International Agreements by U.S. States: Federalism, Foreign Affairs, and Constitutional Change

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The text of the U.S. Constitution appears to require that, to the extent that individual states are ever allowed to conclude agreements with foreign governments, they must obtain congressional approval. In practice, however, states conclude many agreements with foreign governments and almost never seek congressional approval. This practice is an illustration of both the importance of federalism in U.S. foreign relations and the significant role played by historical practice in informing U.S. 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 the Canadian province of Quebec. 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 U.S. states in an effort to work around strained relations with the U.S. 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 nonbinding agreements that deserves greater scrutiny under both domestic and international law.

Article I, Section 10 of the U.S. 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.” This language appears to require that, to the extent that U.S. 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 the Canadian province of Quebec.²

In practice, U.S. states almost never seek congressional approval for their agreements with foreign governments, and the number of 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 subnational agreements provide an illustration of how the U.S. 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 federalism is a vibrant part of the United States’ (and many other nations’) international relations. Finally, the agreements highlight a broader


³ For an extensive defense of this claim, see Curtis A. Bradley, Historical Gloss and Foreign Affairs: Constitutional Authority in Practice (forthcoming, Harvard University Press).

⁴ See, e.g., United States v. Belmont, 301 U.S. 324, 331 (1937) (“In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.”); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) (“For 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 191, 197 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”).
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 nonbinding agreements.\(^5\)

Part I describes the U.S. constitutional law relating to state international agreements. Part II explains that, despite what the text of the Constitution might suggest, states generally do not seek congressional approval for these agreements. Part III recounts the litigation over the California-Quebec agreement and the reasons that the court gave for rejecting the Trump administration’s challenges. Part IV discusses the recent growth in state international agreements and the potential for conflicts with national policy. Part V explains how this growing practice relies in part on a sharp distinction between binding and nonbinding agreements that merits greater scrutiny than it has yet received.

I. State International Agreements

The U.S. 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

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arrangement was widely viewed as inadequate. As the historian Walter LaFeber observed, “Nothing 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.”

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.”

Despite the Founders’ goal of strengthening the national government, the Constitution preserved a federal structure, in part by giving the national government limited 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. But there was less support for federalism with respect to the conduct of international affairs. As James Madison contended, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”

Even the pro-states’ rights Thomas Jefferson reasoned that the United States should be “made one nation

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7 Federalist No. 15 (Dec. 1, 1787), in The Federalist Papers 106 (Clinton Rossiter ed., 1961). See also Bradford Perkins, The Creation of a Republican Empire, 1776-1865, 1 Cambridge History of American Foreign Relations 56 (1993) (“Because 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.”).

8 See U.S. Const. amend. X (1791) (“The 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 (Jan. 22, 1788), in The Federalist Papers, supra note 7, at 264.
in every case concerning foreign concerns.” 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 Preemption

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. 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 preempt state laws and activities. This preemption is generally straightforward when Congress or an international agreement made by the national government expressly provides for preemption or where there is a direct conflict between federal and state law. Congress has broad authority to regulate, especially under its commerce power. And the Supreme Court has held the national government’s treaty power is even broader and can address matters that Congress could not otherwise address.


11 See U.S. Const. art. VI.

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

13 See Missouri v. Holland, 252 U.S. 416 (1920) (allowing the national government to regulate the hunting and capturing of migratory birds based on a treaty, regardless of whether Congress would
The Supreme Court has also made clear that preemption 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 preempted.\textsuperscript{14} In addition, the Court has held that state laws or actions that stand as an obstacle to the achievement of the policies in a federal statute or agreement may be preempted.\textsuperscript{15} Under these doctrines of “field preemption” and “obstacle preemption,” 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 preempted. States and municipalities also often take a position on international issues—for example, by issuing nonbinding resolutions relating to subjects like arms control and human rights—a form of speech that has not typically been thought to be subject to preemption, even though foreign


governments sometimes complain to the national government about these expressions.16

More controversially, states sometimes limit their investments and contracting relating to particular countries as a result of foreign events. In theory, these measures can be found to be preempted if they conflict with federal sanctions laws. This is what the 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 preempting even these types of state measures and sometimes specifically endorses them. In the 1980s, Congress did not include a preemption 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

16 See, e.g., Gingery v. City of Glendale, 831 F.3d 1222, 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.”).

17 See Crosby, 530 U.S. at 373 (“[W]e see the state Burma law as an obstacle to the accomplishment of Congress’s full objectives under the federal [sanctions] Act.”).

