Nonbinding Subnational International Agreements: A Landscape Defined

Aaron Messing*

Abstract

The political and sociological trends evident from the election of Donald Trump as President of the United States represent significant limitations on the high international aspirations for climate change reform following the Paris Agreement. Subnational action will now be as important as ever for forward progress in this space; however, legal limitations prevent Subunits from taking fully concrete and deliberate action. Thus, the climate action movement is left with an imperfect mechanism with which to continue reform. This movement must be aware of its landscape of possibilities to be as effective as possible. This Note identifies four categories of nonbinding subnational international agreements that constitute the different possibilities for action: near-binding arrangements, memoranda of understanding, third-party representation, and unilateral declarations. Each of these categories has advantages and disadvantages, but with continued study of the formulation of these types of agreements, a hybrid arrangement may arise that has the capacity to utilize the advantages of some types while avoiding the disadvantages of others.

Table of Contents

* Georgetown University Law Center; J.D. expected 2018; Northwestern University, B.M. 2012.

INTRODUCTION

Nonbinding agreements, or "soft law," in the international sphere were evident as early as the 1960s, with a major influx of nonbinding international agreements taking place in the late seventies all the way through the nineties.[1] These agreements were made primarily between nations or groups of nations, and began to be seen as a practical and functional means of negotiation without making binding commitments. Some experts attribute the growth of nonbinding agreements to the development of permanent international institutions and a world economy, as well as a growing diversity of developed and underdeveloped nations entering into international negotiations and making consensus more difficult.[2] Through nonbinding agreements, nations were able to move more quickly than through formal treaty procedures, the negotiations were less costly for nations to participate in, and nations could achieve specified goals with relative political ease, without binding themselves to commitments.[3] By allowing nations to ease into political consensus, many believe that the nonbinding agreements created the foundation for future binding agreements between the parties.[4]

In the late 2000s, faced with increasing political divisiveness, including the failure of the United States to ratify the Kyoto Protocol, subnational units in the United States began taking action amongst themselves to combat the problem of climate change.[5] The successes of these subnational agreements were primarily domestic in nature; however, some subnational international agreements found success by following the rubric of nonbinding agreements that had occurred on

---

1. Antto Vihma, *Chapter 7 Analyzing Soft Law and Hard Law in Climate Change*, 21 IUS GENTIUM 143, 144 (2013); *see*, Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 423–24 (1991).

2. Dupuy, *supra* note 1, at 421.

3. Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555, 1568 (1999).

4. *Id.*

5. Vicki Arroyo, Kathryn A. Zyla, Gabe Pacyniak, & Melissa Deas, *State Innovation on Climate Change: Reducing Emissions from Key Sectors While Preparing for a "New Normal,"* 10 HARV. L. & POL'Y REV. 385, 386 (2016).

the national level in the previous decades. After a period of international movement on climate change at the national level, new political developments in the United States have placed the onus once again on subnational units to continue the work of developing a movement of nonbinding subnational international agreements to prevent the regulatory landscape from backsliding.

This movement must be aware of its own dimensions in order to produce effective results. This Note will explain the foundations of the current political landscape leading to the current movement, and will explain the legal justifications for the specific types of international arrangements that this movement is producing. This Note will then create a typology of nonbinding subnational international agreements throughout the international legal spectrum to produce a comprehensive landscape of the potential arrangements. Finally, this Note will present a framework for understanding the efficacies of the different types of agreements to determine why particular agreements are chosen and what potential benefits and disadvantages are associated with each type.

Ultimately, this Note's analysis demonstrates that the current method of subnational international action is imperfect and requires sacrifices in one way or another, regardless of the type chosen. By continuing to develop and understand the landscape of these agreements, subnational units can break the mold of previous agreements to create a hybrid structure that utilizes the advantages of the various types of agreements while avoiding their disadvantages.

I. THE POLITICAL PROBLEM

In the 1970s, the development of nonbinding international agreements occurred in response to a growing difficulty for nations to enter into binding agreements as national political stances hardened and diversity of opinion grew.[6] In the 2000s, a new type of nonbinding international agreement grew out of new political difficulties and a new international landscape.[7] Subnational units were intimately connected around the globe for the first time, no longer by proxy through communications between national governments, but through the apolitical world economy and a development of a vast network of easy and effective communication.[8] Thus, like-minded subnational units could readily locate one another and collaborate towards the same cause. Today, in the face of national ambivalence or potential resistance to climate-related action, as well as a culture of skepticism surrounding climate change, subnational units in support of action face a new threat of obstruction.

---

6. Dupuy, *supra* note 1, at 421.

7. *See* Joana Setzer, *Testing the Boundaries of Subnational Diplomacy: The International Climate Action of Local and Regional Governments*, 4 TRANSNAT'L ENVNT'L L. 319 (2015).

8. *See* Janet H. Moore, *Cross-Border Litigation: Preparing for Cultural Nuances*, 63 THE ADVOC. (TEXAS) 38, 38 (2013).

A. RESISTANCE AT THE FEDERAL LEVEL

The election of Donald Trump as President of the United States has fundamentally altered the political landscape for any form of climate change legislation. Over the course of his candidacy and presidency, President Trump has declared that he will back out of the Paris Agreement, although he has appeared to hedge this stance in recent months;[9] he has indicated that he will roll back enforcement of the Clean Power Plan, and has already removed many other executive climate change initiatives begun by former President Barack Obama;[10] he has placed as the head of the Environmental Protection Agency (EPA) an administrator who is critical of the anthropogenic nature of climate change and who places significant emphasis on the unburdening of greenhouse gas (GHG) producing industries;[11] he has proposed a budget that reflects a pivot away from spending on climate research, particularly NASA's budget, which has been entirely directed away from any climate research;[12] he has indicated an interest in lowering the emission reduction burden on car manufacturers and potentially revoking the California wavier that allows the state to have its own car emission standards;[13] and he made a considerable part of his campaign platform the revitalization of the coal industry and increased the energy production from coal fired power plants.[14]

Thus, national movement on climate change is unlikely for the next four, and potentially eight years. Organizations devoting their time to this issue on the national level will likely be focused on preventing backsliding on national climate initiatives, and not on moving onto new strategies for implementation of emission reductions.[15] However, because of the United States' federalist structure of government, states potentially have the capacity to move forward with their own emission reduction initiatives, and will likely be the driving force behind new subnational international agreements.

---

9. Emre Peker, *Trump Administration Seeks to Avoid Withdrawal from Paris Climate Accord*, WALL ST. J. (Sept. 17, 2017), https://www.wsj.com/articles/trump-administration-wont-withdraw-from-paris-climate-deal-1505593922.

10. Lisa Freidman, *Trump Wants to Repeal Obama's Climate Plan. The Next Fight: Its Replacement.*, N. Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/climate/clean-power-plan.html.

11. Tom DiChristopher, *EPA Chief Scott Pruitt Says Carbon Dioxide Is Not a Primary Contributor to Global Warming*, CNBC (Mar. 9, 2017), http://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html.

12. Nell Greenfieldboyce, *Trump's Budget Slashes Climate Change Funding*, NAT'L PUB. RADIO (Mar. 16, 2017), http://www.npr.org/sections/thetwo-way/2017/03/16/520399205/trumps-budget-slashes-climate-change-funding.

13. Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, THE ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649/.

14. Clifford Krauss & Michael Corkery, *A Bleak Outlook for Trump's Promises to Coal Miners*, N. Y. TIMES (Nov. 19, 2016), https://www.nytimes.com/2016/11/20/business/energy-environment/a-bleak-outlook-for-trumps-promises-to-coal-miners.html.

15. *See* Chelsea Harvey, *The U.S. Isn't the Only Big Country at Risk of Falling Behind on Climate Change. Meet Brazil*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/29/the-u-s-isnt-the-only-big-country-at-risk-of-backsliding-on-climate-change/?utm_term=.a56a70c05ac7.

