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State International Agreements: The United States, Canada, and Constitutional Evolution

Accords internationaux d'État: Les États-Unis, le Canada et l'évolution constitutionnelle

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Abstract

The text of the US Constitution appears to require that individual states, to the extent that they are ever allowed to conclude agreements with foreign governments, must obtain congressional approval. In practice, however, states conclude many agreements with foreign governments, including with Canada and its provinces, and they almost never seek congressional approval. This practice is an illustration of both the importance of federalism in US foreign relations and the significant role played by historical practice in informing US constitutional interpretation. The phenomenon of state international agreements assumed new prominence in 2019 when the Trump administration sued to challenge a climate change agreement that the state of California had made with Québec. Despite this challenge, for the most part, neither Congress nor the executive branch has resisted the growth in state international agreements. This acquiescence could change as countries like China target US states in an effort to work around strained relations with the US national government and as states become more assertive in resisting the national government's foreign policies. In any event, the practice of state international agreements unapproved by Congress rests in part on a distinction between binding and non-binding agreements that deserves greater scrutiny under both domestic and international law.

Keywords: State agreements; compacts; federalism; preemption; climate change; constitutional evolution; non-binding agreements

Résumé

Le texte de la Constitution américaine semble exiger que, dans la mesure où des États individuels sont autorisés à conclure des accords avec des gouvernements étrangers, ils

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doivent obtenir l'approbation du Congrès. Cependant, dans la pratique, les États concluent de nombreux accords avec des gouvernements étrangers, y compris avec le Canada et ses provinces, et ils ne demandent presque jamais l'approbation du Congrès. Cette pratique illustre à la fois l'importance du fédéralisme dans les relations étrangères des États-Unis et le rôle important que joue la pratique historique en guidant l'interprétation de la constitution américaine. Le phénomène des accords internationaux entre États a pris une nouvelle importance en 2019 lorsque l'administration Trump a intenté une action en justice pour contester un accord sur le changement climatique que l'État de la Californie avait conclu avec le Québec. Malgré cette contestation, dans l'ensemble ni le Congrès ni le pouvoir exécutif n'ont résisté à la croissance des accords internationaux entre États. Cet assentiment pourrait changer à mesure que des pays comme la Chine ciblent les États américains dans le but de contourner les relations tendues avec le gouvernement national des États-Unis et que les États s'opposent avec plus d'assurance aux politiques étrangères du gouvernement national. Quoi qu'il en soit, la pratique des accords internationaux d'État non approuvés par le Congrès repose en partie sur une distinction entre les accords contraignants et non contraignants qui mérite un examen plus approfondi en vertu du droit national et international.

Mots-clés: Accords d'État; pactes; fédéralisme; préemption; changement climatique; évolution constitutionnelle; accords non contraignants

Article I, section 10, of the US Constitution disallows states from entering into “any Treaty, Alliance, or Confederation,” and it requires that they obtain the “consent of Congress” in order to “enter into any Agreement or Compact with ... a foreign Power.”¹ This language appears to require that, to the extent that US states are ever allowed to conclude agreements with foreign governments, they must obtain congressional approval. This requirement was the subject of litigation during the Trump administration when the national government unsuccessfully sought to challenge a climate change agreement made by the state of California with Québec.² As it turns out, US states often enter into agreements with foreign governments, including sub-national governments, including with Canada and its provinces. Yet states almost never seek congressional approval for these agreements, and the number of these unapproved agreements has been growing substantially in recent years. Notwithstanding the Trump administration's lawsuit, Congress and the executive branch have generally accepted this development — and, indeed, in some ways, they have encouraged it. There are nevertheless potential flashpoints that could produce federal-state friction in the years ahead.

These sub-national agreements provide an illustration of how the US constitutional law of foreign affairs has evolved over time and is often found more in historical practice than in the text of the Constitution.³ The agreements also reveal that, although it is sometimes said that the conduct of foreign affairs is exclusively a national prerogative,⁴

¹US Const, art I, § 10.

²See *United States v California*, 444 F Supp (3d) 1181 (ED Cal 2020); *United States v California*, 2020 US Dist LEXIS 126504 (ED Cal, 16 July 2020).

³For an extensive defence of this claim, see Curtis A Bradley, *Historical Gloss and Foreign Affairs: Constitutional Authority in Practice* [forthcoming].

⁴See e.g. *United States v Belmont*, 301 US 324 at 331 (1937) (“[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the

federalism is a vibrant part of the United States' (and many other nations') international relations. Finally, the agreements highlight a broader question that deserves greater attention, which is whether it makes sense for requirements and limitations in both domestic law and international law to turn sharply on a distinction between binding and non-binding agreements.⁵ The first section of this article describes the US constitutional law relating to state international agreements. The second section explains that, despite what the text of the Constitution might suggest, states generally do not seek congressional approval for these agreements. The third section recounts the litigation over the California-Québec agreement and the reasons that the court gave for rejecting the Trump administration's challenges. The fourth section discusses the recent growth in state international agreements and the potential for conflicts with national policy. The fifth section explains how this growing practice relies in part on a sharp distinction between binding and non-binding agreements that merits greater scrutiny than it has yet received.

1. State international agreements

The US Constitution, which took effect more than 230 years ago, is the oldest written constitution in the world. One of the goals of the constitutional founders was to enhance the foreign affairs powers of the national government because there was a perception that the country was not as effective in international affairs as it should be. In the years leading up to the adoption of the Constitution, the country operated under a treaty-like arrangement known as the Articles of Confederation, but this arrangement was widely viewed as being inadequate. As the historian Walter LaFeber observed, “[n]othing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation, Congress could not effectively and safely conduct foreign policy.”⁶ In arguing for the adoption of the Constitution, Alexander Hamilton complained that “[w]e may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride, or degrade the character of an independent nation, which we do not experience.”⁷

Despite the founders' goal of strengthening the national government, the Constitution preserved a federal structure, in part by giving the national government limited

State of New York does not exist”); *Chinese Exclusion Case*, 130 US 581 at 606 (1889) (“[f]or local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”). See also Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed (New York: Oxford University Press, 1996) at 197 (“[a]t the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist’”).

⁵For discussion of this issue in the context of agreements made by national governments, see Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, “The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis” (2023) 90 U Chi L Rev 1281.

⁶Walter LaFeber, “The Constitution and United States Foreign Policy: An Interpretation” (1987) 74 J American History 695 at 697.

⁷“Federalist No 15” (1 December 1787), in *The Federalist Papers*, edited by Clinton Rossiter (New York: Penguin Books USA, 1961) 106. See also Bradford Perkins, “The Creation of a Republican Empire, 1776–1865” (1993) 1 Cambridge History of American Foreign Relations 56 (“[b]ecause the states retained so much power, the government at Philadelphia could not bargain effectively, could not assure other nations that any agreements it made would actually be observed by the states, could not develop a unified commercial policy to extort concessions from other countries, could not maintain an effective military or naval force”).

and enumerated power and by reserving the remaining powers to the states and the people, an idea subsequently reflected in the Tenth Amendment to the Constitution.⁸ But there was less support for federalism with respect to the conduct of international affairs. As James Madison contended, “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁹ Even Thomas Jefferson, a defender of states’ rights, reasoned that the United States should be “made one nation in every case concerning foreign concerns.”¹⁰ In addition to assigning various foreign affairs powers to the national government, the Constitution sought to ensure national control over foreign affairs in two basic ways — through the Supremacy Clause and through express prohibitions on certain state foreign affairs activities.

A. Federal pre-emption

One way in which the Constitution sought to ensure national control over foreign affairs was through the Supremacy Clause, which makes the Constitution, federal laws, and treaties the supreme law of the land, binding on the states.¹¹ The Supremacy Clause, when combined with the extensive array of legislative powers assigned to Congress in Article I of the Constitution, gives the national government substantial ability to pre-empt state laws and activities. This pre-emption is generally straightforward when Congress or an international agreement made by the national government expressly provides for pre-emption or where there is a direct conflict between federal and state law. Congress has broad authority to regulate, especially under its commerce power.¹² And the US Supreme Court has held that the national government’s treaty power is even broader and can address matters that Congress could not otherwise address.¹³

The US Supreme Court has also made clear that pre-emption can occur where the conflict with federal law is indirect. For example, the court has held that a federal statute may evince an intent by Congress to occupy a particular field of regulation (for example, an aspect of immigration enforcement), in which case any state laws in that field are pre-empted.¹⁴ In addition, the court has held that

⁸See US Const, Tenth Amendment (1791) (“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

⁹“Federalist No 42” (22 January 1788), in *The Federalist Papers*, *supra* note 7 at 264.