18 See Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int’l L. 821, 823 (1989); Sarah H. Cleveland, Crosby and the “One Voice” Myth in U.S. Foreign Relations, 46 Vill. L. Rev. 975, 1002 (2001). For an opinion from the Justice Department’s Office of Legal Counsel concluding that the state measures were not subject to dormant preemption, see Memorandum Opinion for the Associate Attorney General, South African Divestment Statutes Enacted by State and Local Governments, 10 Op. OLC 49 (Apr. 9, 1986). Cf. Crosby, 530 U.S. at 388 (noting that the Supreme Court “never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid”).


companies after Russia’s 2022 invasion of Ukraine, and to date these measures have not been found to be preempted.\footnote{See Mitch Smith, More U.S. States Reevaluate Their Financial Ties to Russia, N.Y. Times (Mar. 1, 2022); Office of the New York State Comptroller, DiNapoli Orders Divestment of Russia Holdings (Mar. 25, 2022), https://www.osc.state.ny.us/press/releases/2022/03/dinapoli-divestment-russia-holdings.}

It is possible that some state activities will be found to be preempted 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 Supreme Court has construed the Constitution’s grant of authority to Congress to regulate domestic and international commerce as implicitly preempting some state laws and activities, under a doctrine known as the “dormant Commerce Clause.”\footnote{See, e.g., Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542 (2015); Japan Line v. County of Los Angeles, 441 U.S. 424 (1979); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).} The Court has also held that some state laws or activities will be preempted if they have a direct impact on foreign affairs, under a doctrine known as “dormant foreign affairs preemption.”\footnote{See Zschernig v. Miller, 389 U.S. 429 (1968). See also Jack L. Goldsmith, 2000 Sup. Ct. Rev. 175, 203. Dormant foreign affairs preemption is also sometimes confusingly called field preemption, see, e.g., Garamendi, 539 U.S. at 419 n.11, even though it does not require that Congress have occupied the field of regulation.} The current scope and viability of this latter doctrine is uncertain, and the Supreme Court has generally seemed more skeptical in recent years of dormant preemption, at least in the absence of discrimination against other states or nations.\footnote{See Ingrid Brunk Wuerth, The Future of the Federal Common Law of Foreign Relations, 106 Geo. L.J. 1825, 1831-32 (2018) (noting that the 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 preemption,” while the Garamendi dissent “explicitly distanced itself from Zschernig”).} 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 U.S. foreign affairs in a variety of other ways that do not implicate federal preemption. Most actions by non-U.S. 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 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.\(^{27}\)

**B. Article I, Section 10**

\(^{25}\) See National Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023). See also Barclays Bank Plc v. Franchise Tax Bd., 512 U.S. 298, 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”).

\(^{26}\) See Curtis A. Bradley, International Law in the U.S. Legal System 64 (3d ed. 2021); Duncan B. Hollis, Executive Federalism: Forging New Federalist Constraints on the Treaty Power, 79 S. Cal. L. Rev. 1327 (2006); Cleveland, supra note 18, at 1002-06.

Another way in which the 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 either another state or a 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.\textsuperscript{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 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.”\textsuperscript{29} In other words, Vattel viewed treaties as ongoing arrangements and other international agreements as one-time resolutions.

\textsuperscript{28} See, e.g., Samuel B. Crandall, Treaties: Their Making and Enforcement 141 (2d ed. 1916) (“The exact distinction between the expressions ‘treaty, alliance or confederation’ and ‘agreement or compact,’ has not been determined.”).

