to be “human rights cities,” often by endorsing international human rights standards and treaties.⁴¹¹ Although not an official “human rights city,” San Francisco has been a leader on human rights and has explicitly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as part of its municipal law.⁴¹² As with climate issues, these subnational governments are not official

⁴⁰⁹ *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015).

⁴¹⁰ See Part III.C (discussing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

⁴¹¹ See generally Barbara Oomen & Moritz Baumgärtel, *Human Rights Cities*, in THE SAGE HANDBOOK OF HUMAN RIGHTS 709–30 (Anja Mihr & Mark Gibney eds., 2014) (discussing the development and history of human rights cities); Davis, *supra* note 359; Martha F. Davis, *The Upside of the Downside: Local Human Rights and the Federalism Clauses*, 62 ST. LOUIS U. L.J. 921, 931 (2018) (discussing the popularization of both human rights cities and sanctuary jurisdictions); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 277–79 (2001) (noting the adoption of the Convention on the Elimination of all Forms of Discrimination Against Women by the City of San Francisco in 1998).

⁴¹² S.F., CAL. ADMIN. CODE § 12K.4(a) (1998) (implementing locally the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)); CITY AND CTY. OF S.F., DEP’T ON THE STATUS OF WOMEN, CEDAW IN ACTION: LOCAL IMPLEMENTATION IN THE CITY AND COUNTY OF SAN FRANCISCO (2010); see also Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1636 (2006) (noting public backlash to the idea of the United States joining CEDAW and qualified support for doing so within the Clinton Administration).

parties to the treaties but, instead, seek to rebrand their existing efforts and develop new laws that are consistent with international norms.

Both the international climate and human rights treaty regimes have also welcomed the participation of non-state actors. The submission of shadow human rights reports to U.N. treaty bodies is a common practice of non-governmental actors,⁴¹³ and some U.S. cities have also done this. For example, the city of Berkeley submitted a report to a U.N. human rights treaty committee in 2009, apparently the first city in the United States to do so.⁴¹⁴ These efforts are not dissimilar from efforts of domestic coalitions—such as the U.S. Climate Alliance, We Are Still In, and American’s Pledge—to report their progress towards the initial U.S. goals under the Paris Agreement in appropriate forums, such as NAZCA, as discussed in Part I.C. Some scholars have also argued for more direct subnational participation in human rights treaty regimes,⁴¹⁵ echoing calls to allow subnational governments to participate even more directly in international climate agreements.⁴¹⁶

A useful comparative perspective is also gained from examining the scholarly discourse concerning foreign affairs federalism and the U.S. ratification of human rights treaties. The United States has ratified three of the major human rights treaties with “federalism understandings.”⁴¹⁷ For example, the federalism clause submitted alongside the U.S. ratification of the Convention Against Torture states:

[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention, and otherwise by the state and local governments . . . the United States Government shall

⁴¹³ For example, as part of the Universal Periodic Review, the Human Rights Council compiles a report summarizing all of the stakeholder submissions, including from non-state actors. *See, e.g.*, Office of the U.N. Comm’r for Human Rights, United States of America, U.N. Doc. A/HRC/EG.6/22/USA/3 (2015) (summarizing ninety-one stakeholders’ submissions to the universal periodic review regarding the United States).

⁴¹⁴ *See* BERKELEY CITY COUNCIL, MOTION ON UNITED NATIONS TREATY REPORTS (2011), http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/MCLI_MeiklejohnCivilLibertiesInstitute_Annex2.pdf [<https://perma.cc/DXS6-NLU2>] (affirming Berkeley City’s compliance with U.N. Treaty recommendations); Martha F. Davis, *Cities, Human Rights and Accountability*, in GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES 31 (Barbara Oomen, Martha F. Davis & Michele Grigolo eds., 2016) (noting Berkeley’s early compliance with the reporting requirements of the Convention on the Elimination of all Forms of Racial Discrimination).

⁴¹⁵ Spiro, *The States and International Human Rights*, *supra* note 41, at 590 (“For example, though the United States refused to agree to the ICCPR’s ban on executing juvenile offenders, about half of the states already prohibit such executions on their own. Many, presumably, would sign on to the treaty prohibition if given the opportunity.”).

⁴¹⁶ *See generally* Esty & Adler, *supra* note 96.