¹⁰Letter from Thomas Jefferson to John Blair, 13 August 1787, online: <founders.archives.gov/documents/Jefferson/01-12-02-0031>.

¹¹See US Const, art VI.

¹²See *ibid*, art I, § 8 (“[t]he Congress shall have Power.... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). See e.g. *Gonzales v Raich*, 545 US 1 (2005) (allowing Congress to regulate personal cultivation of marijuana for medical use); *Wickard v Filburn*, 317 US 111 (1942) (allowing Congress to regulate the growing of wheat for home consumption).

¹³See *Missouri v Holland*, 252 US 416 (1920) (allowing the national government to regulate the hunting and capturing of migratory birds based on a treaty, regardless of whether Congress would have had the authority to enact the regulation in the absence of the treaty). See e.g. *Clark v Allen*, 331 US 503 (1947) (finding part of a California inheritance law to be pre-empted by a treaty with Germany); *Asakura v City of Seattle*, 265 US 332 (1924) (finding a Seattle ordinance concerning the licensing of pawnbrokers to be pre-empted by a treaty with Japan).

¹⁴See e.g. *Arizona v United States*, 567 US 387 (2012); *Hines v Davidowitz*, 312 US 52 (1941).

state laws or actions that stand as an obstacle to the achievement of the policies in a federal statute or agreement may be pre-empted.¹⁵ Under these doctrines of “field pre-emption” and “obstacle pre-emption,” state laws or actions may be set aside even if it is possible to comply with both federal and state law. Many state activities relating to foreign affairs, it should be noted, do not conflict with federal law, even indirectly. For example, most of the states have offices overseas and send trade and diplomatic representatives to meet with foreign officials, and this interaction is not viewed as being pre-empted. States and municipalities also often take a position on international issues — for example, by issuing non-binding resolutions relating to subjects like arms control and human rights — a form of speech that has not typically been thought to be subject to pre-emption, even though foreign governments sometimes complain to the national government about these expressions.¹⁶

More controversially, states sometimes limit their investments and contracting with respect to particular countries as a result of foreign events. In theory, these measures can be found to be pre-empted if they conflict with federal sanctions laws. This is what the US Supreme Court concluded in a 2000 decision with respect to a Massachusetts law that restricted purchases from companies doing business with Burma.¹⁷ But Congress often avoids pre-empting even these types of state measures and sometimes specifically endorses them. In the 1980s, Congress did not include a pre-emption provision in its sanctions legislation against South Africa, despite the existence by that point of many state and local measures aimed at that country in response to its apartheid policies.¹⁸ A 2007 federal statute specifically allowed for state and local disinvestment from Sudan.¹⁹ And a 2010 statute authorized state and local disinvestment from Iran.²⁰ Some states disinvested from Russian banks and companies after Russia’s 2022 invasion of Ukraine, and, to date, these measures have not been found to be pre-empted.²¹

¹⁵See *Crosby v National Foreign Trade Council*, 530 US 363 (2000) [*Crosby*]; *American Ins Ass’n v Garamendi*, 539 US 396 (2003) [*Garamendi*].

¹⁶See e.g. *Gingery v City of Glendale*, 831 F (3d) 1222 at 1229 (9th Cir 2016) (“Glendale’s establishment of a public monument to advocate against ‘violations of human rights’ [by Japan] is well within the traditional responsibilities of state and local governments”).

¹⁷See *Crosby*, *supra* note 15 at 373 (“we see the state Burma law as an obstacle to the accomplishment of Congress’s full objectives under the federal [sanctions] Act”).

¹⁸See Richard B Bilder, “The Role of States and Cities in Foreign Relations” (1989) 83 Am J Intl L 821 at 823; Sarah H Cleveland, “*Crosby* and the ‘One Voice’ Myth in U.S. Foreign Relations” (2001) 46 Vill L Rev 975 at 1002. For an opinion from the Justice Department’s Office of Legal Counsel concluding that the state measures were not subject to dormant pre-emption, see “Memorandum Opinion for the Associate Attorney General, South African Divestment Statutes Enacted by State and Local Governments,” *Opinions, Office of Legal Counsel*, vol 10 (9 April 1986) at 49; cf *Crosby*, *supra* note 15 at 388 (noting that the US Supreme Court “never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid”).

¹⁹See *Sudan Disinvestment and Accountability Act of 2007*, 31 December 2007, Pub L 110–74 at 3.

²⁰See 22 USC § 8532.

²¹See Mitch Smith, “More US States Reevaluate Their Financial Ties to Russia,” *New York Times* (1 March 2022); Office of the New York State Comptroller, *DiNapoli Orders Divestment of Russia Holdings* (25 March 2022), online: <www.osc.state.ny.us/press/releases/2022/03/dinapoli-orders-divestment-russia-holdings>.

It is possible that some state activities will be found to be pre-empted even in the absence of a conflict with a statute or agreement if the laws or activities unduly interfere with either the national government's authority to regulate commerce or its ability to conduct foreign relations. The US Supreme Court has construed the Constitution's grant of authority to Congress to regulate domestic and international commerce as implicitly pre-empting some state laws and activities under a doctrine known as the "dormant Commerce Clause."²² The court has also held that some state laws or activities will be pre-empted if they have a direct impact on foreign affairs under a doctrine known as "dormant foreign affairs preemption."²³ The current scope and viability of this latter doctrine is uncertain, and the US Supreme Court has generally seemed more sceptical in recent years of dormant pre-emption, at least in the absence of discrimination against other states or nations.²⁴ This is true even in the domestic context. Recently, for example, the court declined to invalidate a California law that imposed animal treatment requirements on pork sold in the state, despite the fact that the law would primarily affect producers of pork in other states.²⁵

Federalism is also relevant to US foreign affairs in a variety of other ways that do not implicate federal pre-emption. Most actions by non-US citizens inside the United States, involving matters such as contracts, property rights, and criminal responsibilities, are regulated under state rather than federal law. The states have their own judicial systems, and their courts can and do hear cases relating to foreign affairs. The national government also often takes federalism into account when negotiating treaties, and the Senate does so when attaching conditions to its consent to treaties.²⁶ Compliance with some international obligations is further complicated by federalism, something illustrated by the US Supreme Court's decision in *Medellin v Texas*, which held that state courts were not obligated to comply with a decision by the International Court of Justice mandating hearings for certain individuals convicted of state crimes.²⁷

²²See e.g. *Comptroller of Treasury of Md v Wynne*, 575 US 542 (2015); *Japan Line v County of Los Angeles*, 441 US 424 (1979); *Pike v Bruce Church, Inc*, 397 US 137 (1970).

²³See *Zschernig v Miller*, 389 US 429 (1968). See also Jack L Goldsmith, "Statutory Foreign Affairs Preemption" (2000) 2000 Sup Ct Rev 175 at 203. Dormant foreign affairs pre-emption is also sometimes confusingly called field pre-emption, even though it does not require that Congress have occupied the field of regulation. See e.g. *Garamendi*, *supra* note 15 at 419, n 1.

²⁴See Ingrid Brunk Wuerth, "The Future of the Federal Common Law of Foreign Relations" (2018) 106 Geo LJ 1825 at 1831–32 (noting that the US Supreme Court "has not applied the dormant Foreign Commerce Clause to strike down a state law since 1992, and it has not applied dormant foreign affairs preemption to strike down a state law since 1968, despite opportunities to apply both" and that the *Garamendi* majority "questioned *Zschernig's* reasoning and did not rely on foreign affairs pre-emption," while the *Garamendi* dissent "explicitly distanc[ed] itself" from *Zschernig*).

²⁵See *National Pork Producers Council v Ross*, 143 S Ct 1142 (2023). See also *Barclays Bank Plc v Franchise Tax Bd*, 512 US 298 at 331 (1994) (declining to overturn California's method of taxing multinational corporations, despite the fact that the method differed from the national government's approach and had triggered foreign protests, and stating that "[w]e leave it to Congress — whose voice, in this area, is the Nation's — to evaluate whether the national interest is best served by tax uniformity, or state autonomy").

²⁶See Curtis A Bradley, *International Law in the U.S. Legal System*, 3rd ed (New York: Oxford University Press, 2021) at 64; Duncan B Hollis, "Executive Federalism: Forging New Federalist Constraints on the Treaty Power" (2006) 79 S Cal L Rev 1327; Cleveland, *supra* note 18 at 1002–06.

²⁷552 US 491 (2008). See also Curtis A Bradley & Jack L Goldsmith, "The Abiding Relevance of Federalism to US Foreign Relations" (1998) 92 Am J Intl L 675.