\textsuperscript{29} 2 Emmerich de Vattel, The Law of Nations §153 (1758) (Charles G. Fenwick transl. 1916).
However, the eminent U.S. 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 Supreme Court endorsed the Vattel distinction in an 1840 decision, *Holmes v. Jennison.*31 The issue there 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 Quebec 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 Taney, concluded that, although Vermont’s agreement with Canada was not a treaty, it was a compact or agreement that required congressional approval. In addition to relying on Vattel, the plurality emphasized the importance of formal characteristics in

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30 3 Joseph Story, Commentaries on the Constitution § 1397 (1833).
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 Quebec 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 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 that 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.

32 For a later endorsement by the Supreme Court of Taney’s reasoning in Holmes, see United States v. Rauscher, 119 U.S. 407, 414 (1886) (“There 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.”).

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 that situation, it is very possible that courts would treat the distinction as a nonjusticiable 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—Joseph Story’s analysis has been influential, even though he offered it as a distinction between treaties and agreements/compacts.

34 Cf. Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution: A Study in Interstate Adjustments, 34 Yale L.J. 685, 694-95 (1925) (“[O]nly 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.’”).
Story’s influence, however, has been indirect. 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 Supreme Court has held, however, that not all agreements between states fall within this requirement. In Virginia v. Tennessee, the Court, drawing upon Joseph Story’s distinction of treaties from compacts/agreements, said 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.”

The Court has reaffirmed this approach in subsequent decisions involving interstate agreements. The Court in these decisions 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 U.S. Steel Corp. v. Multistate Tax Comm’n, for example, the Court reasoned that a multistate 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.”

35 148 U.S. 503 (1893).
36 Id. at 518.
In *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, the Court was skeptical that two state statutes that regulated regional bank acquisitions on a reciprocal basis amounted to an “Agreement or Compact” for 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:

“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 importantly, neither statute requires a reciprocation of the regional limitation.”\(^{39}\)

The Court also concluded that, in any event, as long 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 preemption.\(^{40}\)

Because interstate 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

\(^{38}\) 472 U.S. 159, 175 (1985).

\(^{39}\) Id.

\(^{40}\) Id. at 176. For additional discussion of interstate agreements, see Joseph F. Zimmerman, Interstate Cooperation: Compacts and Administrative Agreements (2d ed. 2012).
States.” The State Department, too, has assumed that the approach in Virginia is relevant to determining whether state international agreements need congressional approval. So, too, have a number of state attorneys general. 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.

II. Lack of Congressional Involvement

Congress has often acted to approve or disapprove state compacts with other states, 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,


43 See, e.g., Treaties – State May Enter Agreement with World Health Organization to Provide Certain Advisory Services, 80 Md. Op. Att’y Gen. 48, 1995 WL 652898 (Nov. 3, 1995) (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 Scoville, supra note 71, at [ ] n.59 (collecting additional citations).

44 See, e.g., Duncan B. Hollis, Unpacking the Compact Clause, 88 Tex. L. Rev. 741, 786 (2010) (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 interstate agreement context, see Michael S. Greve, Compacts, Cartels, and Congressional Consent, 68 Mo. L. Rev. 285 (2003).

45 The Supreme Court has noted that the requirement of congressional approval of interstate 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, 958 (2018).
when it approved a compact between the state of New York and Canada to construct a Niagara River bridge.\textsuperscript{46} But since then, in a period of more than 150 years, there have been only about a dozen examples of congressional action on state international agreements.\textsuperscript{47} And the agreements approved by Congress have concerned just a few subjects: bridges, fire-fighting, highways, and emergency management.\textsuperscript{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 U.S. Attorney General advised the State Department that the State of Minnesota could not enter into an agreement concerning the construction of a dam on the Canadian-U.S. border unless it obtained Congress’s consent.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{46} See Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River, ch. 176, 16 Stat. 173 (1870).