⁴¹⁷ Davis, *The Upside of the Downside*, *supra* note 411, at 922.

take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.⁴¹⁸

These clauses have been criticized for allowing the United States to use federalism as a way to shield itself from international human rights obligations.⁴¹⁹ Some scholars have argued that these types of federalism clauses provide state and local governments with the necessary authority to implement human rights and to have their policies protected as long as they are otherwise in fulfillment of the treaties.⁴²⁰ Although this is not a view that has gone without criticism, it offers an interesting perspective on the nature of the conflict. As Martha Davis suggests, “[r]ather than permit general federal preemption of state prerogatives through purported exercise of treaty power, the federalism understanding would shield ‘appropriate’ rights-protective measures taken by local governments within their sphere of authority.”⁴²¹ In other words, states and local governments can adopt policies inconsistent with the national government, as long as they are consistent with the treaty obligations—which is arguably exactly what is happening in the climate context.

The United States did not ratify the UNFCCC or accede to the Paris Agreement with any federalism understandings. However, in theory, it could have because states and cities have jurisdictional authority over key greenhouse gas mitigation pathways, such as decisions over land-use, zoning, public transit and building codes.⁴²² Would it be possible to interpret the U.S. obligations under the UNFCCC (and under the Paris Agreement until any withdrawal is formalized) as if there was an implicit federalism

⁴¹⁸ 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990).

⁴¹⁹ See, e.g., Spiro, *The States and International Human Rights*, *supra* note 41, at 568, 588–89 (describing a form of international joint and several liability for national and state actors that would minimize the ability of governments to claim that federalism or devolution excuses them from their international obligations).

⁴²⁰ Compare Davis, *The Upside of the Downside*, *supra* note 411, at 937 (discussing the International Covenant on Civil and Political Rights’ federalism understanding), and Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301, 330–31 (1999) (noting that “nothing in the federal clauses prohibits state or sub-state entities from executing or further implementing” certain treaties), with Bradley Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 905 (2001) (noting that the International Covenant on Civil and Political Rights provisions covered by its federalism understanding are also those “least likely to be federally preempted”). For a description of the subnational adoption of human rights treaties as an example of “dialogic federalism” because it creates a dialogue among different levels of government with respect to international human rights law, see Powell, *supra* note 411, at 250.

⁴²¹ Davis, *The Upside of the Downside*, *supra* note 411, at 937.

⁴²² See Esty & Adler, *supra* note 96, at 281–82.

understanding? This is not a far-fetched idea when one considers the Supreme Court's decision in *Bond*, which held that the Chemical Weapons Convention was not violated by an isolated act of poisoning by a jilted lover.⁴²³ Davis has suggested that “the *Bond* court read into the treaty a federalism clause that circumscribed the federal ability to implement the treaty at every level of government and reserved such implementation activities for state and local governments.”⁴²⁴

If the UNFCCC was interpreted in a similar way, then states and cities could permissibly take action to the limits of their jurisdiction as long as this action was consistent with the treaty's goals—and *even if* this subnational action was arguably in conflict with national policy. I do not mean to suggest that the U.S. government *should* cabin its state responsibility by adopting future climate agreements with federalism understandings. Rather, I engage in this comparative analysis to suggest a way of reconciling inconsistent national and subnational positions. This discussion also demonstrates that the interplay between international, national, state, and local law is not unique to the climate arena, but pervades other areas of law, like human rights.⁴²⁵

I now turn to the final area of constitutional analysis relevant to foreign affairs federalism: the dormant Foreign Commerce Clause.

IV. DORMANT FOREIGN COMMERCE CLAUSE

A. Doctrine: Two-Pronged Test

Congress has the constitutional authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴²⁶ Most dormant Commerce Clause cases arise in the context of domestic interstate commerce. Under the modern dormant Commerce Clause test, a state law that treats in-state and out-of-state economic interests differently will likely be struck down as a discriminatory law.⁴²⁷ However, if it is a nondiscriminatory law that “regulates evenhandedly with only ‘incidental’ effects on interstate commerce,”⁴²⁸ then the court engages in a

⁴²³ *Bond v. United States*, 572 U.S. 844, 866 (2014).

⁴²⁴ Davis, *The Upside of the Downside*, *supra* note 411, at 929.

⁴²⁵ See, e.g., Powell, *supra* note 411.

⁴²⁶ U.S. CONST. art. 1, § 8, cl. 3.

⁴²⁷ See *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994) (striking down a state law that imposed higher costs on waste generated out of state); *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (striking down a New Jersey law that prohibited out of state waste on the grounds that it “falls squarely within the area that the Commerce Clause puts off limits to state regulation”).