B. CULTURAL SKEPTICISM

A secondary aspect of the climate change debate that has been unique among other contemporary global health issues is the ardent skepticism over the findings of the scientific community.[16] There is considerable political will in opposing environmental regulation of any kind and a divide down partisan lines as to the manner in which the climate change problem should be addressed.[17] This is due to either the power of disinformation from fossil fuel energy companies,[18] or the recent sociological backlash of skepticism towards government authority perceived to have a political bias.[19] As evidence of this phenomenon, there have been multiple "climate-gates"—accusations that climate scientists have been manipulating data to show evidence of climate change where it does not exist.[20] These scandals have not amounted to any substantive wrongdoings, but have further entrenched the idea that climate change is a purely partisan issue.[21]

Both political realities addressed above have a common origin and enjoy self-reinforcing relationships. For climate change activists, the practical implications are that the United States federal government will not be taking major steps to prevent or adapt to the worst outcomes of climate change. The onus is now on subnational units that have the political will to move forward, at least until the political scene realigns with their interests.

II. THE LEGAL PROBLEM

Given that the political climate requires subnational action, this Note will address the domestic and international legal constraints on U.S. states to engage in subnational international agreements and will explain why the vast majority of these agreements have been and will continue to be varying forms of non-binding agreements.

---

16. *See* SKEPTICAL SCIENCE, https://www.skepticalscience.com (last visited Apr. 23, 2017).

17. Riley E. Dunlap & Aaron M. McCright, *The Polarization of U.S. Public Opinion on Climate Change*, SCHOLARS STRATEGY NETWORK (January 2013), http://www.scholarsstrategynetwork.org/brief/polarization-us-public-opinion-climate-change.

18. Elliott Negin, *Documenting Fossil Fuel Companies' Climate Deception*, UNION OF CONCERNED SCIENTISTS (Summer 2015), http://www.ucsusa.org/publications/catalyst/su15-documenting-fossil-fuel-companies-climate-deception#.WPQIJ1LMyRs; Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/.

19. Richard Tol, *UN Climate Change Expert Reveals Bias in Global Warming Report*, FOX NEWS (May 20, 2014), http://www.foxnews.com/opinion/2014/05/20/un-climate-change-expert-reveals-bias-in-global-warming-report.html.

20. *See* David Rose, *Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data*, THE DAILY MAIL (Feb. 5, 2017), http://archive.is/hmXLn.

21. *See What do the 'Climategate' Hacked CRU Emails Tell Us?*, SKEPTICAL SCIENCE, https://www.skepticalscience.com/Climategate-CRU-emails-hacked.htm (last visited Apr. 23, 2017).

A. CONSTITUTIONAL LIMITS ON SUBNATIONAL ACTION

Under the United States Constitution, the foreign relations and interstate affairs doctrine prevents states from forming legally binding agreements that conflict with the interests of the federal government.[22] Within this doctrine, there are four particular clauses that regulate international agreements between domestic states and foreign governments: the Treaty Clause,[23] the Compact Clause,[24] Dormant Foreign Affairs Preemption,[25] and the Dormant Foreign Commerce Clause.[26]

1. The Treaty and Compact Clauses

Both the Treaty and Compact Clauses expressly limit states when entering into legally binding international agreements.[27] A treaty is a binding agreement between nations governed by international law.[28] The Treaty Clause clearly establishes that states may not enter into treaties with other nations.[29] This is because "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India."[30] The Supreme Court has distinguished treaties from acceptable state "agreements," but has not established any definition that clarifies the difference between the two.[31] The only major decision invalidating state law as a treaty was a plurality opinion in a case where the state of Vermont attempted to unilaterally extradite a Canadian citizen.[32] This lack of precedent may be due to the inherent difficulty in formulating a distinction without a large volume of cases illuminating their differences, or it may be because the distinction is primarily a political judgement that courts have been hesitant to rule upon.[33] Regardless, the Treaty Clause has historically prevented states from making binding treaties with other nations or subnational units.

---

22. David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10478, 10486 (2016).

23. U.S. CONST. art. 1, § 10, cl. 2 ("No State shall enter into any treaty, alliance, or confederation").

24. *Id.* at cl. 3 ("No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power").

25. Jeremy Lawrence, *The Western Climate Initiative: Cross-Border Collaboration and Constitutional Structure in the United States and Canada*, 82 S. CAL. L. REV. 1225, 1257 (2009).

26. U.S. CONST. art. 1, § 8.

27. Wright, *supra* note 22, at 10486.

28. Lawrence, *supra* note 25, at 1252.

29. *Id.* at 1250.

30. Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

31. Lawrence, *supra* note 25, at 1252.

32. Holmes v. Jennison, 39 U.S. 540, 561 (1840).

33. Lawrence, *supra* note 25, at 1252; *see Jennison*, 39 U.S. at 561.

A compact is a binding agreement between states governed by federal law.[34] The Compact Clause allows for marginally more flexibility in subnational international agreements through a two-step inquiry: 1) whether the subnational compact or agreement increases the political authority of the member states and encroaches on federal supremacy, and if so, 2) whether this increase in authority is implicitly or explicitly authorized by Congress.[35] The first step asks "whether the Compact enhances state power *quoad* the National Government."[36] An increase relative to the federal government might be authorization for a member state to exercise powers that they otherwise would not possess, or granting sovereign powers to the implementing body of the Compact. [37] If states enter into an arrangement that does not violate the first step, Supreme Court precedent has allowed considerable flexibility to enter into interstate agreements.[38]

2. Dormant Foreign Affairs Preemption

The Dormant Foreign Affairs Preemption doctrine is a relatively underdeveloped constitutional doctrine that can be best conceptualized as a part of and an analogue to the Supremacy Clause. The Supremacy Clause contains express and implied preemption.[39] Express preemption occurs when the actions of a state are expressly prohibited by Congressional legislation.[40] Implied statutory preemption divides into field and conflict preemption. Field preemption occurs when there is no direct conflict with a statute, but Congress has demonstrated a legislative intent to "occupy the field" of law in question, and cannot be intruded upon by state law.[41] Conversely, conflict preemption occurs when there is a conflict between state law and official federal policy or political power.[42]

Similar to implied Supremacy Preemption, Dormant Foreign Affairs Preemption contains field and conflict preemption, but focuses primarily on the power of the executive branch and its international responsibilities. In Dormant Foreign Affairs Preemption, conflict preemption occurs when state law conflicts with foreign policy that is embedded within formal executive authority, and field preemption occurs when there is no conflict with any formal policy device, but the state has still infringed upon the federal government's exclusive capacity to shape foreign affairs.

---

34. Lawrence, *supra* note 25, at 1252.
35. *Id.* at 1253.
36. U. S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978).
37. *See id.*
38. *See* New Hampshire v. Maine, 426 U.S. 363, 365–66 (1976); Virginia v. Tennessee, 148 U.S. 503, 506 (1893); *see also* New York v. United States, 505 U.S. 144, 183 (1992).
39. Wright, *supra* note 22, at 10486.
40. *Id.*
41. *Id.*
42. Crosby v. NFTC, 530 U.S. 363, 363 (2000); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419–20 (2003).

There are two cases that most clearly demonstrate the link between Supremacy Preemption and Dormant Foreign Affairs Preemption. In the first, *Crosby v. National Foreign Trade Council (NFTC)*, the Court found a Massachusetts law that prohibited conducting business with Burma unconstitutional because it was at odds with a federal statute that gave the president control over economic sanctions in that context, and would have compromised his political position.[43] The second case, *American Insurance Association v. Garamendi,*[44] expanded *Crosby* by declaring that a state law need not interfere with a federal statute to be preempted, but can also be preempted by executive branch foreign policy embodied in an executive agreement.[45] This opens the door for the Dormant Foreign Affairs Preemption Doctrine to preempt internationally-focused state law solely on the basis of the exclusive power of the executive to handle foreign affairs.

a. Conflict Preemption

Conflict preemption in Dormant Foreign Affairs Preemption occurs when state law infringes on United States' foreign policy embodied by formal executive authority.[46] To determine if there is a state violation, the Court balances the executive authority underlying the foreign policy, any historical tradition supporting the state law, and the degree to which the two conflict.[47]

To understand the extent of executive authority underlying the foreign policy, the Court utilizes Justice Jackson's concurrence in *Youngstown* where he outlined three levels of executive power with respect to Congressional authorization.[48] In *Garamendi*, the Court "recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress," which was a result of "power having been

---

43. *Crosby*, 530 U.S. at 377.