\textsuperscript{47} See Duncan B. Hollis, The Elusive Foreign Compact, 73 Mo. L. Rev. 1071, 1075-77 (2008).

\textsuperscript{48} See id. at 1076.


\textsuperscript{50} Id. at 332.
treaty power.\footnote{See 5 Green Haywood Hackworth, Digest of International Law 24 (1943).} 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.\footnote{Id.}

But this executive branch opposition faded, and state agreement-making without congressional consent grew after World War II with the rise in globalization of commerce and travel. At times, 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.\footnote{Id.} 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.”\footnote{Raymond Spencer Rodgers, The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments, 61 Am. J. Int’l L. 1021, 1025 n.14 (1967).}

Some of this willful blindness was made easier by the fact that it was the pre-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 Legal Adviser acknowledged that the Department was “aware that U.S. states often conclude various
arrangements with foreign powers without congressional consent.”\textsuperscript{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 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 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 Executive branch of the federal government.”\textsuperscript{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,”\textsuperscript{57} this had not happened for the MOU in question. Taft

\textsuperscript{55} Taft Memorandum, supra note 42, at 185.

\textsuperscript{56} Id. at 180.

\textsuperscript{57} Id. at 180-81.
attached a memorandum to his response describing “some of the considerations that the Department would have raised if it had been consulted.”

The memorandum that Taft attached noted that the view articulated by Chief Justice Taney in *Holmes* that all state agreements with foreign governments require congressional consent “has not been widely supported.” 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, said the memorandum, that states often conclude agreements with foreign powers. “When [these agreements] are called to the Department’s attention,” said the memorandum, “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.”

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. 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.

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58 Id. at 179.
59 Id. at 182.
60 Id. at 185.
III. Litigation over the California-Quebec Agreement

The phenomenon of international agreements by U.S. states assumed new prominence during the Trump administration, which sued to challenge a climate change-related agreement between California and Quebec. 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 is a cap on the overall emissions of regulated entities, emissions allowances are given out, and there is an ability to trade the allowances. In 2011, the organization established a non-profit corporation, Western Climate Initiative, Inc., to provide administrative and technical support for such a program.61

Both California and Quebec 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 is organized, like a treaty, into chapters and articles, and 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 12 months after such consent. In 2017 the agreement was modified to add Ontario to the linkage, 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. 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 UN Framework Convention on Climate Change) and that the core emissions reduction obligation in the Convention was nonbinding and thus did not require legislative approval. Obama’s successor, Donald Trump, was opposed to the Convention and, in 2017, announced that the United States was withdrawing from it. Because of a provision in the Convention 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 Quebec, arguing that the agreement violated Article I, Section 10 of the Constitution and was also preempted by federal law. A federal district court rejected these arguments. The government appealed, but the subsequent Biden

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64 See decisions cited supra note 2.
administration decided not to continue challenging California’s action. President 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-Quebec 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 regulations,” said the court, “means unilateral termination of California’s participation in the Agreement is possible.”

In a separate opinion, the court also rejected the Trump administration’s preemption 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

65 444 F. Supp. 3d at 195.
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 preempt state law, said the court. The court also concluded that the agreement was not subject to dormant preemption. 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.”

The district court’s conclusions, especially with respect to Article I, Section 10, are debatable. The agreement between California and Quebec 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. While such a shift might draw support from what is now extensive governmental practice (including national


67 In discussing interstate compacts, the 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, 958 (2018).
government inaction), 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. For state international agreements, the national government’s general passivity to date may simply reflect the fact that the agreements have not yet raised serious foreign relations difficulties for the national government.

Although only from a single district court, the decision to uphold the California-Quebec agreement is important because there are few other judicial

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68 An 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.” Brief of Amici Curiae Professors of Foreign Relations Law at 10, United States v. California, Case No. 2:19-cv-02142-WBS-EFB (Feb. 14, 2020).