⁴²⁸ *Or. Waste Sys.*, 511 U.S. at 99 (internal quotation marks omitted) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

balancing test and will uphold the law unless the burden on interstate commerce is excessive compared to local benefits.⁴²⁹ The one key exception is when the state acts as a market participant, and not just a regulator.⁴³⁰ At least in the domestic context, Congress can “authorize state regulations that burden or discriminate against interstate commerce” provided that “such an intent is clearly expressed.”⁴³¹ Moreover, the dormant Commerce Clause does not prevent “coordinated action” between the federal government and states in regulating interstate commerce.⁴³²

The Supreme Court has made clear that “[w]hen construing Congress’ power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required.”⁴³³ However, the Court has only considered the dormant Foreign Commerce Clause in cases involving taxation. In addition to the usual factors applied in a domestic context,⁴³⁴ the Court has applied two additional factors.⁴³⁵ The Court must first inquire whether there

⁴²⁹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (striking down an Arizona law that required local packaging of cantaloupe as an excessive burden on commerce).

⁴³⁰ *Compare Hughes v. Alexandria*, 426 U.S. 794 (1976) (upholding a Maryland junked auto law), *with S.-Cent. Timber v. Wunnicke*, 467 U.S. 82 (1984) (striking down Alaska law on timber on the grounds that it was regulating downstream processing). The Court has not yet decided a case involving a market participant exception in the context of the DFCC. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980) (“We have no occasion to explore the limits imposed on state proprietary actions by the ‘foreign commerce’ Clause We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.”); *see also* GLENNON & SLOANE, *supra* note 8, at 160–61 (describing the market participant exception to the Dormant Commerce Clause).

⁴³¹ *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *see also* *Ne. Bancorp, Inc. v. Bd. of Governors Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”).

⁴³² *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946); *see also* Norman Williams, *Why Congress May Not Overrule the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 157 (2005) (explaining the “coordinated action” rationale for the Dormant Commerce Clause and criticisms thereof).

⁴³³ *Japan Line v. Los Angeles*, 441 U.S. 434, 446 (1979); *see also Reeves*, 447 U.S. at 437–38 n.9 (“Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.”).

⁴³⁴ The Court has “sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also* *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (finding that states may properly tax foreign corporations doing business in those states).

⁴³⁵ *See generally* *Itel Containers Int’l. Corp. v. Huddleston*, 507 U.S. 60 (1993) (ruling that a state sales tax on international shipping containers did not conflict with the Foreign Commerce Clause).

is an “enhanced risk of multiple taxation.”⁴³⁶ Second, it should examine whether the tax prevents the Federal Government from “speak[ing] with one voice when regulating commercial relations with foreign governments.”⁴³⁷ As the Court subsequently noted, “a state tax at variance with federal policy will violate the ‘one voice’ standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive.”⁴³⁸ The Court was motivated to develop these additional criteria due to the “evidence that the Founders intended the scope of the foreign commerce power to be . . . greater” than the power to regulate interstate commerce.⁴³⁹

The two-pronged test applied in the foreign context comes from *Japan Line v. County of Los Angeles*, where the Supreme Court struck down a California ad valorem property tax on foreign-owned cargo ships under the dormant Foreign Commerce Clause.⁴⁴⁰ The U.S. interest in a uniform foreign policy was supported by the fact that the United States and Japan were parties to a relevant multi-lateral treaty governing the issue.⁴⁴¹ The asymmetry in taxation also led the Court to be concerned about retaliation that “would be felt by the Nation as a whole,” and not just the taxing state.⁴⁴² The Court did not find it dispositive that Congress had failed to preempt state law by affirmative regulation.⁴⁴³

In a series of tax cases decided after *Japan Line*, however, the Supreme Court appears to have retreated from the “one voice” theory by sustaining state laws that were challenged under the dormant Foreign Commerce Clause.⁴⁴⁴ For example, in *Barclays Bank v. Franchise Tax Board*

⁴³⁶ *Japan Line*, 441 U.S. at 446.

⁴³⁷ *Id.* at 449 (internal quotation marks omitted) (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *see also* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 311 (1994) (“In ‘the unique context of foreign commerce,’ a State’s power is further constrained because of ‘the special need for federal uniformity.’” (quoting *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986))).

⁴³⁸ *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

⁴³⁹ *Japan Line*, 441 U.S. at 448.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 452–55 (discussing the Customs Convention on Containers, which required that “containers temporarily imported are admitted free of ‘all duties and taxes whatsoever chargeable by reason of importation.’”).