44. *Garamendi*, 539 U.S. at 398–99.

45. Joseph B. Crace, Jr., *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 213 (2004).

46. *Garamendi*, 539 U.S. at 417.

47. *See id.* at 420.

48. *See Garamendi*, 539 U.S. at 415; Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937). First, '[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Medellin v. Texas, 552 U.S. 491, 524–25 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)). Second, "'[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." *Id.* Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.* at 525.

exercised since the early years of the Republic."[49] The Court held that utilization of this power, under Justice Jackson's second category, had authorized an exclusive federal capacity to settle Holocaust-era claims which could not be compromised by state law.[50] Conversely, the Court in *Medellin* found that while "the President has an array of political and diplomatic means available to enforce international obligations . . . unilaterally converting a non-self-executing treaty into a self-executing one is not among them."[51] Thus, a Presidential memorandum that attempts to "unilaterally make treaty obligations binding on domestic courts" without direct authorization from Congress falls under Justice Jackson's third category, and will likely not preempt state law.[52]

Next, the Court determines the extent to which the state power in question has historical roots with respect to its free exercise without federal conflict. In *Garamendi*, California was attempting to create a "different, state system of economic pressure" on foreign nations by establishing a new cause of action for Holocaust survivors against insurance companies. The Court recognized that these types of sanctions have historically been preempted as infringing upon "the very capacity of the President to speak for the Nation."[53] In *Medellin*, the state power in question was the "state police power" and a state court's capacity to declare "final criminal judgements" and apply "neutrally applicable state laws."[54] The Court found that these enforcement powers, found "deep in the heart" of traditional state jurisdiction, should not be preempted by insufficient executive authority.[55]

Combining the two previous elements, the Court looks to the extent of the conflict between the two powers. The Court in *Garamendi* cited evidence that the California law's foreign impact "has in fact placed the [federal] Government at a disadvantage in obtaining practical results from persuading" foreign governments and foreign companies to voluntarily participate in internationally-supported Holocaust victim relief programs. Thus, the sound executive authority, the lack of historical state supremacy in the area, and the evidence of conflict was found to be "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."[56] Conversely, the lack of executive authority and the historical state power at issue in *Medellin,* in combination with the fact that "the Government [had] not identified a single instance in which the President has attempted (or Congress has acquiesced in)" to take control of these state powers, was enough for Texas to overcome a

49. *Garamendi*, 539 U.S. at 415.
50. *Id.* at 425.
51. *Medellin*, 552 U.S. at 525.
52. *Id.* at 527.
53. *Garamendi*, 539 U.S. at 424 (citing Crosby v. NFTC, 530 U.S. 363, 381 (2000)).
54. *Medellin*, 552 U.S. at 532.
55. *Id*.
56. *Garamendi*, 539 U.S. at 427.

state-federal conflict over settlements of international claims disputes.[57]

Thus, to remain in good standing under this doctrine, subnational units attempting international collaboration must avoid entering into agreements that would detract from the state's compliance with concretely-held executive authority and avoid expanding their reach beyond what has historically been state-held power.

b. Field Preemption

Field preemption, within the Dormant Foreign Affairs Preemption Doctrine, occurs where there is no state conflict with an explicit federal policy, but the state law nonetheless enters into the exclusive sphere of the federal foreign affairs power and "has a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems."[58] To date, federal courts have primarily found that the exclusive sphere of foreign affairs pertains to the power of the President and Congress to engage in war and war-related policy.[59] Also relevant is the degree to which the state policy in question is concrete as opposed to expressive in its application.[60]

The state law in question must have "more than some incidental or indirect effect" on foreign affairs in order to come under field preemption scrutiny.[61] The Court in *Movesian* found that a state "having a distinct political point of view on a specific matter of foreign policy" that was acutely internationally sensitive was sufficient to show more than an incidental effect.[62] When subjects are particularly sensitive, "experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[63]

This desire to prevent conflict from sensitive topics is the reason why many courts have emphasized the foreign affairs power pertains primarily to war-related policy. *Zschernig* concerned judicial decisions surrounding the Cold War; *Von Saher* and *Garamendi* regarded Holocaust-related claims; *Movsesian* con-

---

57. *Medellin*, 552 U.S. at 532.

58. Zschernig v. Miller, 389 U.S. 429, 441 (1968).

59. *See* Deutsch v. Turner Corp., 324 F.3d 692, 711 (9th Cir. 2003) ("Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution's express limitations on states' foreign affairs powers also concern war. Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to prevent war. Indeed, as the Federalist shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war."); *See also* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010).

60. *See Deutsch*, 324 F.3d. at 706–07.

61. *Movsesian*, 552 U.S. at 1076.

62. *Id.*

63. *Zschernig*, 389 U.S. at 441.

cerned U.S. recognition of the Armenian Genocide; and *Deutsch* regarded WWII claims. These leading cases indicate a trend in Dormant Foreign Affairs Preemption that the exclusive foreign affairs power of the federal government "may be understood, in part, as a design to prevent war."[64]

Finally, state laws invalidated by field preemption have primarily been concrete laws that produce enforceable policy.[65] The law invalidated in *Zschernig* required courts to "make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[66] Many state and circuit courts have found the lack of this element to be dispositive.[67] Additionally, state action or laws that are "merely expressive" in their intent to send a political message would not create the same intrusive circumstance as an enforceable political message.[68]

3. Dormant Foreign Commerce Clause

The final constitutional doctrine relevant to subnational international agreements is the Dormant Foreign Commerce Clause, which prevents states from interfering with Congress' power to "regulate Commerce with foreign Nations, and among the several States."[69] In domestic matters, courts subject potential violations of this doctrine to a two-part test: first, the Court determines whether the state law discriminates against out-of-state interests on its face or in its effects; then, the Court determines whether the law's burden on interstate commerce outweighs its benefits to the state.[70]

When the matter is of foreign commerce, the Court has required "a more extensive Constitutional inquiry."[71] The main determination is whether the state's law detrimentally affects the interests of the nation[72] by impeding the federal government's ability to "speak with one voice."[73] This general rule may be qualified if the Court cannot discern congressional intent.[74] The Court also weighs the international community's awareness of the problem in question and its attempts to come to an international solution.[75] In the context of subnational international arrangements, the main concern would be agreements that require

---

64. *See Deutsch,* 324 F.3d. at 713–14.
65. *See id.* at 706–07.
66. *Zschernig*, 389 U.S. at 440.
67. *See* Estate of Horman, 5 Cal. 3d 62, 79–80 (1971); Trojan Techs., Inc. v. Com. of Pa., 916 F.2d 903, 913–14 (3d Cir. 1990).
68. *See* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1077 (9th Cir. 2012).
69. U.S. CONST. art. 1, §8, cl. 3.
70. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142–43 (1970).
71. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979).
72. *Id.* at 450.
73. *Id.* at 451.
74. *See* Barclays Bank v. Franchise Tax Board, 512 U.S. 298 (1994).
75. Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 8 (1986).

states to adopt regulations that would disadvantage other states, such as cap-and-trade programs, renewable portfolio standards (RPS),[76] or other market mechanisms that may be perceived to have a discriminatory purpose or effect on foreign commerce.[77] Thus, as subnational international agreements grow in impact, they increase the chances of coming into conflict with the Dormant Foreign Commerce Clause.

B. INTERNATIONAL LIMITS OF SUBNATIONAL ACTION

Aside from constitutional constraints, there are structural limitations at the international level that prevent subnational units from creating binding agreements with other subnational units. For example, only nations have the capacity to bring claims against other nations in the International Court of Justice (ICJ) for breaching an international obligation.[78] This means that subnational units are not able to enforce international legal frameworks with other subnational actors in the ICJ.[79] Furthermore, nonbinding law is not included in Article 38 of the Statute of the International Court of Justice, which is seen as the foundation for sources of international law.[80] Thus, subnational units are unable to make enforceable binding agreements and the resulting nonbinding agreements are not considered actionable in the ICJ. Although there have been claims that this list is inadequate in contemporary international law[81] and there are occasions where subnational units have made strides in being recognized by the ICJ,[82] there is no significant historical basis of established international law for these types of agreements.[83]

Further evidence of the subservient role subunits play in international agreements between nations is frequently found within the language of the agreements themselves. Subnational authorities within the Paris Agreement are considered "non-party stakeholders" that have the capacity to demonstrate their efforts in

---

76. Courts have been unwilling to find that RPS violate the dormant commerce clause. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174 (10th Cir.), cert. denied, 136 S. Ct. 595 (2015).