70 Just 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., 424 U.S. 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”).
precedents in this area.\textsuperscript{71} The decision is likely to further encourage states and localities to make agreements without seeking congressional approval.\textsuperscript{72}

\textbf{IV. Rise of Subnational 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 U.S. states and Canadian provinces, with interactions defined to include agreements, understandings, and arrangements.\textsuperscript{73} 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”

\textsuperscript{71} See Ryan M. Scoville, The International Commitments of the Fifty States, 70 UCLA L. Rev. [ ], [ ] (2023) (“The 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.”).

\textsuperscript{72} See Conor J. Mannix, The Chorus Doctrine: Promoting Sub-National Diplomacy in Regional Growth Management, 97 Wash. L. Rev. 627, 648-51 (2022) (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).

\textsuperscript{73} Roger Frank Swanson, State/Provincial Interaction: A Study of Relations Between U.S. States and Canadian Provinces Prepared for the U.S. Department of State (1974).
and that “[o]ver 400 agreements currently exist between the states and Canadian provinces.”

In a 2010 article, which did not purport to be comprehensive, Professor Duncan Hollis identified “over 340 [international agreements] concluded by forty-one U.S. states since 1955.” 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, Professor Ryan Scoville has offered a more comprehensive (but still incomplete) empirical picture. Based on materials that he obtained through open records requests to the various states, Scoville identified over 600 agreements currently in force totaling roughly 3000 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.

As noted in in the last Part, the Trump administration unsuccessfully challenged a climate change related agreement between California and Quebec. That

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75 Hollis, Unpacking the Compact Clause, supra note 44, at 744.

76 See Scoville, supra note 71.

77 In his earlier study in 2010, Duncan Hollis found that Canada and its provinces were the primary agreement partner. See Hollis, supra note 44, at 753. It appears that since then China and Canada have switched places.
agreement is one of many subnational agreements in recent years relating to climate change. Other examples include: In 2006, California entered into an agreement with the United Kingdom to limit emissions.78 In 2007, ten U.S. 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.79 In 2014, California entered into an MOU with agencies of Mexico to address climate change.80 In 2018, the California Energy Commission entered into an MOU with Scotland to develop the use of wind energy.81 In 2021, California signed a joint declaration with New Zealand and Quebec 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 Quebec-California market partnership.82 In 2022, California renewed an MOU with China to enhance cooperation in addressing climate change and promoting the use of clean energy.83 In 2023, the state of Washington’s Department of Ecology launched a public consultation

78 Deborah Schoch & Janet Wilson, Governor, Blair Reach Environmental Accord, L.A. Times (Aug. 1, 2006).
process to explore linking Washington’s cap-and-invest program to the systems of California and Quebec.\textsuperscript{84}

Climate change is just one of many topics for which there are state international agreements. As Professor Hollis has noted, these agreements today cover a wide array of topics, “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.”\textsuperscript{85} Moreover, although California is an especially active player in this realm, all the U.S. states sometimes enter into international agreements.\textsuperscript{86}

This extensive practice of state international agreement-making seems surprising from the perspective of the text of the U.S. 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. This is probably because the agreements generally do not cause foreign relations problems for the country. Other nations do not typically object to more international


\textsuperscript{85} Hollis, Unpacking the Compact Clause, supra note 44, at 754.

\textsuperscript{86} See Scoville, supra note 71, at [ ]. Cf. Hollis, Unpacking the Compact Clause, supra note 44, at 751 (finding in his 2010 study that that forty-one of the fifty states had concluded international agreements).
cooperation, and thus the agreements tend not to generate obstacles to the national government’s management of foreign affairs.\textsuperscript{87}

If anything, the federal government has promoted rather than opposed subnational engagement with foreign governments. For example, U.S. 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 nonprofit organization based in Washington, D.C., that was originally established by President Eisenhower. Its network now includes over 2,000 cities, states, and counties across more than 140 nations.\textsuperscript{88} 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.”\textsuperscript{89} 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

\textsuperscript{87} See Michael J. Glennon & Robert D. Sloane, Foreign Affairs Federalism: The Myth of National Exclusivity 284-85 (2016) (“[N]either 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.”).


support State and municipal governments in conducting subnational engagement and increasing cooperation with foreign allies and partners.”