⁴⁴² *Id.* at 453.

⁴⁴³ *Id.* at 454.

⁴⁴⁴ *See* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (holding that California’s worldwide combined reporting method of assessing taxes on foreign and domestic corporations did not offend the Dormant Foreign Commerce Clause); *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60 (1993) (upholding Tennessee’s sales tax); *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1 (1986) (rejecting a challenge

of California, the Supreme Court once again rejected a challenge to California's taxation scheme under the dormant Foreign Commerce Clause.⁴⁴⁵ The Court held, in part, that California's worldwide combined reporting scheme did not prevent the national government from "'speaking with one voice' in international trade."⁴⁴⁶ The Court concluded that Congress had the opportunity to preempt state laws on the taxation of multinational companies—and had even studied and considered such legislation—but ultimately did not enact any preemptive legislation.⁴⁴⁷ The Court "discern[ed] no 'specific indications of congressional intent' to bar the state action."⁴⁴⁸

Like the dormant foreign affairs power doctrine, the dormant Foreign Commerce Clause doctrine is perceived to be on the decline.⁴⁴⁹ The last time that the Supreme Court struck down a case on dormant Foreign Commerce Clause grounds was 1992.⁴⁵⁰ In many ways, *Japan Line* and the few subsequent cases that have been found to violate the dormant Foreign Commerce Clause stand as an aberration.

B. Subnational Climate Analysis

It is hard to see how the transnational climate networks, domestic climate, coalitions, or the nonbinding MOUs discussed above could be challenged under the dormant Foreign Commerce Clause because these agreements themselves do not create binding legal obligations that could be

to California's taxation scheme); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) (upholding California's application of its tax scheme to foreign subsidiaries); see also GLENNON & SLOANE, *supra* note 8, at 166 (describing the *Wardair* decision as a "retreat from the one-voice doctrine"); Spiro, *Globalization and the (Foreign Affairs) Constitution*, *supra* note 22, at 695 (stating that the decision in *Barclays Bank PLC v. Franchise Tax Bd.* was a "break with the one-voice tradition," as the law in question had elicited real protest from foreign governments and yet was sustained).

⁴⁴⁵*Barclays Bank* resolved matters left open in *Container Corp.*, 463 U.S. 159, which involved the taxation of a U.S. corporation with overseas subsidiaries incorporated in the countries in which they operated. *Barclays Bank* addressed the constitutionality of California's taxing scheme as applied to "domestic corporations with foreign parents or [to] foreign corporations with either foreign parents or foreign subsidiaries." *Barclays*, 512 U.S. at 302 (quoting *Container Corp.*, 463 U.S. at 189 n.26).

⁴⁴⁶*Barclays*, 512 U.S. at 320 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

⁴⁴⁷*Id.* at 325–26.

⁴⁴⁸*Id.* at 324.

⁴⁴⁹Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations Symposium: The Law of Nations and the United States Constitution*, 106 GEO. L.J. 1825, 1830–31 (2018).

⁴⁵⁰Wuerth, *supra* note 449, at 1831 (noting that the last time the Supreme Court invalidated a law under the Dormant Foreign Commerce Clause was in *Kraft Gen. Foods v. Iowa Dept. of Rev.*, 505 U.S. 71 (1992)).

said to discriminate against foreign commerce. However, the Cap-and-Trade Agreement between California and Quebec deserves scrutiny.⁴⁵¹

As the discussion in the prior Part suggests, the Supreme Court has considered dormant Foreign Commerce Clause challenges primarily in the context of tax cases.⁴⁵² Although it might be possible for the doctrine to apply in other contexts, a successful challenge to California's cap-and-trade program would likely have to be framed in terms of tax. It is theoretically possible to conceive of a cap-and-trade program as economically equivalent to a tax, but they function differently in practice.⁴⁵³ Unlike a tax, California's cap-and-trade program is a market-based approach to regulating carbon. As discussed in Part II.B.4, California's Global Warming Solutions Act and implementing regulations created a cap-and-trade system that issues greenhouse gas allowances and offset credits, which in turn gives covered entities flexibility with how to reduce their carbon emissions. Even if the cap-and-trade program could be conceived of as a tax, it is difficult to understand how it could create the "enhanced risk of multiple taxation"⁴⁵⁴ that the cargo ships in *Japan Line* experienced. It is also challenging to see how the program discriminates against regulated entities; if anything, it is enhancing market function and regulatory compliance.