77. Lawrence, *supra* note 25, at 1257.

78. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 814 (2002).

79. *How the Court Works*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/en/how-the-court-works 6 (last viewed Apr. 23, 2017) ("Only States (State Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases.").

80. *Statute of the International Court of Justice*, 55 YALE L.J. 1318, 1326 (1946); Christopher Greenwood, *Sources of International Law: An Introduction*, UNITED NATIONS: OFFICE OF LEGAL AFFAIRS 4 (2008) http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf.

81. Ilhami Alkan Olsson, *Four Competing Approaches to International Soft Law*, 58 SCANDINAVIAN STUDIES IN LAW 177, 193–96 (2013).

82. *See* Weiss, *supra* note 78, at 815.

83. Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 32 (1997) ("Notwithstanding the rise of non-state entities as part of the global dynamic, states have effectively maintained their monopoly over the levers of international law. With few exceptions, they have barred all others from

reducing emissions through the Non-State Actor Zone for Climate Action (NAZCA) platform.[84] While this is an important role for subnational units, the subunits do not possess equal bargaining power within the Agreement as a nation does.[85] Additionally, in international trade agreements like the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP), subnational units are shielded by vicarious liability from being challenged for noncompliance with the agreements.[86] While this prevents subunits from being liable for violations, it also represents their lack of standing within the international sphere to be held accountable or hold others accountable for their commitments.

Thus, both constitutional and international legal constraints that accompany subnational involvement in the international sphere require that subnational involvement in climate change be nonbinding. This does not mean that there is no means of enforcement for subnational agreements; rather, only that conventional methods of enforcement must give way to creative and new means of incentivizing compliance.

III. TYPES OF NON-BINDING SUBNATIONAL INTERNATIONAL AGREEMENTS

In response to the political and legal challenges discussed *supra*, subnational units have creatively employed a wide variety of measures that attempt to address the issue at hand while remaining in compliance with national and international laws. Processing these agreements is essential for an effective social movement. These new arrangements can be divided into four separate categories: near-binding arrangements, memoranda of understanding (MOU), third-party representation, and unilateral declarations. Understanding the structural landscape of these arrangements will provide insights for future subnational international agreements to push the boundaries of these categories.

A. NEAR-BINDING ARRANGEMENTS

The agreements most difficult to negotiate of the four categories are the near-binding arrangements that have either petitioned for federal legal sanctioning or have come close enough to providing binding commitments as to blur the line between nonbinding and binding agreements. These agreements can take many different forms, but what binds them together as a coherent category is the mutual understanding between the parties that the commitments being made are the strongest legally feasible.[87] Thus, what makes these agreements effective is

---

formal participation in the lawmaking process. States are the sole repositories of international rights. They are also the sole repositories of international duties.").

84. Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, Draft Decision -/CP.21 no. 135.

85. *Id.* at no. 137.

86. Timothy Meyer, *Local Liability in International Economic Law*, 95 N.C. L. REV. 261, 274 (2017).

87. *See*, *e.g.*, Wright, *supra* note 22, at 10490–91.

the tangible political pressure they place on the parties to uphold their commitments.

A prominent example of the development of a near-binding arrangement is The Great Lakes Compact. The Compact began in 1985 as a charter between eight U.S. states and two Canadian provinces[88] designed to provide a framework for the preservation and management of the Great Lakes and cooperation between the subnational units directly affected by changes to the waters.[89] The compliance element of the agreement was "mutually dependent upon the good faith performance by each State and Province of its commitments and obligations under the Charter."[90] Thus, the only binding effect on parties was the "good faith" application of the principles within the charter.

Though the initial agreement was nonbinding, the collective of U.S. states eventually submitted a Compact to the federal government for congressional passage and presidential signature. With the Compact's ratification in 2008, the Great Lakes Compact became a legally binding interstate compact; however, the Canadian provinces are only voluntary signatories to the Compact, and therefore not subject to the binding effect.[91] The U.S. states are required to cooperate and consult with the provinces in the preservation, conservation, restoration, improvement, and management of the Great Lakes in accordance with the Great Lakes-St. Lawrence River Basin Water Resources Council, which was created by the Compact.[92] Because the international parties are not subject to the binding effect of the Compact, this subnational agreement cannot be seen as fully binding; however, the U.S. states have made a substantial legal and political commitment, and the Canadian provinces have made the strongest commitment possible within the United States' legal framework, making this a near-binding arrangement. This development from nonbinding to formally recognized near-binding arrangement is an example of the potential for nonbinding agreements, but does not prove to be the rule.[93] Other similarly aimed agreements have pushed the boundaries of what can be internationally binding, but have not sought congressional

---

88. Pennsylvania, Michigan, Wisconsin, Indiana, New York, Illinois, Ohio, Minnesota, Ontario, and Quebec.

89. Council of Great Lakes Governors, *The Great Lakes Charter: Principles for the Management of Great Lakes Water Resources* 1 (Feb. 11, 1985), http://www.internationalwaterlaw.org/documents/regionaldocs/Local-GW-Agreements/1985-GL-Charten.pdf [hereinafter *Great Lakes Charter*].

90. *Id.* at 5.

91. Diane P. Dupont & Wiktor L. Adamowicz, *Water Valuation, in* 17 GLOBAL ISSUES IN WATER POLICY: WATER POLICY AND GOVERNANCE IN CANADA 181, 193 (Steven Renzetti & Diane P. Dupont ed., 2017); Lauren Petrash, *Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water "Products" Industry*, 39 U. MIAMI INTER-AM. L. REV. 145, 156 (2007).

92. Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008) [hereinafter *Great Lakes Compact*].

93. *See* Brooks V. Rice, *The "Triumph" of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 401, 413 (2010).

authorization.[94]

The 1988 MOU on Environmental Cooperation on Lake Chaplain (ECLC) between New York, Vermont, and Quebec contains no provision expressly indicating the nonbinding nature of the arrangement, unlike most other MOUs.[95] Some argue that this is implicit within the MOU format,[96] but while not strictly obligated to comply with the tenants of the arrangement, "in practice, the three jurisdictions treat them as 'binding covenants.'"[97] Although this agreement is called an MOU, it functionally serves as a near-binding arrangement because it represents the strongest legal arrangement these subnational actors could enter, and reflects a sincere desire by the parties to strongly bind their interests together.

However, the lack of explicit mention of the nonbinding nature of the arrangement, along with the intensity of the arrangement desired by the parties, may be problematic if challenged.[98] Congress treated The Great Lake Basin Compact, an earlier and similarly binding international arrangement, as invalid because it "infringed on State Department turf."[99] As a result of its specificity, Congress required the Canadian provinces to be removed as members from the ECLC, leaving it similarly situated to the Great Lakes Compact.[100]

Another prominent, more recent example of the near-binding arrangement is the California-Quebec-Ontario Linkage. The Linkage is an agreement between the three subnational units linking their respective cap-and-trade programs through WCI, Inc., which is the corporation that houses and administers the cap-and-trade's market mechanism and ensures compliance.[101] The anatomy of the agreement resembles what might be considered a binding agreement between three parties. The Linkage is framed around an "Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas

94. Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO. INT'L ENVTL. L. REV. 141, 169–73 (1995).

95. *Id.* at 171.

96. *Id.*; Rice, *supra* note 93, at 414.

97. Rice, *supra* note 93, at 414 (quoting WILLIAM G. HOWLAND ET AL, LAKE CHAMPLAIN: EXPERIENCE and Lessons Learned Brief 97 (2005)).

98. *Id.*; *see* Jennetten, *supra* note 94, at 165.

99. *See The Great Lake Basin Compact*, Pub L. 90-419, 82 Stat. 412 (1968), http://www.glc.org/about/glbc.html [hereinafter *Great Lakes Basin Compact*]; Jennetten, *supra* note 94, at 166–67.