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 have aspirations for national office, which can lead them to stake out independent foreign policy positions. At the same time, foreign governments appear to be increasingly targeting subnational governments as a way of working around the national government. This has been true of China, for example, as Ryan Scoville has noted:

> [S]tates have entered 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.  

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

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91 Scoville, supra note 71, at [ ].
China-U.S. subnational relationships to influence U.S. policies and advance PRC geopolitical interests.”

Not to be outdone, Taiwan has also been deepening its engagement with U.S. states. Other nations may also be targeting U.S. states and localities. Recently, for example, the United Kingdom entered into trade-related agreements with U.S. states at the same time it was attempting to negotiate a free trade agreement with the national government. 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 preemption would also be stronger in those 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

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94 See Andrea Shalal, Britain Inks Trade Deal with Oklahoma, Hails Architects’ Licensing Pact, Reuters (Apr. 18, 2023). For another example of a state international agreement potentially at odds with national policy, see Hollis, Unpacking the Compact Clause, supra note 44, at 741-42 (describing an agreement between the state of Kansas and Cuba).
that quickly led to litigation. 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. Before that, some U.S. states (and others) sued China for the COVID pandemic, an effort that to date has been blocked by a federal statute, the Foreign Sovereign Immunities Act. 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.

It is thus not difficult to imagine conflicts developing between state agreement-making and national policies.

V. The Binding Versus Nonbinding Distinction

95 See Sapna Maheswari & David McCabe, TikTok Users Sue Montana, Calling State Ban Unconstitutional, N.Y. Times (May 18, 2023).

96 Daniel Weissner, Florida Sued for Barring Chinese Citizens from Owning Homes, Land, Reuters (May 22, 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 (June 28, 2023).


98 The Supreme Court held that a number of immigration enforcement measures enacted by the state of Arizona during the Obama administration were preempted by federal immigration law. See Arizona v. United States, 567 U.S. 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).
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. The district court in the California-Quebec 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.”

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 nonbinding agreements to Congress for its approval. In any event, the executive branch is much less likely to object to agreements if they are nonbinding. The Department has in fact offered to provide guidance to states in their drafting of agreements to help ensure that the agreements are indeed not binding.

99 444 F. Supp. 3d at 1195.

100 For 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) (“Both [the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement and Annex 2001 Implementing Agreement] appear to 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.”).

101 See U.S. Dep’t of State, Compact Clause, at https://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 nonbinding. See U.S. Dep’t of State, Guidance on Non-Binding Documents, at https://2009-2017.state.gov/s/l/treaty/guidance/index.htm#:~:text=U.S.%20Department%20of%20State&text=While%20not%20binding%20should%20be%20avoided.
It is worth noting that some state international agreements by their terms appear to impose binding reciprocal obligations.\textsuperscript{102} In fact, as discussed earlier, many aspects of the California-Quebec agreement are written in terms that sound binding.\textsuperscript{103} In his recent study, Professor Scoville found that approximately one-fourth of the agreements used binding language like “shall.”\textsuperscript{104} Binding agreements can potentially implicate issues of national responsibility that should be of potential concern to the national government.\textsuperscript{105} 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, \textit{sub-national}

\textsuperscript{102} See Scoville, supra note 71, at [ ].

\textsuperscript{103} Cf. Hollis, The Elusive Foreign Compact, supra, at 1089 n.74 (”States including ‘non-binding’ provisos in their agreements also often include other language indicative of legal effect.”). See also Aaron Messing, Note, Nonbinding Subnational International Agreements: A Landscape Defined, 30 Geo. Envt’l L. Rev. 173 (2017) (describing different types of nonbinding subnational agreements)

\textsuperscript{104} Scoville, supra note 71, at [ ].