Unlike the *Japan Line* case where the California tax was seen to conflict with a relevant multilateral treaty,⁴⁵⁵ the California-Quebec emissions trading program is not at odds with international climate law. The Paris Agreement does not require the use of market-based trading programs, but, it allows parties to meet their own targets through such means,⁴⁵⁶ thereby encouraging the growth of international linkages from the bottom-up.⁴⁵⁷ The rather awkward phrasing of Article 6.2 of the Paris Agreement⁴⁵⁸ was

⁴⁵¹ I assume for purposes of this analysis that all of the subnational global climate action discussed, including the cap-and-trade program, would survive a Dormant Commerce Clause challenge. For an analysis of potential concerns under the ordinary dormant Commerce Clause, see Kysar & Meyler, *supra* note 15, at 1647.

⁴⁵² See *supra* note 444.

⁴⁵³ See generally PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE POLICY MEMO #1: CAP AND TRADE V. TAXES (2009), <https://www.c2es.org/site/assets/uploads/2009/03/climate-policy-memo-1-cap-and-trade-vs-taxes.pdf> [<https://perma.cc/FWS4-F6RD>] (discussing "Similarities Between Cap and Trade and Taxes").

⁴⁵⁴ *Japan Line v. Los Angeles*, 441 U.S. 434, 446 (1979).

⁴⁵⁵ *Id.* at 452–54.

⁴⁵⁶ See Paris Agreement, *supra* note 2, art. 6.2.

⁴⁵⁷ MEHLING, METCALF & STAVINS, *supra* note 160, at 2.

⁴⁵⁸ Art. 6.2 of the Paris Agreement states in part, "Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development. . . , and shall apply robust accounting to ensure, inter alia, the avoidance of

apparently adopted, in part, to assuage concerns of the United States and Canada, which did not want to be accountable for cross-border trading at the subnational level due to the lack of national oversight of these systems.⁴⁵⁹

Given the lack of conflict with a treaty, it is difficult to discern a reason why the California-Quebec emissions trading program raises concerns about the nation speaking with “one voice.”⁴⁶⁰ Instead, this situation recalls to mind the facts of *Barclays Bank*.⁴⁶¹ Just as Congress had considered, but rejected, legislation that would preempt state laws on the taxation of multinational companies in *Barclays Bank*, Congress has considered, but rejected, legislation that would preempt subnational emissions trading.⁴⁶²

C. Abandoning the Domestic Versus Foreign Distinction?

The foregoing analysis is premised on a distinction between the domestic and foreign dormant Commerce Clauses. However, scholars have argued that the dormant Foreign Commerce Clause should not be treated differently from the domestic version.⁴⁶³ This is not such a radical idea when one considers that no such distinction was made for almost two centuries, until the decision in *Japan Line* in 1979. Glennon and Sloane challenge the constitutional basis for a heightened standard in cases involving the dormant Foreign Commerce Clause because nothing in the Constitution prohibits discrimination against nations.⁴⁶⁴ In contrast, in domestic interstate dormant Commerce Clause cases, the burdened parties are states, which have powers reserved to them under the Tenth Amendment. As a result, Glennon and Sloane suggest abandoning the additional two-pronged inquiry in *Japan Line*, and also changing the standard to one of presumptive validity.⁴⁶⁵

The risk of retaliation has long motivated the Court’s rationale in foreign affairs cases. Under the doctrine of state responsibility in international law, nations are responsible for the actions of their sub-units.⁴⁶⁶ At our nation’s founding and under the Articles of Confederation, “a single

double counting. . . .” Paris Agreement, *supra* note 2, art. 6.2. The term “internationally transferred mitigation outcomes” is part of the new climate jargon for emissions trading. ANDREI MARCU ET AL., ISSUES AND OPTIONS: ELEMENTS FOR TEXT UNDER ARTICLE 6, at 3–5 (2017), <https://www.ictsd.org/themes/climate-and-energy/research/issues-and-options-elements-for-text-under-article-6-0> [<https://perma.cc/D375-EBNA>].

⁴⁵⁹ MULLER, *supra* note 237, at 7.

⁴⁶⁰ *Japan Line*, 441 U.S. at 449.

⁴⁶¹ *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 325–26 (1994).

⁴⁶² Buzbee, *supra* note 241, at 1042.

⁴⁶³ GLENNON & SLOANE, *supra* note 8, at 178.

⁴⁶⁴ *Id.* at 176–77.

⁴⁶⁵ *Id.* at 178.