100. *Compare Great Lakes Charter*, *supra* note 89 *with Great Lakes Basin Compact, supra* note 99; Jennetten, *supra* note 94, at 167.

101. WESTERN CLIMATE INITIATIVE, INC., http://www.wci-inc.org/ (last visited Oct. 25, 2017).

Emissions."[102] The three parties agreed to a number of substantive areas of collaboration that would allow for regulatory harmonization, joint auctions, supervision, and enforcement.[103]

Although the language of the Linkage states unequivocally that the agreement "does not, will not and cannot be interpreted to restrict, limit or otherwise prevail over relevant national obligations of each Party," many questions arise from the fundamental elements of the agreement that hint at binding commitments.[104] For example, the term "shall" is used more than fifty times throughout the agreement.[105] In international agreements, the term shall is used carefully and intentionally, and typically applies only when a commitment is binding on the agreeing parties.[106] Additionally, there is a twelve-month notice requirement for the agreeing parties before any party may withdraw from the agreement.[107] The justification for this withdrawal policy follows clearly from the interests of all parties in building market security; however, adherence to this provision in the face of conflicting federal foreign policy could be seen as a violation of one of the constitutional doctrines mentioned above.[108] These potential contradictions within a carefully worded agreement display the most cutting edge approach at creating a near-binding arrangement, endeavoring to bind the parties to the fullest extent legally feasible, and reflects the serious level of commitment intended by the parties.

B. MEMORANDA OF UNDERSTANDING

A second category of agreements is the MOU, which is capable of welcoming parties from all levels of government into a nonbinding set of commitments. These memoranda all provide political pressure on the signatories to adhere to their commitments, but the commitments made are considerably less specific than those in a near-binding arraignment, and thus do not carry the same weight on the actions of the parties. The following list is a small cross-section of these types of subnational international agreements and their common features.

The Western Climate Initiative (WCI) began as an MOU between the Governors of Arizona, California, New Mexico, Oregon, and Washington, as a joint

---

102. Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, CA-QC-ON (2017), https://news.ontario.ca/opo/en/2017/09/agreement-on-the-harmonization-and-integration-of-cap-and-trade-programs-for-reducing-greenhouse-gas.html [hereinafter *Linkage Agreement*].

103. *Id.*

104. *Id.*

105. *See id.*

106. Daniel Bodansky, *Legally-Binding vs. Non-Legally Binding Instruments*, *in* TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME 155, 157 (Scott Barrett, Carlo Carraro and Jaime de Melo, eds., CEPR Press 2015), http://voxeu.org/sites/default/files/file/bodansky.pdf.

107. *Linkage Agreement*, *supra* note 102, at art. 17.

108. Wright, *supra* note 22, at 10484.

effort to reduce GHGs and address climate change.[109] These parties were soon joined by Utah and Montana, as well as British Columbia, Manitoba, Ontario, and Quebec.[110] An additional fourteen jurisdictions joined as observers, including Alaska, Colorado, Idaho, Kansas, Nevada, and Wyoming in the United States; Nova Scotia and Saskatchewan in Canada; and Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas in Mexico.[111] However, as the initiative transitioned to a more concrete program, moving from an MOU to a near-binding arrangement, they lost six members.[112] While this showed a strong dedication to the cause on the part of some of the parties, the exit by other members displays the lower commitment intended by many parties that join MOUs.

The Global Climate Leadership Memorandum of Understanding (Under2MOU) was established as the result of a partnership between California and Baden-Württemberg as a means for subnational units to organize "to limit the increase in global average temperature to below 2 degrees Celsius."[113] This MOU signifies a desire to coordinate and cooperate to pursue emission reductions consistent with a trajectory of 80 to 95 percent below 1990 levels by 2050.[114] However, each state is to create their own strategies to implement and achieve their goals and targets, and the MOU explicitly states that it is not a contract or a treaty, thus signifying its lack of enforceability.[115] As of 2017, the agreement included a total of 167 jurisdictions representing 33 countries and 6 continents, which have either signed or endorsed the MOU.[116]

The origins of the Under2MOU came at a period in the early to late 2000s when subnational units from the United States and Germany began developing MOUs with each other aimed at sustainable development, regulatory reform, and climate change action.[117] California established MOUs with Bavaria "to establish joint projects to promote the commercial viability of technologies such as renewable energy, efficient energy and clean vehicles" and with North Rhine-Westphalia to "help accelerate the development of hydrogen fuel cells."[118] Both

---

109. *Multi-State Climate Initiations: WCI,* CENTER FOR CLIMATE AND ENERGY SOLUTIONS https://www.c2es.org/us-states-regions/regional-climate-initiatives (last visited Apr. 23, 2017).

110. *Id.*

111. *Id.*

112. Geoffrey Craig, *Six US States Leave the Western Climate Initiative*, S&P GLOBAL: PLATTS (Nov. 11, 2011), http://www.platts.com/latest-news/electric-power/washington/six-us-states-leave-the-western-climate-initiative-6695863.

113. Subnational Global Climate Leadership Memorandum of Understanding, Art. IA (2015), http://under2mou.org/wp-content/uploads/2015/04/Under2-MOU-English.pdf [hereinafter *Under2MOU*].

114. *Id.* at IIA.

115. *Id.* at IV.

116. *Under2 Coalition*, UNDER2MOU, http://under2mou.org/coalition/ (last visited Apr. 23, 2017).

117. *See generally* HOLLEY ANDREA RALSTON, SUBNATIONAL PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT: TRANSATLANTIC COOPERATION BETWEEN THE UNITED STATES AND GERMANY (Arthur Mol et al. eds., 2013).

118. *Id.* at 50, 150.

of these initiatives lacked much of an impact, which is attributed to a lack of strong institutionalization and to the political replacement of subnational personnel, via the democratic process, that were the driving force behind the negotiation and preservation of the agreements.[119]

In contrast, an MOU between Wisconsin and Bavaria, which was intended to "encourage private sector participation in [environmental management systems]," was considered a success because the parties quickly institutionalized their reform activities, and had multiple levels of support from multiple subnational agencies and non-governmental organizations (NGO).[120] Through this initiative, the parties were able to see advancements each year. They created regulatory agreements with federal environmental agencies and developed political clout that enabled subnational reform agendas to be influenced by the agreement.[121]

Ultimately, it appears that many MOUs hinge on the dedication of a few individuals at the top to provide guidance and motivation for continuing the initiative. Some are more successful than others, but the Under2MOU and WCI serve as clear evidence of the global potential for these types of agreements.

C. THIRD-PARTY REPRESENTATION

A third category of agreements takes the formation and governance of the commitments out of the hands of the subnational governments and places them into the hands of a third party, frequently an NGO, which is tasked with presiding over the arrangement. Unlike an MOU, where subunits come together to form a legal arrangement, third-party representation often originates outside of government altogether, and government entities are then invited to take on the commitments suggested by the third party.[122] The third party then admits new members, and monitors and promotes their commitments.

The International Zero-Emission Vehicle Alliance (ZEV Alliance) is made up of both subnational and national actors, including eight U.S. states as well as provinces from Canada and European countries.[123] The initiative manifests a set of goals that are contained within a participation statement.[124] Each jurisdiction that joins the alliance is a participant and agrees to "collaborate with other governments to expand the global zero-emission vehicle (ZEV) market and enhance government cooperation on ZEV policies, in order to strengthen and

---

119. *Id*. at 71–72.

120. *Id.* at 99.

121. *Id*. at 90.

122. *See About the ICCT*, INTERNATIONAL COUNCIL ON CLEAN TRANSPORTATION, http://www.theicct.org/about-icct (last visited Apr. 23, 2017).

123. *Members,* ZEV ALLIANCE, http://www.zevalliance.org/members/ (last visited Apr. 23, 2017) [hereinafter *ZEV Alliance*].