B. Article I, Section 10

Another way in which the US Constitution sought to ensure national control over foreign relations was by disallowing the states from engaging in certain foreign relations activities. As noted above, Article I, section 10, of the Constitution disallows states from, among other things, entering into treaties, and it requires that they obtain congressional consent in order to enter into “any Agreement or Compact” with another state or foreign power. This latter provision is often referred to as the “Compact Clause.” The Constitution does not explain the difference between treaties and agreements/compacts, and the dividing line between these categories has long been uncertain.²⁸

There have been several theories throughout history about the difference between treaties and agreements and compacts. One theory draws upon distinctions drawn by the Swiss publicist Emmerich Vattel, whose international law treatise (published in 1758) was well known to the founding generation in the United States. In his treatise, Vattel contrasted “treaties” from “agreements, conventions, and arrangements.” Whereas treaties, in Vattel’s classification, are entered into by sovereigns “either in perpetuity or for a considerable length of time,” agreements, conventions, and arrangements “are fulfilled by a single act and not by a continuous performance of acts.”²⁹ In other words, Vattel viewed treaties as ongoing arrangements and other international agreements as one-time resolutions.

However, the eminent US jurist Joseph Story thought that using the Vattel categorization for this purpose was “at best a very loose, and unsatisfactory exposition,” and he suggested that the distinction in Article I, section 10, might instead turn on the importance and subject matter of the agreement. In particular, Story surmised that Article I, section 10, might have been distinguishing between “treaties of a political character,” such as treaties of alliance or those granting general commercial privileges, and agreements addressing “mere private rights of sovereignty; such as questions of boundary; interests in land, situated in the territory of each other; and other internal regulations for the mutual comfort, and convenience of States, bordering on each other.”³⁰

A plurality of the US Supreme Court endorsed the Vattel distinction in a 1840 decision, *Holmes v Jennison*.³¹ The issue in this case was whether the state of Vermont was precluded by Article I, section 10, from agreeing to extradite a Canadian citizen to Canada after he had been indicted in Québec for murder. This issue arose before there was a federal extradition statute and at a time in which there was no operative extradition treaty between the federal government and Great Britain, which handled Canada’s foreign policy. Four justices, in an opinion by Chief Justice Roger Taney, concluded that, although Vermont’s agreement with Canada was not a treaty, it was a compact or agreement that required congressional

²⁸See e.g. Samuel B Crandall, *Treaties: Their Making and Enforcement*, 2nd ed (Washington, DC: John Byrne & Company, 1916) at 141 (“[t]he exact distinction between the expressions ‘treaty, alliance or confederation’ and ‘agreement or compact,’ has not been determined”).

²⁹Emmerich de Vattel, *The Law of Nations, 1758*, translated by Charles G. Fenwick, vol 2 (Washington, DC: Carnegie Institution of Washington, 1916) at 153.

³⁰Joseph Story, *Commentaries on the Constitution*, vol 3 (Boston: Hilliard, Gray & Company, 1833) at 1397.

³¹39 US (14 Pet) 540 (1840).

approval. In addition to relying on Vattel, the plurality emphasized the importance of formal characteristics in distinguishing between treaties and other agreements, noting that, whereas a treaty is “an instrument written and executed with the formalities customary among nations,” a compact or agreement could be less formal and, in fact, could even be a verbal agreement. A fifth justice agreed that an extradition agreement between Vermont and Québec would violate Article I, section 10, but he doubted that there had been such an agreement. On remand, the Vermont Supreme Court found that there was in fact such an agreement, which it held violated Article I, section 10.³²

Besides *Holmes*, there is little case law explaining the difference between a “treaty” that states can never enter into and an “agreement or compact” that they can enter into with congressional approval. In an 1877 decision, however, the US Supreme Court observed that the agreement among the Confederate states during the Civil War did not give the Confederacy a legal status because “the Constitution of the United States prohibits any treaty, alliance, or confederation by one state with another.”³³ Under this analysis, an agreement by a state to form a military alliance with a foreign power or to form a common government — scenarios unlikely today but that would have seemed like realistic concerns to the constitutional founders — would presumably be viewed as a treaty that is completely off-limits.

In practice, the distinction between treaties and agreements/compacts probably does not matter that much today when considering the propriety of state international agreements. If there is no congressional consent, then, as in *Holmes*, a state agreement is improper if it is either a treaty or an agreement or compact within the meaning of the clause. And if Congress has consented to a state agreement with a foreign nation, it seems unlikely that courts would invalidate the agreement on the ground that it is a treaty forbidden to the states, especially given the uncertain nature of the distinction between the categories. Indeed, in this situation, it is very possible that courts would treat the distinction as a non-justiciable political question to be left to Congress’s determination.³⁴

In practice, what has mattered is whether a state agreement is neither a treaty nor an agreement or compact. The plurality decision in *Holmes* can be read to suggest that, if a state agreement with a foreign nation is not a treaty, then it must be an agreement or compact. In fact, though, it has long been accepted that not all state agreements with foreign nations qualify as even agreements or compacts that need congressional approval. For that distinction — that is, between agreements that require congressional approval and those that do not — Story’s analysis has been influential, even though he offered it as a distinction between treaties and

³²For a later endorsement by the US Supreme Court of Taney CJ’s reasoning in *Holmes*, see *United States v Rauscher*, 119 US 407 at 414 (1886) (“[t]here can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government; and that it is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers”).

³³*Williams v Bruffey*, 96 US 176 at 182–83 (1877).

³⁴Cf Felix Frankfurter & James M Landis, “The Compact Clause of the Constitution: A Study in Interstate Adjustments” (1925) 34 Yale LJ 685 at 694–95 (“only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of ‘Treaty, Alliance, or Confederation,’ and what arrangements come within the permissive class of ‘Agreement or Compact’”).

agreements/compacts. Story's influence, however, has been indirect, relating to a different part of Article I, section 10.

In addition to addressing international agreements, Article I, section 10, says that states must obtain congressional consent in order to conclude agreements or compacts *with other states*. The US Supreme Court has held, however, that not all agreements between states fall within this requirement. In *Virginia v Tennessee*,³⁵ the court, drawing upon Story's distinction of treaties from compacts/agreements, stated that congressional consent is required only for agreements between states that "tend[] to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."³⁶

The court has reaffirmed this approach in subsequent decisions involving inter-state agreements. In these decisions, the court has emphasized that the form of the agreement is not dispositive; rather, the issue is whether the agreement enhances state power at the expense of federal supremacy. In *US Steel Corp. v Multistate Tax Comm'n*, for example, the court reasoned that a multi-state tax compact, which created an administrative commission, did not need to be approved by Congress because "[t]his pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, ... each State is free to withdraw at any time."³⁷

In *Northeast Bancorp, Inc. v Bd. of Governors of Fed. Reserve Sys.*, the court was sceptical that two state statutes that regulated regional bank acquisitions on a reciprocal basis amounted to an "Agreement or Compact" for the purposes of Article I, section 10, reasoning that "several of the classic indicia of a compact are missing."³⁸ In particular, the court noted that "[n]o 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 importantly, neither statute requires a reciprocation of the regional limitation."³⁹ The court also concluded that, in any event, as long as the state statutes complied with a federal statute that authorized state regulation in this area, they "cannot possibly" infringe federal supremacy and that, if they did not comply with federal statutory limitations, they would be subject to federal pre-emption.⁴⁰

Because inter-state agreements and agreements between states and foreign governments are mentioned in the same clause of Article I, section 10, commentators have generally assumed that the analysis from *Virginia v Tennessee*, which relies on Story's distinction, applies to state agreements with foreign nations. The *Restatement (Third) of Foreign Relations Law*, for example, states, citing *Virginia*, that "states may make international agreements without the consent of Congress as long as the agreements do not 'impinge upon the authority or the foreign relations of the United

³⁵ 148 US 503 (1893).

³⁶ *Ibid* at 518.

³⁷ 424 US 452 at 473 (1978) [*Steel Corp*].

³⁸ 472 US 159 at 175 (1985).

³⁹ *Ibid*.

⁴⁰ *Ibid* at 176. For additional discussion of inter-state agreements, see Joseph F Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements*, 2nd ed (Albany: State University of New York Press, 2012).