⁴⁶⁶ *Id.* at 29 n.108; Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1260.

misstep by a single state could imperil the entire country.”⁴⁶⁷ During the nineteenth century, concerns about retaliation motivated the striking down of state laws attempting to regulate international commerce and immigration.⁴⁶⁸ Similarly, in the twentieth century, the same rationale animated the *Japan Line*’s “one voice” theory.⁴⁶⁹

In today’s world, is the risk of foreign retaliation smaller? The Court has not necessarily found retaliation to be the overriding concern. For example, this concern did not sway the court in later dormant Foreign Commerce Clause cases, like *Barclays Bank*. The decision in *Medellin* also created a risk of potential retaliation against U.S. citizens in other countries, including, for example, denial of access to U.S. consular services.⁴⁷⁰ Arguably, this was a greater risk than the issues at play in *Japan Line*,⁴⁷¹ but it did not govern the Court’s ultimate holding.

With globalization, the nature of retaliation has also changed. Spiro, for example, has argued that, given the ability for nations to retaliate in a targeted way against states, the “one voice” rationale is no longer compelling.⁴⁷² As an illustrative example, he points out that in response to an earlier version of the California tax at issue in the *Barclays Bank* case, the U.K. Parliament passed retaliatory legislation aimed only against corporations registered in California and in other states with similar tax laws.⁴⁷³

⁴⁶⁷ GLENNON & SLOANE, *supra* note 8, at 32.

⁴⁶⁸ See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (striking down a California statute requiring bonds from certain immigrant passengers); *Brown v. Maryland*, 25 U.S. 419 (1827) (holding unconstitutional a state law requiring importers of foreign goods to purchase a license).

⁴⁶⁹ 441 U.S. 434, 449 (1979).

⁴⁷⁰ As Justice Breyer warned in his dissent:

The majority’s two holdings . . . unnecessarily complicate the President’s foreign affairs task insofar as, for example, they increase the likelihood of Security Council *Avena* enforcement proceedings, of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation’s reputation abroad as a result of our failure to follow the “rule of law” principles that we preach.

552 U.S. 491, 566 (2008) (Breyer, J., dissenting); see also GLENNON & SLOANE, *supra* note 8, at 174 (noting that the *Medellin* decision “almost certainly threatened the interest of the nation and its citizens” by risking retaliation by foreign nations).

⁴⁷¹ 441 U.S. 434 (1979).

⁴⁷² Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1261–62; Spiro, *Globalization and the (Foreign Affairs) Constitution*, *supra* note 22, at 688; Spiro, *The States and International Human Rights*, *supra* note 41, at 584–86.

⁴⁷³ Spiro, *Foreign Relations Federalism*, *supra* note 22, at 1265; Spiro, *The States and International Human Rights*, *supra* note 41, at 585 n.66. (noting that California changed its tax reporting system as a result of the United Kingdom’s retaliatory laws).

Moreover, the reality is that the nation rarely speaks with one voice, as there is often a contest between the President, Congress, and the Court.⁴⁷⁴ Indeed, the Constitution has been described as “an invitation to struggle for the privilege of directing American foreign policy.”⁴⁷⁵ This line of reasoning is consistent with arguments made by international law scholars. For instance, Anne Marie Slaughter has argued that international law is better conceived as a system of horizontal networks between disaggregated government institutions across borders and vertical networks between national government officials and their supranational counterparts.⁴⁷⁶

If the dormant Commerce Clause doctrine is the same in the foreign context as in the domestic context, or if the Supreme Court’s application of the dormant Foreign Commerce Clause is truly limited to a tax case like *Japan Line*, then the subnational climate activity discussed here, including the California-Quebec emissions trading system, will be even better positioned to survive constitutional scrutiny.

CONCLUSION

States and cities have extensive experience engaging on matters that arguably fall within the scope of foreign affairs, including trade, tourism, investment, agriculture, family support, and transboundary pollution.⁴⁷⁷ The breadth of subnational engagement in foreign affairs alone does not mean that these activities are constitutional.⁴⁷⁸ But the fact that states and cities have entered into hundreds, perhaps even thousands, of agreements with foreign governments in the past half-century with almost no oversight from Congress is notable.⁴⁷⁹

Set against this backdrop, the international actions of states and cities on climate change do not seem so extraordinary. Climate change is a collective action problem of global dimensions that transcends national

⁴⁷⁴ Sarah Cleveland, *Crosby and the “One Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975 (2001); Spiro, *Normalizing Foreign Relations Law*, *supra* note 22, at 26.