124. *Id.*

coordinate efforts to combat air pollution, limit global climate change, and reduce oil dependence by establishing an International Zero-Emission Vehicle Alliance to increase ZEV deployment."[125]

The Compact of Mayors is a global coalition of mayors and city officials that have committed their city to reduce greenhouse gas emissions, enhance city resilience to climate change, and transparently track their progress.[126] Because the reduction commitments resemble many other global city-agreements, the purpose of the Compact is not necessarily to create new and more stringent standards. Instead, the Compact aims to make it so that previous commitments are made "more visible through a single, transparent, and consistent platform so that local action can be adequately recognized by the global community as a critical part of the climate solution."[127] In order to become a member of the Compact, a city must make both mitigation and adaption commitments.[128] Once cities have made their commitments, they work towards achieving their goals and targets, and, if they are able to meet all of their requirements, they are recognized with an official "Compact of Mayors" seal.[129] Thus, the Compact of Mayors is nonbinding and relies upon the intrinsic desire to have the official seal to promote compliance. A city that does not meet its requirements does not receive a seal until it is able to prove compliance, but that is the only consequence of noncompliance.

In a similar vein, the International Council for Local Environmental Initiatives (ICLEI)—Local Governments for Sustainability, is a global network of more than 1,500 cities, towns, and regions that prioritize innovation towards sustainable, low-carbon, resilient, eco-mobile, biodiverse cities with a green economy and smart infrastructure.[130] There are no substantive commitments required by members of the ICLEI, only the "payment of modest annual dues based on

---

125. *Id.*

126. *Compact of Mayors—FAQ for US Local Governments,* COMPACT OF MAYORS, http://icleiusa.org/wp-content/uploads/2015/06/Compact-FAQ-for-US-Local-Govts.pdf (last visited Apr. 23, 2017).

127. *Id.*

128. *Compact of Mayors: Definition of Compliance*, BLOOMBERG FINANCE LP, https://www.bbhub.io/mayors/sites/14/2015/07/Compact-of-Mayors_Definition-of-Compliance.pdf (last visited Apr. 23, 2017). For their mitigation commitments, states must: 1) make a political commitment, 2) describe a vision of the city's overall ambition and clear objectives, 3) provide context from the city's current status, 4) create a baseline of GHG emissions, 5) establish a business-as-usual GHG emissions forecast, 6) create GHG emissions reduction target(s), 7) create an implementation plan, 8) and create a monitoring plan. For adaptation cities must: 1) make a political commitment, 2) take actions to reduce the harm or exploit the benefits of expected climate change, 3) establish cross-departmental engagement, and 4) create a mechanism for review.

129. COMPACT OF MAYORS, *supra* note 126; *see Compliance Seal,* BLOOMBERG FINANCE LP, https://www.bbhub.io/mayors/sites/14/2015/09/Compliant.png (last visited Apr. 23, 2017) (image of seal to be displayed by complying city).

130. *Who We Are,* ICLEI: LOCAL GOVERNMENTS FOR SUSTAINABILITY, http://www.iclei.org/about/who-is-iclei.html (last visited Apr. 23, 2017).

population size."[131] Members are encouraged to make a self-defined commitment to address climate change and sustainability.[132] Over the past twenty-five years, the organization has hosted capacity building events, facilitated the use of innovative sustainability management systems and biodiversity management, and created a global network of subnational units to help with emission targets and leadership in multilateral agreements.

A final example of third-party representation is the United Cities and Local Governments (UCLG). Participants in the network do not focus on a single issue, but broadly work to represent and defend the interests of local governments on an international level.[133] The organization has a vast network of over 240,000 towns, cities, regions, and metropolises to which it provides networking and capacity building, as well as general advocacy.[134] Like the ICLEI, the membership requirements for UCLG is simply a fee and a general commitment to the values of the organization.

Thus, third-party representation displays a desire for like-minded parties to connect with one another, but outsources the organization and governance of the agreement to non-governmental entities.

D. UNILATERAL DECLARATIONS

A final category of subnational action comes in the form of unilateral declarations. A subnational unit may make a declaration of their own initiatives or of their compliance with an international treaty that their national government has not ratified. This type of subnational action can motivate other parties to take similar unilateral action, and might ultimately sow the seeds for agreements of the types of the first three categories.

It should first be noted that the types of subnational actions in this category are prominently represented in developed constitutional law. The point at issue in *Crosby* was the legality of a Massachusetts unilateral declaration of sanctions against Burma over human rights concerns.[135] After Congress imposed its own sanctions on Burma, the Court found that the Massachusetts act was an obstacle to the federal act as it interfered with Congress' and the President's ability to place specific and cohesive sanctions on Burma.[136] Therefore, even unilateral declarations from a subnational unit have a history of being challenged and potentially overturned by court decisions.

---

131. *Frequently Asked Questions About ICLEI,* ICLEI: LOCAL GOVERNMENTS FOR SUSTAINABILITY, http://www.iclei.org/about/who-is-iclei/faq.html (last visited Apr. 23, 2017).

132. *Id.*

133. *About Us,* UCLG, https://www.uclg.org/en/organisation/about (last visited Apr. 23, 2017).

134. *Why Join,* UCLG, https://www.uclg.org/en/join-uclg/why-join (last visited Apr. 23, 2017).

135. Crosby v. NFTC, 530 U.S. 363, 363 (2000).

136. *Id.*

Other instances of unilateral declarations have not been challenged in court, but have been at odds with the position of Congress on international issues. Prior to the United States' failure to ratify the Comprehensive Nuclear Test Ban Treaty, Takoma Park, Maryland became the first U.S. city to declare itself a "nuclear free zone."[137] The declaration came along with a prohibition on the investment of city funds in the production of nuclear weapons, as well as bans on the production, storage, transport, or activation of nuclear arms within city borders.[138] Proximally resulting from this declaration was the adoption of similar resolutions in cities around the country.[139] Similarly, as a result of Congress not ratifying the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), San Francisco unilaterally codified the provisions in the CEDAW.[140] The city was able to detect improvement in the working lives of women in the city, and inspired other cities, like Chicago and Boston, to adopt similar initiatives.[141] Today, a number of states have adopted provisions in support of the CEDAW.[142]

In both of these unilateral declarations, the measures taken by the subnational units were largely symbolic,[143] and were primarily impacting policy "insofar as it relates to the governing of citizens within their own city limits."[144] However, the only policies that have been explicitly upheld by the Supreme Court have been over regulations that mimic international doctrine, "but that lack any international mention."[145] Thus, the question of unilateral declarations explicitly following international law that conflicts with federal policy has not been fully addressed by the Court.[146]

Relevant to the climate sphere are unilateral declarations made after the United States' withdrawal from the Kyoto Protocol. Seattle and Salt Lake City, among other cities, made plans to bring their cities into compliance with the Kyoto Protocol, regardless of federal inaction.[147] These unilateral initiatives eventually led to an agreement between mayors of numerous other U.S. cities, which created a climate protection program for their cities, and were ultimately endorsed by the

---

137. Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 548–49 (2005).

138. *Id.* at 549.

139. *Id.*

140. *Id.* at 546.

141. *Id.* at 547.

142. *See Cities for CEDAW- Resources: Sample Resolutions, Ordinances and Executive Directives*, CITIES FOR CEDAW, http://citiesforcedaw.org/resources/ (last visited Apr. 23, 2017).

143. Singh, *supra* note 137, at 551.

144. *Id.* at 550.

145. *Id.* at 551.

146. *Id.* at 552.

147. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 62 (2007).

United States Conference of Mayors.[148]

Additionally, the 2015 Paris Agreement specifically allocated responsibility to subnational units in contributing to the implementation of the commitments of the agreement.[149] The agreement includes NAZCA, the platform for subnational units to project their commitments and declare their GHG emission reductions.[150] Currently, there are 2,508 cities and 209 regions around the world that have registered their commitments on the online platform.[151] Although these declarations are within the framework of an international agreement, the autonomy with which subnational units can act indicates that this platform resembles the unilateral declarations from previous efforts to implement international agreements and therefore should be considered in the unilateral declaration category.

Within the United States, an open question remains as to the new executive policy towards the Paris Agreement.[152] Depending on the ultimate stance of the Trump Administration, there may be legal questions surrounding these commitments under the Foreign Affairs doctrines discussed *supra*.