States.”⁴¹ The State Department also has assumed that the approach in *Virginia* is relevant to determining whether state international agreements need congressional approval.⁴² So, too, have a number of state attorneys general.⁴³ This approach, it should be noted, is both lenient and indeterminate, and one might reasonably question whether a stricter and more precise standard is warranted in the international context.⁴⁴

2. Lack of congressional involvement

Congress has often acted to approve or disapprove state compacts with other states,⁴⁵ but only occasionally has it been involved in deciding whether to approve state agreements with foreign governments. The first time it did so was in 1870 when it approved a compact between the state of New York and Canada to construct a Niagara River bridge.⁴⁶ But, since that time — in a period of more than 150 years — there have been only about a dozen examples of congressional action on state international agreements.⁴⁷ And the agreements approved by Congress have concerned just a few subjects: bridges, fire-fighting, highways, and emergency management.⁴⁸ This means that states have often entered into agreements with foreign governments that have not been approved by Congress.

In the early twentieth century, the executive branch tended to oppose unapproved state agreements. In 1909, the US attorney general advised the State Department that

⁴¹Restatement (Third) of the Foreign Relations Law of the United States § 302, cmt. f (1987).

⁴²See Letter and Memorandum from William H Taft, IV, Legal Adviser of the Department of State to Senator Byron L Dorgan of North Dakota Regarding a Memorandum of Understanding Signed by the State of Missouri and the Province of Manitoba (20 November 2001), excerpted in *Digest of United States Practice in International Law* (2001) at 177, 181 [Taft Memorandum] (“[t]he Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), in assessing whether an agreement involving a U.S. state would constitute a ‘Compact ... with a foreign Power,’ although that case did not involve a compact with a foreign power”). The full text is available on the State Department’s website: <2009-2017.state.gov/s/l/22720.htm>.

⁴³See e.g. US, Maryland Attorney General, *Treaties: State May Enter Agreement with World Health Organization to Provide Certain Advisory Services*, vol 80, Doc 1995 WL 652898 (3 November 1995) at 48 (opinion by Maryland attorney general applying the *Virginia* test to conclude that an agreement between Maryland and the World Health Organization did not violate the Compact Clause). See also Ryan M Scoville, “The International Commitments of the Fifty States” (2023) 70 UCLA L Rev 310 at 324, n 59 (collecting additional citations).

⁴⁴See e.g. Duncan B Hollis, “Unpacking the Compact Clause” (2010) 88 Tex L Rev 741 at 786 [Hollis, “Unpacking”] (contending that state agreements with foreign powers “pose distinct risks from interstate agreements that suggest two additional functions congressional consent serves: (1) avoiding unwanted interference with federal foreign affairs activities and (2) insulating federal and state governments from ‘subversive’ external influence and interference”). For an argument that the test is too lenient even in the inter-state agreement context, see Michael S Greve, “Compacts, Cartels, and Congressional Consent” (2003) 68 Mo L Rev 285.

⁴⁵The US Supreme Court has noted that the requirement of congressional approval of inter-state compacts serves as a check on agreements that might harm other states, intrude on the prerogatives of the national government, or create friction with other countries. See *Texas v New Mexico*, 138 S Ct 954 at 958 (2018).

⁴⁶See *Act to Authorize the Construction and Maintenance of a Bridge across the Niagara River*, 1870, 16 Stat 173, c 176.

⁴⁷See Duncan B Hollis, “The Elusive Foreign Compact” (2008) 73 Mo L Rev 1071 at 1075–77 [Hollis, “Elusive”].

⁴⁸See *ibid* at 1076.

the state of Minnesota could not enter into an agreement concerning the construction of a dam on the Canadian-US border unless it obtained Congress's consent.⁴⁹ According to the attorney general, Article I, section 10, of the Constitution "prohibits a State from making any kind of an agreement [on its own] with a foreign power."⁵⁰ In 1936, California asked the State Department whether it could make an agreement with the Mexican territory of Baja, California, to reciprocally exempt motor vehicles from registration and payment of fees, and the department's legal adviser replied that such an arrangement would, at minimum, require the consent of Congress and might even infringe on the national government's treaty power.⁵¹ In 1937, the State Department suggested that the state of Florida could not enter into an agreement with Cuba to promote trade even if it obtained congressional approval.⁵²

But this executive branch opposition faded, and state agreement making without congressional consent grew after the Second World War with the rise in globalization of commerce and travel. At times, like the French police chief's professed lack of awareness of gambling at Rick's Café in the movie *Casablanca*, there seems to have been a certain amount of willful blindness by the executive branch to this growing practice. In 1924, the State Department reported that it had no information on the conclusion of any treaty or agreement between a state of the United States and a foreign government.⁵³ In 1967, an observer remarked that "[t]he policy of not noticing such agreements seems to continue to this date and the present author is unable to document agreements known to exist."⁵⁴ Some of this willful blindness was made easier by the fact that it preceded the Internet age, so it was less likely that these agreements were widely known. In recent years, the State Department has had to acknowledge its general awareness of the robust state practice. In 2001, the State Department's legal adviser acknowledged that the department was "aware that U.S. states often conclude various arrangements with foreign powers without congressional consent."⁵⁵ But it has been passive with respect to this development and has sometimes insisted that it is up to Congress, not the executive branch, to object.

In early 2001, Senator Byron Dorgan from North Dakota wrote to the State Department complaining about a memorandum of understanding (MOU) that Missouri had signed with the Canadian province of Manitoba. In the MOU, Missouri and Manitoba agreed to "work cooperatively to the fullest extent consistent with law and existing treaties" in their efforts to oppose water transfers between the Missouri River and the Hudson Bay watersheds, due to their concern about the introduction of invasive species. Senator Dorgan's state would benefit from the water transfers, and he objected. After many months, the State Department's legal adviser, William Taft, responded to the senator by noting that "the Constitution does not specifically assign responsibility for interpretation or enforcement of [the Compact Clause] to the

⁴⁹Attorney General, *Opinion: Construction of Long Sault Rapids Dam, Rainy River*, vol 27 (1909) at 327.

⁵⁰*Ibid* at 332.

⁵¹See Green Haywood Hackworth, *Digest of International Law*, vol 5 (Washington, DC: Government Printing Office, 1943) at 24.

⁵²*Ibid*.

⁵³*Ibid*.

⁵⁴Raymond Spencer Rodgers, "The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments" (1967) 61 *Am J Intl L* 1021 at 1025, n 14.

⁵⁵Taft Memorandum, *supra* note 42 at 185.

Executive branch of the federal government.”⁵⁶ Taft also observed that, while “it is not uncommon for states of the United States to consult with the Department of State when they are considering entering into arrangements with a foreign power that may engage these interests,”⁵⁷ this had not happened for the MOU in question. Taft attached a memorandum to his response describing “some of the considerations that the Department would have raised if it had been consulted.”⁵⁸

The memorandum that Taft attached noted that the view articulated by Taney CJ in *Holmes* that all state agreements with foreign governments require congressional consent “has not been widely supported.”⁵⁹ The memorandum relied instead on *Virginia v Tennessee* for the proposition that only agreements that “would increase the political power of the states in such a way as to interfere with the supremacy of the federal government require congressional consent.” The State Department is aware, the memorandum explained, that states often conclude agreements with foreign powers: “When [these agreements] are called to the Department’s attention, such arrangements have generally been analyzed under the *Virginia* standard, with particular attention to whether such texts would interfere with the President’s foreign relations responsibilities.”⁶⁰ Some of the factors to be considered, the memorandum suggested, are attributes like whether the agreement imposes binding obligations, limits withdrawal, has various formal attributes of an agreement, and sets up a joint body or organization. This multi-factor approach is not very determinate, and, in any event, the State Department has not shown any inclination to actively police state international agreements and nor has Congress. Indeed, it is telling that Senator Dorgan appealed to the State Department rather than to the body in which he served — that is, Congress.

3. Litigation over the California-Québec agreement

The phenomenon of international agreements by US states assumed new prominence during the Trump administration, which sued to challenge a climate change-related agreement between California and Québec. The agreement was an outgrowth of a regional organization — the Western Climate Initiative — formed in 2007 by the governors of California and other western states and the premiers of several Canadian provinces. In 2010, this organization had recommended a regional “cap-and-trade” program, whereby there would be a cap on the overall emissions of regulated entities, emissions allowances would be given out, and there would be an ability to trade the allowances. In 2011, the organization established a non-profit corporation — Western Climate Initiative, Incorporated (WCI) — to provide administrative and technical support for such a program.⁶¹

Both California and Québec established cap-and-trade programs, and, then in 2013, they agreed to link the programs by, for example, conducting joint auctions for the purchase of allowances. This linkage agreement was organized, like a treaty, into

⁵⁶*Ibid* at 180.

⁵⁷*Ibid* at 180–81.

⁵⁸*Ibid* at 179.