⁴⁷⁵ EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1984*, at 201 (Randall W. Bland et al. eds., 5th ed. 1984); GLENNON & SLOANE, *supra* note 8, at 173.

⁴⁷⁶ SLAUGHTER, *supra* note 83, at 12–13.

⁴⁷⁷ *See* Part I.A.

⁴⁷⁸ In the past, the Supreme Court has declined to draw parallels to conduct that was widely believed to be constitutional but that it has not ruled upon, such as the state and local sanctions against South Africa in the 1980s. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

⁴⁷⁹ *See* Peter Spiro, *The Waning Federal Monopoly over Foreign Relations*, LAWFARE (Jan. 9, 2017), <https://www.lawfareblog.com/waning-federal-monopoly-over-foreign-relations> [<https://perma.cc/XX77-CFXJ>] (suggesting examples of foreign affairs federalism “from practice that may be more constitutionally consequential than judicial pronouncements”).

borders. Dismissing agreements between states and foreign governments or interstate agreements that have clear foreign implications as legally meaningless because they purport to be nonbinding misses an important dimension of international law.⁴⁸⁰ The Westphalian model of nation-states as the only salient actors in international law has been challenged by scholars and defied by reality. Even ostensibly political actions by states and cities in support of a treaty, such as the Paris Agreement, can enable them to act as norm sustainers of international law.⁴⁸¹ The concept of subnational norm sustaining helps to explain how subnational governments can strengthen international legal norms that have been rejected by national governments. City and state norm sustaining behavior runs counter to the notion that the national government has “exclusive” authority over foreign affairs and that the nation should speak with “one voice.”

Scholars of foreign affairs law have long observed that the nation rarely speaks with just one voice.⁴⁸² In addition, although the federal government theoretically has plenary power over foreign affairs, the Constitution does not contain an express prohibition against states engaging internationally. Thus, unless the federal government affirmatively takes action, such as through preemption, states and cities can engage in foreign affairs within boundaries that are not always clearly demarcated. The analysis of four specific examples of subnational action on global climate change highlights this grey zone of foreign affairs federalism.⁴⁸³

The questions raised in this Article are not merely theoretical because, as this Article was being finalized for publication, the Trump administration sued California over its Cap-and-Trade Agreement with Quebec. This Article addresses the major legal issues raised in the complaint.⁴⁸⁴

The one and only time the Supreme Court has invalidated an agreement between a state and a foreign government was in 1840 and the plurality opinion did not agree whether it violated the Compact or Treaty Clause.⁴⁸⁵ Further, when considering agreements between states, the Supreme Court has retreated from a literal interpretation of the clause and given up on attempts to distinguish among key terms, such as the difference between a treaty, an agreement, and a compact. Under the Compact Clause, Congress has the explicit power to regulate interstate compacts and those

⁴⁸⁰ See Part I.C.

⁴⁸¹ Murthy, *supra* note 14.

⁴⁸² See Introduction, Part IV.C.

⁴⁸³ See Parts I.B, II.B.

⁴⁸⁴ Amended Complaint, *United States v. California*, No. 2:19-cv-02142-WBS-EFB (E.D. Cal. Nov. 19, 2019), ECF No. 7.

⁴⁸⁵ *Holmes v. Jennison* 39 U.S. 540, 568–79 (1840).

between states and foreign nations.⁴⁸⁶ Yet, for the most part, it has not exercised this power; there is not even a formal mechanism for Congress to be notified when a state enters into an agreement that might implicate the Compact Clause. Rather than apply the requirement of congressional consent literally, the Supreme Court has developed a functional test for interstate compacts that assesses the power of the state versus the national government. It has also identified classic indicia of a compact, such as whether a joint body is created or whether the state is free to reject the rules or withdraw from the agreement. Most experts believe that this interstate Compact Clause doctrine now applies to agreements with foreign nations.

Applying this functional test to the foreign context, credible arguments can be made that the four examples of subnational global climate action discussed earlier enhance the power of the state at the expense of the national government and may run afoul of the Compact Clause.⁴⁸⁷ Ultimately, however, I conclude that such agreements and alliances would survive potential challenges. Even the California-Quebec agreement creating a linked cap-and-trade program is not dissimilar to other forms of cross-border cooperation, such as those on the Great Lakes and regarding motor vehicle regulation. However, if the underlying assumption is incorrect, and the Supreme Court was inclined to interpret the Compact Clause literally for agreements with foreign powers, then many forms of subnational engagement on foreign affairs, including on climate change, would be constitutionally suspect.⁴⁸⁸ The ongoing litigation about California's Cap-and-Trade Agreement with Quebec will test these assumptions.