IV. JUSTIFICATIONS FOR DIFFERENT TYPES

The agreements in the previous section are not always the ideal mechanisms for achieving their respective goals. Instead, they are put in place when the political circumstances require such type of nonbinding action. Because a major impetus of these arrangements is a desire to work around the legal and political roadblocks, the major question underlying this analysis is why one type of agreement is better at solving a given problem than another. Climate change is a multifaceted problem, so the answer depends on the impetus for the agreement and the political realities of achieving climate related goals. This Note suggests that there are three different criteria for deciding which legal arrangement works best for particular scenarios: the logistical ease in drafting a legal agreement, the number of parties willing to sign on, and the level of actual political pressure in adhering to commitments.[153]

---

148. *Id.*

149. *Paris Agreement*, *supra* note 84.

150. Global Climate Action, *NAZCA: Tracking Climate Action*, UNFCCC, http://climateaction.unfccc.int (last visited Apr. 23, 2017).

151. *Id.*

152. *See* Peker, *supra* note 9.

153. For more discussion on what makes an agreement effective, regardless of its "legal" effect, see Weiss, *supra* note 3, at 1567; Catherine Martini, *Transparency: The Backbone of the Paris Agreement*, YALE CTR. FOR ENVTL L. & POL'Y ONLINE (May 29, 2016), http://envirocenter.yale.edu/transparency-the-backbone-of-the-Paris-Agreement; Bodansky, *supra* note 106, at 160 ((1) the ambition of its provisions; (2) the level of participation by the states; and (3) the degree to which states comply).

A. LOGISTICAL EASE

As established previously, the international and national legal barriers to subnational international agreements provide logistical pitfalls for any binding agreement. As a result, subunits must spend valuable resources attempting to avoid these pitfalls, which ultimately affects some parties' willingness to increase their level of ambition.[154] After laying out the landscape of these agreements, it is clear that the closer to binding an agreement becomes, the more logistically difficult it becomes to avoid violating national and international law.

Near-binding arrangements are the most difficult logistically to create. The California-Quebec linkage establishes a number of potentially contradictory requirements, including a linkage agreement that attempts to straddle the line between creating agreements that "shall" be followed by the parties, and allowing the federal government to force California to "adopt, maintain, modify, repeal or revoke any of [its] respective program regulations."[155] These requirements may open up constitutional challenges to California's policy, showing the difficulty of striking the right balance in creating near-binding arrangements.[156] In comparison, the Great Lakes Compact began as a charter and over the course of twenty years became so entrenched in the existence of the parties that groundwork had been laid for a more binding agreement.[157] But, a twenty-year timeline from charter to near-binding arrangement is likely not preferable for climate change activists, given the urgency of climate change initiatives. Thus, in both cases, the logistics of designing the agreement create considerable hurdles for the parties to avoid.

For MOUs and third-party agreements, logistical ease is greater than near-binding arrangements because the internal commitments do not reach the level of specificity that would require more exacting language with respect to commitments and enforcement. These arrangements vary greatly in the types of commitments they require. Many MOUs and third-party agreements allow for individualized commitments, while others provide specific guidelines that subunits must follow in order to be a member or receive the agreement's stamp of approval. The MOUs studied in this Note get around the relevant legal hurdles either by providing this flexibility in commitments or by framing the current commitments as instigating future commitments to be defined later. Third-party agreements employ a similar strategy, but also can serve an alternative function as a networking agent and advocate, which requires no legal action from the parties to the agreement.

---

154. Bodansky, *supra* note 106, at 160.
155. *Linkage Agreement*, *supra* note 102.
156. *See* Wright, *supra* note 22, at 10484.
157. *See* Rice, *supra* note 93, at 413.

Logistically, unilateral declarations have two relevant concerns. First, they are essentially subnational legislation, and are therefore subject to the same domestic constraints as any other subnational legislation. While this does not negate any of the subunit's domestic struggles, it only requires the knowledge of one governmental system, and is thus logistically less difficult than the other types of agreements from that perspective. The second concern is logistical international concerns. This is particularly relevant to unilateral declarations because of the constitutional questions they have raised in the past. As mentioned above, unilateral declarations have been under constitutional scrutiny previously because they are binding commitments to the subnational units making the declaration; they are subject to questions of violations against the Federal Foreign Affairs Doctrine because they can be seen as preventing the federal government from "speaking with one voice."[158] Thus, unilateral declarations require some logistical maneuvering to avoid legal issues, but these are discrete in comparison to the balancing of multiple parties in near-binding arrangements, MOUs, and third-party agreements.

B. NUMBER OF MEMBERS

Another metric for the efficacy of subnational agreements is its potential capacity to bring in members to the agreement. As evidenced both by the large numbers of members attained by third-party representation and by the exodus of members during the transition from WCI to WCI Inc., the numbers of participants tend to increase as the agreements become less stringent and vice versa. Particularly relevant for climate change reform and its global impact is the potential for continual expansion both before and after the agreement is made. As is evidenced below, some types of agreements have more success at this than others.

For near-binding arrangements, there are difficulties on both sides of the numbers issue. First, it is difficult to draw members in to make the initial commitment, and once that has been made, bringing in new members is an arduous process that ultimately might prevent parties from entering into the arrangement in the first place.[159] WCI grew to as many as eleven signatories with fourteen observing participants.[160] However, as the binding nature of the WCI increased into the current multisector cap-and-trade regime, most of the parties dropped out of the arrangement.[161] At the time of the creation of WCI, Inc., only two members of WCI found themselves capable of continuing with the broad

158. Crosby v. NFTC, 530 U.S. 363, 381 (2000).
159. *See* Craig, *supra* note 112.
160. CENTER FOR CLIMATE AND ENERGY SOLUTIONS, *supra* note 109.
161. *See* Craig, *supra* note 112.

commitments initially made.[162] In 2011, the exit of six parties from the arrangement was accompanied by the sentiment that "there was little to no hope that they'd get involved in a regional cap-and-trade program given the current political make-up of the states."[163] There are clearly a number of potential subnational units interested in being involved in the agreement,[164] but the commitments taken on are so significant that the political implications were too much to overcome.

In contrast, as a condition of passing the Great Lakes Basin Compact of 1968, Congress deliberately removed international subunits from the agreement in order to make the compact purely domestic.[165] Thus, it appears that near-binding arrangements reduce the pool of potential participants and potentially hinder expansion to other interested parties that do not have the political will to join.

MOUs appear to attract more members because they function primarily as an indication of political direction and do not frequently hold the parties to specific standards that would be politically damaging to violate. The Under2MOU is a prime example of this trait. It binds parties to a future commitment to reduce carbon emissions, but allows each subunit to achieve this through their own means.[166] As a result of this flexibility, the Under2MOU currently has 188 participants.[167] Conversely, because many MOUs are specific to a particular region or issue, large numbers of participants are not the norm.[168]

For agreements focused on accruing members, third-party representation appears to be the best method. The main feature third-party representation has to offer is the visibility that it provides through the agreement platform. All the third-party arrangements discussed above advertise their capacity for networking with massive numbers of like-minded subunits.[169] Additionally, because the third party can be singularly focused on the agreement and its public stature, they can be more accommodating to the growth of the agreement.[170] Finally, because third-party representation agreements are outside the direct control of government, their binding effect on states for entering and exiting is even less politically damaging than in an MOU, where negotiations for the agreement are driven primarily through the governments of subnational units.[171]

---

162. *See* CENTER FOR CLIMATE AND ENERGY SOLUTIONS, *supra* note 109.

163. *See* Craig, *supra* note 112.

164. *See* The Canadian Press, *Western Climate Initiative Will See Manitoba, Ontario, Quebec Link Up Cap-And-Trade Systems*, THE HUFFINGTON POST (Dec. 7, 2016, 5:12 pm), http://www.huffingtonpost.ca/2015/12/07/manitoba-ontario-quebec-sign-agreement-to-link-cap-and-trade-systems_n_8739564.html.

165. Jennetten, *supra* note 94, at 167.

166. *See Under2MOU*, *supra* note 113.

167. UNDER2MOU, *supra* note 116.

168. *See* RALSTON, *supra* note 117.

169. *See* UCLG, *supra* note 133.

170. *See* ICLEI: LOCAL GOVERNMENTS FOR SUSTAINABILITY, *supra* note 131.