⁵⁹*Ibid* at 182.

⁶⁰*Ibid* at 185.

⁶¹See “Western Climate Initiative,” online: <wci-inc.org>.

chapters and articles, and it has provisions concerning matters such as withdrawal, amendments, and dispute resolution.⁶² It also frequently uses the mandatory word “shall.” While the agreement says that each party has the sovereign right to modify its regulations, it also says that termination of the agreement requires the unanimous consent of the parties and that the termination shall not be effective until twelve months after such consent. In 2017, the agreement was modified to add Ontario to the linkage,⁶³ although Ontario canceled its cap-and-trade program the following year and dropped out of the program.

These efforts took place against the backdrop of international negotiations over the *Paris Agreement* on climate change.⁶⁴ In 2016, during the Obama administration, the United States joined the *Paris Agreement*. The administration did so, it should be noted, without seeking congressional approval, claiming that parts of it were authorized by an earlier treaty (the 1992 *United Nations Framework Convention on Climate Change*) and that the core emissions reduction obligation in the convention was non-binding and, thus, did not require legislative approval.⁶⁵ Obama’s successor, Donald Trump, was opposed to the *Paris Agreement* and, in 2017, announced that the United States was withdrawing from it. Because of a provision in the *Paris Agreement* that limited withdrawal, the United States’ exit from it did not take effect until 2020. Meanwhile, the Trump administration sued California over its cap-and-trade agreement with Québec, arguing that the agreement violated Article I, section 10, of the Constitution and was also pre-empted by federal law. A federal district court rejected these arguments.⁶⁶ The government appealed, but the subsequent Biden administration decided not to continue challenging California’s action. President Joe Biden also had the United States rejoin the *Paris Agreement*.

In rejecting the administration’s Article I, section 10, argument, the district court first reasoned that the California-Québec agreement was not a “treaty,” noting that it was not an alliance for purposes of peace and war, a general trade agreement, or an agreement that entailed a cession of sovereignty. On the last point, the court pointed out that each party had adopted its own emission reduction targets and applied its own regulations in administering the cap-and-trade programs and that each party was free to modify or repeal its program. As for whether the agreement was an “Agreement or Compact” requiring congressional approval, the court noted that the parties’ cap-and-trade programs could operate independently, that the agreement did not impose a regional limitation, and that WCI did not exercise regulatory authority over the parties. Finally, the court emphasized that the agreement did not contain any enforceable prohibition on unilateral modification or termination of a party’s regulations: “[T]he simple fact that California retains the power to modify its enacting

⁶²See 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, online: <ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca_quebec_linking_agreement_english.pdf>.

⁶³See Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, online: <ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/2017_linkage_agreement_ca-qc-on.pdf>.

⁶⁴*Paris Agreement*, 22 April 2016, Can TS 2016 No 9 (entered into force 4 November 2016).

⁶⁵*United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7 (entered into force 21 March 1994).

⁶⁶See decisions cited in note 2 above.

regulations, means unilateral termination of California's participation in the Agreement is possible."⁶⁷

In a separate opinion, the court also rejected the Trump administration's pre-emption arguments. The court first concluded that the agreement did not conflict with any federal statute or treaty. Next, it held that the agreement was not preempted by President Trump's decision to withdraw from the *Paris Agreement*, reasoning that there was no conflict with a "clear and express foreign policy." A mere "intent to negotiate for a 'better deal' at some point in the future" is not enough to pre-empt state law. The court also concluded that the agreement was not subject to dormant pre-emption. Even though the agreement extended beyond an area of traditional state responsibility, the court concluded that it did not unduly intrude on the national government's authority over foreign affairs. Among other things, the court said there was an "absence of concrete evidence that the President's power to speak and bargain effectively with other countries has actually been diminished."⁶⁸

The district court's conclusions, especially with respect to Article I, section 10, are debatable. The agreement between California and Québec concerns an important topic that overlaps with issues of national policy. It is also a formal, ongoing arrangement that uses mandatory language throughout. The district court's permissive approach largely converts the Constitution's requirement of affirmative congressional approval for state international agreements to an allowance of such agreements in the absence of congressional disapproval.⁶⁹ While such a shift might draw support from what is now extensive governmental practice (including national government inaction),⁷⁰ the arguments for judicial deference to such practice are more complicated in the federalism context than in the separation of powers context. Among other things, the patterns of practice in the federalism context are less likely than in the separation of powers context to reflect an institutional bargain concerning constitutional authority, and the need for deference may also be lower in the federalism context because the courts are not being asked to sit in judgment on co-equal institutions.⁷¹ For state international agreements, the national government's general passivity to date may simply reflect the

⁶⁷444 F Supp (3d) at 195 (2020).

⁶⁸2020 US Dist LEXIS 126504 at *29.

⁶⁹In discussing inter-state compacts, the US Supreme Court has emphasized the importance of the congressional consent requirement, noting that it provides a check on agreements that "might lead to friction with a foreign country or injure the interests of another region of our own." *Texas v New Mexico*, 138 S Ct 954 at 958 (2018).

⁷⁰An *amicus curiae* brief filed by foreign relations law scholars in the California case correctly noted that state international agreements without congressional approval have "become common." *United States v California*, Case No 2:19-cv-02142-WBS-EFB (14 February 2020) at 10, Brief of *Amici Curiae* Professors of Foreign Relations Law.

⁷¹Cf Curtis A Bradley & Trevor W Morrison, "Historical Gloss and the Separation of Powers" (2012) 126 Harv L Rev 411 at 429, 435–36 (noting these factors as reasons to credit practice in the separation of powers context). See also Curtis A Bradley & Neil S Siegel, "Historical Gloss, Madisonian Liquidation, and the Originalism Debate" (2020) 106 Va L Rev 1 at 36 (noting that courts can often draw upon materials other than historical practice when evaluating federalism questions). This is not to deny, however, that there is bargaining between the federal government and state governments. See e.g. Aziz Z Huq, "The Negotiated Structural Constitution" (2014) 114 Colum L Rev 1595 at 1632 ("document[ing] diverse forms of regulatory exchange between the federal government and the states").

fact that the agreements have not yet raised serious foreign relations difficulties for the national government.⁷²

Although only from a single district court, the decision to uphold the California-Québec agreement is important because there are few other judicial precedents in this area.⁷³ The decision is likely to further encourage states and localities to make agreements without seeking congressional approval.⁷⁴

4. Rise of sub-national agreements and potential for conflict

Unlike agreements made at the national level, there is no formal system in the United States for the reporting and publication of state-level agreements. As a result, at least until recently, it has been difficult to know much about the scale and nature of this practice. A 1974 study prepared for the State Department found 766 active and ongoing “interactions” between US states and Canadian provinces, with interactions defined to include agreements, understandings, and arrangements.⁷⁵ The study showed that state-provincial interaction was “pervasive in scope, extending to all functional areas of governmental activity.” More than twenty years later, a book on the role of states in foreign affairs reported that “[a]ll states have entered into international agreements, accords, or pacts with national and subnational governments abroad” and that “[o]ver 400 agreements currently exist between the states and Canadian provinces.”⁷⁶

In a 2010 article, which did not purport to be comprehensive, Duncan Hollis identified “over 340 [international agreements] concluded by forty-one U.S. states since 1955.”⁷⁷ The unapproved agreements, as Hollis noted, covered a vast range of topics, such as coordination on roads, police cooperation, border control, local trade cooperation, education exchanges, and conservation measures. Recently, Ryan Scoville has offered a more comprehensive (but still incomplete) empirical picture.⁷⁸ Based on materials that he obtained through open records requests to the various

⁷²Just as past inaction by the national government does not necessarily foreclose it from objecting to state activities, past inaction by the states does not necessarily indicate that they are barred from acting. See *Steel Corp.*, *supra* note 37 at 471 (reasoning that the mere fact that states had not previously concluded interstate agreements like the one at issue without congressional consent “may simply reflect considerations of caution and convenience on the part of the submitting States” and “is not controlling”).

⁷³See Scoville, *supra* note 43 at 319 (“[t]he district court’s decision to uphold the agreement in *United States v. California* thus suggests that few, if any, recent commitments are likely to be unconstitutional, and that there is generally ample room for states to shift toward more robust commitments going forward”).

⁷⁴See Conor J Mannix, “The Chorus Doctrine: Promoting Sub-National Diplomacy in Regional Growth Management” (2022) 97 Wash L Rev 627 at 648–51 (noting that, “because there are so few cases involving agreements between American states and international nation states, and no federal precedent between sub-national actors, the ruling in *United States v. California* represents an opening for” diplomacy by subnational actors).