With respect to the Supremacy Clause, neither Congress nor the President has expressly preempted the kinds of transnational networks, domestic coalitions, or bilateral agreements on climate change discussed in this Article.⁴⁸⁹ The climate context is distinguishable from the seminal foreign affairs preemption cases because there is no conflicting congressional statute or executive agreement.⁴⁹⁰ In fact, the actions of states and cities are broadly consistent with the UNFCCC, a treaty that the U.S. Senate consented to ratify, and the Clean Air Act, which applies to greenhouse gas regulation. Even though President Trump has indicated that he seeks to re-negotiate the terms of the treaty, the bargaining chip theory—a key rationale of preemption cases—does not make sense after the Supreme Court's holding in *Massachusetts v. EPA*, or in light of the bottom-up/top-down structure of the Paris Agreement.

⁴⁸⁶ See Part II.A.

⁴⁸⁷ See Part II.B.

⁴⁸⁸ See Part II.C.

⁴⁸⁹ See Part III.

⁴⁹⁰ See Parts III.A., III.B.

As there is neither a statute nor an executive agreement that creates a clear conflict with subnational climate action, President Trump would have to rest a preemption argument on the basis of his foreign policy decision to withdraw from the Paris Agreement and on his dormant foreign affairs power.⁴⁹¹ This is a difficult argument. Moreover, in cases involving questions of dormant executive power over foreign affairs, the Supreme Court determined that the real purpose of the state laws was not to regulate in areas of traditional state authority, such as insurance and probate, but to influence U.S. diplomacy.⁴⁹² In contrast, states and cities are motivated to engage on climate change to protect the health and welfare of their citizens; they engage globally because climate change is a challenging collective action problem.

If the potential trend towards normalization in the field of foreign affairs law continues, then the Supreme Court may determine that subnational global climate action should not be preempted.⁴⁹³ The field of human rights offers comparable insights because, like in the climate context, cities have re-branded their local actions as in support of human rights treaties and sought to participate in international processes.⁴⁹⁴ Moreover, because the United States has adopted several human rights treaties with explicit federalism understandings, scholars have offered ways to reconcile the kinds of conflicting national and subnational positions that are also seen in the climate field.

Finally, the Article considers the dormant Foreign Commerce Clause.⁴⁹⁵ Of the different kinds of subnational action on global climate change considered in this paper, only the California-Quebec agreement on cap-and-trade raises possible concern. However, the dormant Foreign Commerce Clause doctrine has primarily been applied to cases involving taxes, and it is difficult to see how the cross-border emissions trading program creates a risk of multiple taxation. In a seminal case, the Supreme Court's finding that the United States must speak with one voice was influenced by U.S. participation in a treaty whose terms conflicted with the state law at issue. In contrast, because the Paris Agreement supports the use of emissions trading, the agreement between California and Quebec is arguably consistent with an international treaty.⁴⁹⁶

Scholars have also made convincing arguments for abandoning the dormant Foreign Commerce Clause's two-pronged test, which focuses on the risk of multiple taxation and the need for the nation to speak with one

⁴⁹¹ See Part III.B.

⁴⁹² See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003); *Zschernig v. Miller*, 389 U.S. 429, 437 n.8 (1968).

⁴⁹³ See Part III.C.

⁴⁹⁴ See Part III.D.

⁴⁹⁵ See Part IV.

⁴⁹⁶ See Parts IV.A, IV.B.

voice.⁴⁹⁷ Although the Supreme Court has said that greater scrutiny should be applied in foreign cases, this presumption should arguably be reversed. Under the Constitution, foreign nations do not have rights reserved to them, as do states burdened in an interstate dispute. Moreover, globalization has allowed for greater targeted retaliation, obviating the need for the nation to always speak with one voice. Thus, while subnational action on global climate change would likely survive a dormant Foreign Commerce Clause challenge as currently understood, strong normative arguments exist for not even subjecting this activity to a heightened standard.

The foregoing analysis suggests that the federal government has not taken constitutionally-sufficient steps to prevent or preempt the transnational networks, domestic coalitions, memoranda of understanding, and bilateral agreements that states and cities have pursued on global climate change. If the analysis is correct, then the types of subnational global climate action discussed in this Article would likely survive constitutional scrutiny. Holding otherwise would also call into question a host of other cross-border activity by states and cities.

⁴⁹⁷ See Part IV.C.