171. *Compare Under2MOU*, *supra* note 113 *with ZEV Alliance*, *supra* note 123.

Unilateral declarations differ greatly in their capacity to draw attention and bring more parties into their wake. The unilateral declarations surrounding CEDAW in the United States and its territories ballooned to sixteen states and the territory of Guam, forty-four cities, and eighteen counties.[172] The response to the Kyoto Protocol by Seattle and Salt Lake City was supported and emulated by other cities, but it did not create the type of movement like the Takoma Park declaration.[173] Thus, the predictability of a unilateral declaration's growth likely depends on the political popularity of the topic and the legal capacity for states to adopt legislation that does not conflict with the Supremacy Clause.

C. POLITICAL PRESSURE

Nonbinding agreements are justified by being a quicker and simpler means of forming partnerships, with the potential for growth into stronger agreements. Though unenforceable, the agreements "create expectations that may shape behavior and avoid disputes."[174] In the context of the Paris Agreement, which is a blend of binding and nonbinding commitment on nations, the enormity of the agreement has been said to make the nonbinding elements "politically binding."[175] The extent to which parties are able to "name and shame" other members of the agreement makes them either more or less politically binding,[176] which can be achieved through transparency mechanisms as well as through precision of language in the instrument itself.[177] For nonbinding subnational international agreements, the level of shame associated with failing to adhere to the commitments of the agreement varies depending on the type of agreement made, and ultimately indicates the power of the agreement to motivate its members outside of their own intrinsic motivation.[178]

The primary benefit of creating a near-binding arrangement is that the results of the agreement are as politically binding as is possible without actually being a legally binding agreement. Both the Great Lakes Compact and the California-Quebec-Ontario linkage have real world consequences for the parties that give the agreements their strength. The twelve-month notice-of-drop-out period for the California-Quebec-Ontario linkage is a precisely designed mechanism to prevent the significant negative economic effects of an abrupt exit by a party.[179] The level of shame that would be associated with breaking this commitment and

---

172. Resnik, *supra* note 147, at 57.

173. *Compare* Resnik, *supra* note 147, at 62 *with* Singh, *supra* note 137, at 547–48.

174. Weiss, *supra* note 3, at 1567.

175. Martini, *supra* note 153; *see* Bodansky, *supra* note 106.

176. Martini, *supra* note 153.

177. Bodansky, *supra* note 106, at 159.

178. *See* Vihma, *supra* note 1, at 144 (discussing "constructivist paradigm" regarding soft law and its capacity to change the behavior of states "through the processes of socialization and the expansion of norms, ideas, and principles.").

179. *See* Wright, *supra* note 22, at 10484.

the economic impacts that would ensue gives the agreement strength and politically binds the parties to their commitments. Similarly, the Great Lakes Compact provides precise standards for the states to abide by in maintaining the Great Lakes region. For U.S. states bound by the national compact, failing to uphold their preservation requirements of the Great Lakes would have an effect on other parties, and the response to that failure would have significant political and legal effects on the failing party.[180] For Canadian provinces, there would be political consequences in their relationships on the Great Lakes-St. Lawrence River Basin Water Resources Council, which is a legally sanctioned body. The Great Lakes-St. Lawrence River Basin Water Resources Council along with WCI Inc., are transparency mechanisms within these agreements that assist in creating the name-and-shame element found in politically binding agreements.

MOUs and third-party representation provide less opportunity to name and shame because their agreements are more ambiguous and their transparency mechanisms typically do not provide enough information to create significant reputational impacts.[181] In creating flexible goals that each party can set for itself, the current MOUs and third-party agreements do not create precise enough commitments that would be directly felt if a party fell out of compliance. In the multiple California-Germany subnational MOUs, the structures of some of the agreements were so imprecise as to eventually render the agreements meaningless when new leadership came into power or minor inconveniences impacted the communication of the parties.[182] Because the agreements relied heavily on the actions of one or two actors, the only reputational effect of the failure of the agreements was on the individuals who worked hard to make the agreement happen.[183] The success of the Wisconsin-Bavaria agreement was in large part to the immediate institutionalization of the commitments, which provided a reputational stake to more parties within the subnational units.[184]

Another example of MOUs and third-party representation's political pressure is the International ZEV Alliance. There, the imprecision of the commitment to "collaborate with other governments" on ZEV promotion creates no tangible requirement for the parties. The third-party representation is built almost entirely on intrinsic motivation, so members are able to move relatively freely within the agreement. Similarly, the WCI, prior to converting to WCI, Inc., did not create significant political implications for parties that fail to contribute to the creation of an emission reducing market mechanism.[185] The agreement was a sign of

---

180. *See Great Lakes Compact*, *supra* note 92.

181. *See Under2MOU*, *supra* note 113; *ZEV Alliance*, *supra* note 123.

182. *See* RALSTON, *supra* note 117, at 50, 150.

183. *See id.* at 90.

184. *See id.* at 99.

185. *See* Benton B. Bodamer, *US Carbon Markets: Mostly Cloudy with a Chance of Regulation*, CLIMATE CHANGE UPDATE: WEIL, GOTSHAL & MANGES LLP 3 (Spring 2011), https://www.weil.com//media/files/pdfs/Climate_Change_Update_Spring_2011_.pdf.

intrinsic political will for the parties, showing desire to explore potential steps to address climate change, but not to take any direct action. Dropping out of the agreement did not have political consequences for the parties that ultimately exited once the commitments became tangible,[186] mostly because the exits followed a change in leadership that was elected in part because of an opposition to the goals of the WCI.[187] Thus, because of the lack of particularity in the commitments, MOUs and third-party representation do not have the same politically binding effect as near-binding arrangements.

Finally, unilateral declarations undeniably create political results within the subunit in question; however, because the actions occur within the subunit, there is minimal political pressure on other subunits to follow suit. In the case of the Takoma Park initiative, the city made binding commitments to promote the reduction of nuclear weapons on itself, and the resulting domino effect in other cities did not have any effect on Takoma Park and their commitments.[188] Because an entrance, exit, or failure to comply with self-enforcing commitments does not have any lasting effect on the parties who have already made the commitments, there is little political pressure to coerce compliance. Thus, by themselves, unilateral agreements do not politically bind in ways found in binding agreements or near-binding arrangements.

CONCLUSION

As the world embarks into uncharted political territory, it is imperative that movements attempting to sidestep legislative morass understand their hurdles and avenues for opportunity to create lasting policy in the climate change space. The analysis above endeavors to frame the cooperative landscape in a way that would provide clarity and prevent redundancy moving forward. For climate change, this landscape is the sphere of nonbinding subnational international agreements. Such agreements allow states to move forward without the need for federal legislation, while being careful not to violate constitutional restrictions.

There are definitive tradeoffs when entering any sort of subnational international action. For the near-binding arrangements, the benefits include politically binding commitments and relative regulatory certainty, while the potential for constitutional invalidity and difficulty in negotiation serve as detractors. For MOUs, they benefit from an easier negotiation process and have the capacity to attract more members as a result, but their commitments are frequently flimsy and do not provide incentives outside of the intrinsic motivation for their members. Third-party representation agreements have the benefit of being run in the private sphere, where legislative challenges are less common, and have the

186. *See* The Canadian Press, *supra* note 164.
187. *See* Barry G. Rabe, *The Durability of Carbon Cap-and-Trade Policy*, 29 GOVERNANCE 103, 110 (2016).
188. Singh, *supra* note 137, at 549.

capacity to expand to massive constituencies because of this flexibility. However, the responsibilities taken by the parties are frequently little more than general commitments to a cause, with an added capacity to network with other like-minded parties. Finally, unilateral declarations have similar legal concerns as near-binding arrangements, but when effective can provide real results for the subunits involved and create good will among other subunits that could potentially evolve into a more widespread concrete agreement.

Ultimately, the ideal solution likely lies somewhere in the middle of these categories of agreements, which would place it outside of the categories established above. By developing knowledge of the characteristics of these agreements and the manner in which they fit together, climate change activists will be able to "think outside of the boxes" and create a more wholly effective agreement that has the capacity to include more members and continually pave the way for more tangible progressive reforms.