⁷⁵Roger Frank Swanson, *State/Provincial Interaction: A Study of Relations between US States and Canadian Provinces Prepared for the US Department of State* (Washington, DC: Canus Research Institute, 1974).

⁷⁶Earl H Fry, *The Expanding Role of State and Local Governments in US Foreign Affairs* (New York: Council on Foreign Relations Press, 1998) at 73. See also Julian G Ku, “Gubernatorial Foreign Policy” (2006) 115 Yale LJ 2380 at 2391–96 (describing the importance of state international agreements).

⁷⁷Hollis, “Unpacking,” *supra* note 44 at 744.

⁷⁸See Scoville, *supra* note 43.

states, Scoville identified over six hundred agreements currently in force, totalling roughly three thousand pages, a finding that (as he notes) almost certainly understates the total number. His data indicates that state agreement making started increasing substantially around the year 2000 and that China and its provinces and cities are now the primary agreement partner, followed by Canada and its provinces.⁷⁹

As noted in the last section, the Trump administration unsuccessfully challenged a climate change-related agreement between California and Québec. That agreement is one of many sub-national agreements in recent years relating to climate change. In 2006, California entered into an agreement with the United Kingdom to limit emissions.⁸⁰ In 2007, ten US states joined ten European nations, the European Commission, two Canadian provinces, and New Zealand to form an “International Carbon Action Partnership” to promote cap-and-trade carbon markets to combat global warming.⁸¹ In 2014, California entered into a MOU with agencies of Mexico to address climate change.⁸² In 2018, the California Energy Commission entered into a MOU with Scotland to develop the use of wind energy.⁸³ In 2021, California signed a joint declaration with New Zealand and Québec on cooperation in the fight against climate change, with the hope that it could lead to New Zealand’s emission-trading scheme joining the established Québec-California market partnership.⁸⁴ In 2022, California renewed a MOU with China to enhance cooperation in addressing climate change and promoting the use of clean energy.⁸⁵ In 2023, the state of Washington’s Department of Ecology launched a public consultation process to explore linking Washington’s cap-and-invest program to the systems of California and Québec.⁸⁶

Climate change is just one of many topics for which there are state international agreements. As Hollis has noted, these agreements today cover a wide array of topics,

⁷⁹In his earlier study in 2010, Duncan Hollis found that Canada and its provinces were the primary agreement partner. See Hollis, “Unpacking,” *supra* note 44 at 753. It appears that since then China and Canada have switched places.

⁸⁰Deborah Schoch & Janet Wilson, “Governor, Blair Reach Environmental Accord,” *Los Angeles Times* (1 August 2006).

⁸¹See “International Carbon Action Partnership,” online: <icapcarbonaction.com/en>.

⁸²“Memorandum of Understanding to Enhance Cooperation on Climate Change and the Environment Between the State of California of the United States of America and the Ministry of Environment and Natural Resources and the National Forestry Commission of the United Mexican States” (28 July 2014), online: <calepa.ca.gov/wp-content/uploads/sites/6/2017/06/2014-MOU-Ministry_of_the_Environment_Mexico.pdf>.

⁸³“Memorandum of Understanding between the Government of Scotland and the California Energy Commission,” online: <www.energy.ca.gov/sites/default/files/2019-12/MOU-Offshore_Wind_between_CEC_and_the_Government_of_Scotland_ada.pdf>.

⁸⁴“Joint Declaration on Cooperation in the Fight Against Climate Change,” online: <ww2.arb.ca.gov/sites/default/files/2021-11/Cal-NZ-QC%20declaration_EN_Final.pdf>.

⁸⁵Office of Governor Gavin Newsom, “California Advances Global Climate Leadership through Expanded Partnership with China (18 April 2022),” online: <www.gov.ca.gov/2022/04/18/california-advances-global-climate-leadership-through-expanded-partnership-with-china/>.

⁸⁶State of Washington, Department of Ecology, “Cap-and-Trade Linkage,” online: <ecology.wa.gov/Air-Climate/Climate-Commitment-Act/Cap-and-invest/Linkage>. For additional discussion of state agreements and other efforts relating to climate change, see Sharmila L Murthy, “The Constitutionality of State and Local ‘Norm Sustaining’ Actions on Global Climate Change: The Foreign Relations Federalism Grey Zone” (2020) 5 J L Public Affairs 35.

“including agriculture, climate change, education, energy, environmental cooperation, family support, hazardous waste, homeland security, investment, military cooperation, pollution, sister-state relations, tourism, trade, transportation, and water issues.”⁸⁷ Moreover, although California is an especially active player in this realm, all the US states sometimes enter into international agreements.⁸⁸ This extensive practice of state international agreement making seems surprising from the perspective of the text of the US Constitution and the original intentions of its founders, so it is a good example of constitutional evolution. For the most part, the national government has not resisted this development, which is probably because the agreements generally do not cause foreign relations problems for the country. Other nations do not typically object to more international cooperation, and, thus, the agreements tend not to generate obstacles to the national government’s management of foreign affairs.⁸⁹

If anything, the federal government has promoted rather than opposed sub-national engagement with foreign governments. For example, US cities often form “sister city” relations with cities in other countries for the purposes of promoting trade, tourism, and educational and cultural exchange, and this engagement has been facilitated by Sister Cities International, a non-profit organization based in Washington, DC, that was originally established by President Dwight Eisenhower. Its network now includes over two thousand cities, states, and counties across more than 140 nations.⁹⁰ These sister-city relationships are embodied in agreements between the relevant jurisdictions. In 2022, the Biden administration went further and created in the State Department a “Special Representative for Subnational Diplomacy,” whose office “lead[s] and coordinate[s] the State Department’s engagement with mayors, governors and other local officials in the United States and around the world.”⁹¹ Congress expressed support for this development in legislation, observing that the new office “will play a critical role in leveraging the Department’s resources to support State and municipal governments in conducting subnational engagement and increasing cooperation with foreign allies and partners.”⁹²

Despite this encouragement from the executive branch and Congress, there could be more conflicts between states and the federal government in the years ahead. National partisanship has filtered down to state governments, which means that these governments sometimes purposely position themselves to be at odds with a particular administration’s policies. In addition, some state governors aspire for national office, which can lead them to stake out independent foreign policy positions. At the same

⁸⁷Hollis, “Unpacking,” *supra* note 44 at 754.

⁸⁸See Scoville, *supra* note 43 at 346. Cf Hollis, “Unpacking,” *supra* note 44 at 751 (finding in his 2010 study that that forty-one of the fifty states had concluded international agreements).

⁸⁹See Michael J Glennon & Robert D Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* (New York: Oxford University Press, 2016) at 284–85 (“neither Congress nor the courts—nor, one might infer from the almost complete absence of litigation, anyone else, whether a private entity or public official—see local [agreement] initiatives as harmful to any significant national interest”).

⁹⁰See “About Us,” *Sister Cities International*, online: <[sistercities.org/about-us/](https://www.sistercities.org/about-us/)>.

⁹¹US Department of State, “The Special Representative for City and State Diplomacy,” online: <www.state.gov/bureaus-offices/under-secretary-for-economic-growth-energy-and-the-environment/the-secretarys-office-of-global-partnerships/the-special-representative-for-subnational-diplomacy/>.

⁹²*National Defense Authorization Act for Fiscal Year 2023*, § 9108.

time, foreign governments appear to be increasingly targeting sub-national governments as a way of working around the national government. This has been true of China, for example, as Scoville has noted:

[S]tates have entered into a collection of instruments with national, provincial, and municipal authorities from the People's Republic of China (PRC) for the express purpose of promoting technology transfer in a number of strategically sensitive fields of innovation, including information technology, nanotechnology, aerospace, biotechnology, and semiconductors. Most of these instruments appear to have been adopted not only without federal approval or public disclosure, but also at the initiative of the Chinese government. This suggests a coordinated, ongoing, and perhaps even intensifying PRC campaign to leverage relations with U.S. states to expand influence and acquire cutting-edge American technology, despite federal efforts to preserve U.S. technological leadership.⁹³

The national government has specifically warned states that, "as tensions between Beijing and Washington have grown, the government of the People's Republic of China (PRC) under President Xi Jinping has increasingly sought to exploit these China-US subnational relationships to influence US policies and advance PRC geopolitical interests."⁹⁴

Not to be outdone, Taiwan has also been deepening its engagement with US states.⁹⁵ Other nations may also be targeting US states and localities. Recently, for example, the United Kingdom entered into trade-related agreements with US states at the same time that it was attempting to negotiate a free trade agreement with the national government.⁹⁶ The potential for conflicts with national policy would be even greater if states started making agreements with countries like Iran and North Korea, although the arguments for pre-emption would also be stronger in these instances in light of the national government's sanctions against those regimes. Moreover, we know that states sometimes take actions that can generate international friction. Recently, for example, Montana purported to ban the social media platform TikTok, which is owned by a Chinese-controlled company, an action that quickly led to

⁹³Scoville, *supra* note 43 at 318–19.