\textsuperscript{105} Under generally accepted principles of state responsibility, the actions of a subnational government are generally attributed to the nation as a whole. See Draft Articles on Responsibility of States for Internationally Wrongful Acts art. IV(1) (2001) (“The 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 the Compact Clause, supra note 44, at 787 (“If the foreign government regards the commitment as legally binding, it may hold the United States legally responsible for the state’s performance.”). But cf. Peter J. Spiro, Globalization and the (Foreign Affairs) Constitution, 63 Ohio St. L.J. 649, 670-71 (2002) (“As 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.”).
units, or both) with the capacity to conclude a treaty governed by international law.”

Even when the agreements are genuinely nonbinding, it may be artificial to distinguish sharply between binding and nonbinding 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 breach, 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.

This is not the only example in which making an international agreement nonbinding may avoid domestic legal constraints. The U.S. national government does this as well: The executive branch has only limited authority to make agreements without congressional approval. But the requirement of congressional approval is


107 If an agreement is binding under international law, however, its breach may entitle the aggrieved party to engage in countermeasures (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 nonbinding agreement. See Draft Articles on Responsibility of States, supra note 105, arts. 22, 49 (recognizing that countermeasures are allowed as a response to an “internationally wrongful act”).

thought to apply only to binding agreements. The federal executive branch often makes agreements that are nonbinding, 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 a number of other nations, in 2015. 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 nonbinding.

Moreover, although Congress has long mandated reporting and publication of international agreements made by the executive branch, until recently this mandate was construed to apply only to binding agreements. In December 2022, Congress passed legislation mandating for the first time the reporting and publication of nonbinding 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. But there is not

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109 See Bradley, Goldsmith, and Hathaway, supra note 5, at [ ].


111 See id. at 1248-52.


currently any such mandate for international agreements made by state governments.

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, and, in any event, its efficacy would depend on state cooperation. Congress could set up a registry system, with perhaps a safe harbor provision—promising, for example, that state agreements submitted and not overturned within a certain period would get protection from challenge. 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.

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This issue of how to ensure sufficient accountability for nonbinding agreements is increasingly a matter of international concern. Nonbinding 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.\textsuperscript{118} Recognizing the importance of the development, the UN’s International Law Commission has placed the topic of nonbinding international agreements on its long-term agenda.\textsuperscript{119} The comparative and international discussions of this topic have so far tended to focus on national agreements,\textsuperscript{120} but, as this Essay has shown, it is important to consider the vibrant subnational practice as well.

## Conclusion

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

\textsuperscript{118} See Bradley, Goldsmith & Hathaway, supra note 5, at [].


these agreements but almost never seek congressional approval, and neither Congress, the executive branch, nor the courts typically object. The main check on this subnational practice is the possibility of federal preemption, but, at least to date, the preemption 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 tailored to local interests and conditions.\(^{121}\) As a scholars’ *amicus* brief noted in the California-Quebec 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.”\(^{122}\) Moreover, it has become more difficult in recent years for the national government to conclude international agreements, due to partisan and other limitations,\(^{123}\) 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.

\(^{121}\) Federal nations vary in their approach to subnational 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), at http://classic.austlii.edu.au/au/legis/cth/num_act/afrataa2020641/. (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 subnational agreements, at least if they are not binding under international law. See Charles-Emmanuel Côté, Federalism and Foreign Affairs in Canada, in The Oxford Handbook of Comparative Foreign Relations Law 277, 284-86 (Curtis A. Bradley ed., 2019). For additional consideration of the different ways that foreign relations are handled in federal nations, see Foreign Relations in Federal Countries (Hans Michelmann ed., 2009); The Oxford Handbook, chs. 15-19, supra.

\(^{122}\) Brief of *Amici Curiae* Professors, supra note 68, at 9.

\(^{123}\) See Bradley, Goldsmith, and Hathaway, supra note 5, at [ ].