⁹⁴National Counterintelligence and Security Center, "Protecting Government and Business Leaders at the US State and Local Level from People's Republic of China (PRC) Influence Operations" (July 2022), online: <www.dni.gov/files/NCSC/documents/SafeguardingOurFuture/PRC_Subnational_Influence-06-July-2022.pdf>.

⁹⁵See e.g. Crain's Content Studio, "APEC Builds Bridges: Michigan and Taiwan Sign Historic MOU, Promote Ties," *Crain's Detroit Business* (29 May 2023), online: <www.crainsdetroit.com/sponsored-content/apec-builds-bridges-michigan-and-taiwan-sign-historic-mou-promote-ties>; Laura Vozzella, "In First Trade Mission, Youngkin Shows Support for Taiwan's Independence," *Washington Post* (24 April 2023), online: <www.washingtonpost.com/dc-md-va/2023/04/24/youngkin-taiwan-china-trade/>; Hannah Cline, "West Virginia, Taiwan Sign Agreement for Teacher Exchange Opportunities," *WCHS Television* (28 February 2023), online: <wchstv.com/news/local/west-virginia-department-of-education-and-taiwan-sign-agreement-for-exchange-opportunities>.

⁹⁶See Andrea Shalal, "Britain Inks Trade Deal with Oklahoma, Hails Architects' Licensing Pact," *Reuters* (18 April 2023). For another example of a state international agreement potentially at odds with national policy, see Hollis, "Unpacking," *supra* note 44 at 741–42 (describing an agreement between the state of Kansas and Cuba).

litigation.⁹⁷ Florida, meanwhile, recently purported to prohibit individuals who are domiciled in China and certain other countries from owning buildings or land in the state, again something that prompted suit.⁹⁸ Before these actions, some US states (and others) had sued China for the COVID pandemic, an effort that to date has been blocked by a federal statute, the *Foreign Sovereign Immunities Act*.⁹⁹ States in recent years have also asserted positions relating to immigration that are out of sync with the national government's approach — for example, conservative states attempting to bolster enforcement of immigration law during the Obama administration and liberal states and cities claiming to be “sanctuary jurisdictions” during the Trump administration.¹⁰⁰ It is thus not difficult to imagine conflicts developing between state agreement making and national policies.

5. The binding versus non-binding distinction

Another reason that state international agreements have not generated much opposition to date from the national government is that many of them are not legally binding. That is, they do not purport to create enforceable obligations under international or domestic law. Many take the form of “memoranda of understanding” and the like that are intended merely to guide cooperation rather than to lock the parties into commitments that they might otherwise be inclined to breach. The district court in the California-Québec case emphasized this point about the cap-and-trade agreement at issue there, noting that “there is no enforceable prohibition on unilateral modification or termination.”¹⁰¹ The 2001 State Department memorandum referenced above took the position that, although whether an agreement is binding is an important consideration in whether an agreement must be approved by Congress, it is not a prerequisite. But this point is disputed, and states have maintained that they do not need to submit non-binding agreements to Congress for its approval. In any event, the executive branch is much less likely to object to agreements if they are non-binding.¹⁰² The department has in fact offered to provide

⁹⁷See Sapna Maheswari & David McCabe, “TikTok Users Sue Montana, Calling State Ban Unconstitutional,” *New York Times* (18 May 2023).

⁹⁸Daniel Weissner, “Florida Sued for Barring Chinese Citizens from Owning Homes, Land,” *Reuters* (22 May 2023). The national government supported the plaintiff's motion to enjoin implementation of the Florida law, arguing that it violated federal statutory and constitutional law. See Julia Shapero, “DOJ Argues Florida Law Restricting Chinese Land Ownership Is ‘Unlawful,’” *The Hill* (28 June 2023).

⁹⁹*Foreign Sovereign Immunities Act*, 19 January 1977, 90 Stat 2891. See John Bellinger, Sean Mirski & Catherine McCarthy, “Missouri Decision Foreshadows Outcomes of Remaining Coronavirus-Related Suits against China,” *Lawfare* (14 September 2022), online: <www.lawfareblog.com/missouri-decision-foreshadows-outcomes-remaining-coronavirus-related-suits-against-china>.

¹⁰⁰The Supreme Court held that a number of immigration enforcement measures enacted by the state of Arizona during the Obama administration were pre-empted by federal immigration law. See *Arizona v United States*, 567 US 387 (2012). But the lower federal courts generally disallowed Trump administration efforts to punish sanctuary jurisdictions. See e.g. *City & County of San Francisco v Trump*, 897 F (3d) 1225 (9th Cir 2018).

¹⁰¹444 F Supp (3d) at 1195.

¹⁰²For emphasis by the State Department after 2001 on whether an agreement is binding, see, for example, *Digest of United States Practice in International Law* 207 (2005) (“[b]oth [the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement and Annex 2001 Implementing Agreement] appear to

guidance to states in their drafting of agreements to help ensure that the agreements are indeed not binding.¹⁰³

It is worth noting that some state international agreements by their terms appear to impose binding reciprocal obligations.¹⁰⁴ In fact, as discussed earlier, many aspects of the California-Québec agreement are written in terms that sound binding.¹⁰⁵ Even when a state international agreement is labeled as a MOU or joint declaration, it will not necessarily mean that it is non-binding. In his recent study, Scoville found that approximately one-fourth of the state international agreements used binding language like “shall.”¹⁰⁶ Binding agreements can potentially implicate issues of national responsibility that should be of potential concern to the national government.¹⁰⁷ In part for this reason, guidelines developed by the Inter-American Juridical Committee of the Organization of American States in 2020 suggest that nations “have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, *sub-national units*, or both) with the capacity to conclude a treaty governed by international law.”¹⁰⁸

contain language of a legally binding nature. In the absence of Congressional approval, they may therefore raise questions under the Compact Clause of the Constitution”).

¹⁰³See US Department of State, *Compact Clause*, online: <20092017.state.gov/s/l/treaty/faqs/70120.htm> (explaining that the State Department assists “in developing appropriate language for these arrangements prior to their signature” and that “[t]he resulting texts are most often of a non-legally binding, political character”). The State Department has separately published guidance for how to draft agreements in a way that helps ensure that they are non-binding. See US Department of State, “Guidance on Non-Binding Documents,” online: <2009-2017.state.gov/s/l/treaty/guidance/index.htm#:~:text=U.S.%20Department%20of%20State&text=While%20not%20binding%20under%20 international,legally%20 binding%20should%20be%20avoided>.

¹⁰⁴See Scoville, *supra* note 43 at 358.

¹⁰⁵Cf Hollis, “Elusive,” *supra* note 47 at 1089, n 74 (“[s]tates including ‘non-binding’ provisos in their agreements also often include other language indicative of legal effect”). See also Aaron Messing, “Note on Nonbinding Subnational International Agreements: A Landscape Defined” (2017) 30 Georgetown Environmental L Rev 173 (describing different types of non-binding subnational agreements)

¹⁰⁶Scoville, *supra* note 43 at 359.

¹⁰⁷Under generally accepted principles of state responsibility, the actions of a sub-national government are generally attributed to the nation as a whole. See “Draft Articles on Responsibility of States for Internationally Wrongful Acts” in *Report of the International Law Commission*, UN GAOR, 56th Sess, Supp No 10, UN Doc. A/56/10 (2001), art. IV(1) (“Draft Articles”) (“[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”) [emphasis added]. It is not clear how that principle applies in this context, given that most state agreements are not approved by the federal government and the federal government may not even be aware of many of them. But it is possible that a binding state agreement could implicate national responsibilities, at least if the other party has not agreed to limit itself to recourse against the state. See Hollis, “Unpacking,” *supra* note 44 at 787 (“[i]f the foreign government regards the commitment as legally binding, it may hold the United States legally responsible for the state’s performance”). But see Peter J Spiro, “Globalization and the (Foreign Affairs) Constitution” (2002) 63 Ohio St LJ 649 at 670–71 (“[a]s states and other international actors find that the rule of international law is advanced by disaggregating the state, rules of responsibility will be modified accordingly”).

¹⁰⁸Inter-American Juridical Committee, *Guidelines on Binding and Non-Binding Agreements* (2020) at 108, para 4.4, online: <www.oas.org/en/sla/iajc/docs/Guidelines_on_Binding_and_Non-Binding_Agreements_publication.pdf> [emphasis added].

Even when the agreements are genuinely non-binding, it may be artificial to distinguish sharply between binding and non-binding agreements. In practice, these two types of agreements may have a similar form and operate in similar ways. In neither situation are the parties likely to try to bring each other to court (either domestic or international) over a violation, and probably cannot do so even if the agreement is binding, due to limitations such as sovereign immunity. But the parties may nevertheless feel obligated to comply with both types of agreements and for similar reasons — for example, because they desire reciprocity, have made investments in the relationship, worry about their reputations for compliance, have implemented the obligations in their internal law, and the like.¹⁰⁹

This is not the only example in which making an international agreement non-binding may avoid domestic legal constraints. The US national government does this as well: the executive branch has only limited authority to make agreements without congressional approval.¹¹⁰ But the requirement of congressional approval is thought to apply only to binding agreements.¹¹¹ The federal executive branch often makes agreements that are non-binding, sometimes to avoid legislative approval requirements. A prominent example is the Iran nuclear deal (also known as the Joint Comprehensive Plan of Action) that the Obama administration concluded, along with several other nations, in 2015.¹¹² Somewhat similarly, the Obama administration justified its conclusion of the *Paris Agreement* on climate change without congressional approval in part because the emissions reduction obligation in the agreement was non-binding.¹¹³ Moreover, although Congress has long mandated reporting and publication of international agreements made by the executive branch,¹¹⁴ this mandate until recently was construed to apply only to binding agreements.¹¹⁵ In December 2022, Congress passed legislation mandating for the first time the reporting and publication of non-binding agreements made by the executive branch if they “could reasonably be expected to have a significant impact on the foreign policy of the United States” — a requirement that becomes effective in September 2023.¹¹⁶ But there is not currently any such mandate for international agreements made by state governments.

¹⁰⁹If an agreement is binding under international law, however, its breach may entitle the aggrieved party to engage in counter-measures (that is, the non-performance of certain international obligations towards the breaching party), an entitlement that would not be triggered by the breach of a non-binding agreement. See “Draft Articles,” *supra* note 107 at arts 22, 49 (recognizing that counter-measures are allowed as a response to an “internationally wrongful act”).

¹¹⁰See Oona A Hathaway, Curtis A Bradley & Jack L Goldsmith, “The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis” (2020) 134 Harv L Rev 629 at 639–41.

¹¹¹See Bradley, Goldsmith & Hathaway, *supra* note 5.

¹¹²See Curtis A Bradley & Jack L Goldsmith, “Presidential Control over International Law” (2018) 131 Harv L Rev 1201 at 1219–20.

¹¹³See *ibid* at 1248–52.

¹¹⁴See 1 USC §§ 112a, 112b.

¹¹⁵See Hathaway, Bradley & Goldsmith, *supra* note 110 at 708.

¹¹⁶See *James M Inhofe National Defense Authorization Act for Fiscal Year 2023*, 23 December 2022, 136 Stat 2395 at para 5947 (amending 1 USC §112b (1972)). See also Curtis Bradley, Jack Goldsmith & Oona Hathaway, “Congress Mandates Sweeping Transparency Reforms for Executive Agreements,” *Lawfare* (23 December 2022), online: <www.lawfaremedia.org/article/congress-mandates-sweeping-transparency-reforms-international-agreements>.

There have been proposals in recent years to have the State Department maintain a database of these agreements, but Congress has not enacted such a requirement,¹¹⁷ and, in any event, its efficacy would depend on state cooperation. Congress could set up a registry system, with perhaps a safe harbour provision, promising, for example, that state agreements submitted and not overturned within a certain period would get protection from challenges.¹¹⁸ But given that almost none of the agreements are being challenged anyway, such a system might not provide enough of an incentive, and states might be wary of highlighting their agreement practice in ways that might trigger national government objections. Another option would be for Congress to provide funding to the states to support more transparency, something that might provide a more tangible incentive. State governments could of course adopt transparency mandates on their own initiative; it is in the interest of state populations, after all, to know what agreements their governments are making on their behalf.¹¹⁹

This issue of how to ensure sufficient accountability for non-binding agreements is increasingly a matter of international concern. Non-binding agreements offer parties greater flexibility in their commitments, allowing for adjustments if the conditions or their interests change. But the use of such agreements can also undermine government accountability because the agreements are not typically subject to the domestic rules concerning legislative approval, reporting, and publication that apply to binding agreements. The growth of these agreements also has potentially profound implications for the field of international law, which has traditionally been organized around binding obligations.¹²⁰ Recognizing the importance of the development, the United Nations' International Law Commission has placed the topic of non-binding international agreements on its long-term agenda.¹²¹ The comparative and international discussions of this topic have so far tended to focus on national agreements,¹²² but, as this article has shown, it is important to consider the vibrant sub-national practice as well.

6. Conclusion

For a variety of reasons, Article I, section 10, of the US Constitution does not do much work today in limiting state international agreements. States often make these

¹¹⁷See Scoville, *supra* note 43 at 386–87. A non-profit organization, the Council of State Governments, maintains a database of inter-state agreements. See Council of State Governments, “National Center for Interstate Compacts,” online: <apps.csg.org/ncic/Default.aspx>.

¹¹⁸Cf Katherine Mims Crocker, “A Prophylactic Approach to Compact Unconstitutionality” (2023) 98 *Notre Dame L Rev* 1185 (suggesting a safe harbour system for inter-state agreements).

¹¹⁹Some states, like California, make their agreements public. See “International Diplomacy,” *State of California*, online: <business.ca.gov/advantages/international-trade-and-investment/international-collaboration/international-diplomacy/> (listing agreements with various countries, their agencies, and their sub-national governments). Some Canadian provinces do the same. See “Agreements and Commitments,” *Quebec*, online: <www.quebec.ca/en/government/agreements-and-commitments>; “International Agreements,” *Manitoba*, online: <www.gov.mb.ca/fpir/intrelations/agreements/index.html>.

¹²⁰See Bradley, Goldsmith & Hathaway, *supra* note 5.

¹²¹See *Report of the International Law Commission*, 73d Sess, Supp No 10, Doc A/77/10 (2022), Annex I.

¹²²See e.g. Committee of Legal Advisers on Public International Law, *Expert Workshop on “Non-Legally Binding Agreements in International Law”* (26 March 2021), online: <www.coe.int/en/web/cahdi/non-legally-binding-agreements-in-international-law>; University of Chicago Conference on Non-Binding International Agreements: A Comparative Assessment (23 September 2021), online: <www.law.uchicago.edu/events/non-binding-international-agreements-comparative-assessment>.

agreements but almost never seek congressional approval, and Congress, the executive branch, and the courts do not typically object. The main check on this sub-national practice is the possibility of federal pre-emption, but, at least to date, the pre-emption doctrines have also not presented much of an obstacle. In general, the rise of state international agreements is likely a positive development because the agreements allow for more extensive international cooperation in ways that are tailored to local interests and conditions.¹²³ As a scholars' *amicus* brief noted in the California-Québec case, "[i]n today's interconnected world, the need for coordination has become far greater and less spatially focused than during the nineteenth century," and this shift has "led to more horizontal, vertical, and diagonal coordination among different levels of government."¹²⁴ Moreover, it has become more difficult in recent years for the national government to conclude international agreements due to partisan and other limitations,¹²⁵ so these state-level agreements may help fill a needed gap. But both the lack of transparency and the potential for federal-state conflicts are likely to require attention going forward.

¹²³Federal nations vary in their approach to sub-national agreements. In 2020, Australia enacted a statute requiring that states obtain the national government's approval before making any international agreements, regardless of whether the agreements are binding. See *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*, No 116 (2020), online: <classic.austlii.edu.au/au/legis/cth/num_act/afra_202020641/>. The legislation was apparently prompted by agreements concluded by the state of Victoria with China. By contrast, Canada (like the United States right now) broadly allows sub-national agreements, at least if they are not binding under international law. See Charles-Emmanuel Côté, "Federalism and Foreign Affairs in Canada" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) 277 at 284–86. For additional consideration of the different ways that foreign relations are handled in federal nations, see Hans Michelmann, ed, *Foreign Relations in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2009); Bradley, *supra* note 123, chs 15–19.

¹²⁴*United States v California*, *supra* note 70 at 9, Brief of *Amici Curiae* Professors.

¹²⁵See Bradley, Goldsmith & Hathaway, *supra* note 5.