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NEWS & ANALYSIS

Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces

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Editors' Summary: This Article explores the legal and practical issues that arise where globalization and federalism intersect. A number of states and provinces in the western part of North America have joined together to reduce greenhouse gas emissions through a cap-and-trade program. The agreement passes scrutiny under the U.S. Constitution because it is essentially a voluntary measure intended to strengthen traditional forms of domestic environmental regulation. Though such strong cross-border measures have never been implemented before, they are a novel tool for dealing with regulatory issues that will increasingly arise as federalism and globalization intersect more often in the future.

There's a very funny story about our agreement with Quebec. Five years ago when it was to be signed, Bob Flack was Commissioner of the Department. About the time we were to sign, an attorney from the State Department called Bob and said, "Of course you know, Commissioner, it's against the law for an individual state to have treaties with other countries." Commissioner Flack thought about it for [a] moment and he said, "I just have two points to make. One is, it's not a treaty it's an agreement, and two, it's not another country, it's Quebec." At which point the attorney from the State Department said, "Well, I guess that's all I have to say," and hung up.¹

Global warming is a problem.² Even the U.S. Supreme Court—an institution that rarely takes sides on pressing public policy issues³—has endorsed the leading scientific view that global warming presents a serious danger to

the planet's future.⁴ But global discussions are moving slowly and the U.S. government has been inattentive to the threat.⁵ It seems, for the moment at least, that local efforts are the only game in town.

In its most recent case related to global warming, the Supreme Court appeared amenable to state-led global warming efforts.⁶ But even though the Court granted Massachusetts standing to petition for U.S. Environmental Protection Agency (EPA) regulation of carbon dioxide (CO₂) emissions, it also suggested that states may pursue only limited avenues to address global warming. "When 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."⁷

This Article argues that the Court's dictum about state-initiated treaties is correct, but only in a very narrow sense. The Court ignored the possibility that a state might enter a non-treaty agreement with a foreign actor—a possibility that is quickly becoming a reality. The Western Climate Initiative (WCI) is an environmental partnership between the states of Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington, and the provinces of British Columbia, Manitoba, and Quebec.⁸ It intends to

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1. David J. Shaw, *Acid Precipitation Program in New York State*, in *ACID RAIN: THE VIEW FROM THE STATES*, 61, 61 (James C. White ed., 1988).
2. Discussions about the science and politics of global warming are well beyond the scope of this Article. It is worth noting that even the leading critics of global warming appear to have largely conceded the existence of a scientific consensus, and have turned their attention to a cost-benefit analysis of global warming reduction policies. See generally, e.g., BJORN LOMBORG, *COOL IT: THE SKEPTICAL ENVIRONMENTALIST'S GUIDE TO GLOBAL WARMING* (2007).
3. Written with tongue firmly in cheek. See generally, e.g., JEFFREY TOOBIN, *THE NINE* (2007) (arguing, inter alia, that recent Court decisions have been influenced by Justices' political beliefs).

4. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455-56, 37 ELR 20075 (2007).
5. See, e.g., Editorial, *Disappointments on Climate*, N.Y. TIMES, Dec. 17, 2007, at A30.
6. 127 S. Ct. at 1458.
7. *Id.* at 1454.
8. See WCI, *Homepage*, <http://www.westernclimateinitiative.org/Index.cfm> (last visited Aug. 20, 2008) [hereinafter *WCI Homepage*].

create a regional emissions trading program that will reduce greenhouse gas (GHG) emissions to 15% below 2005 levels by 2020.⁹

If the WCI succeeds in achieving its ambitious goals, either by carrying out the regional trading plan or by encouraging national action, it will stand as an example of a new form of policymaking. But if the WCI fails, either due to its members' lack of commitment or domestic constitutional legal barriers, it will highlight the limits of nationhood and federalism in a modern globalized world.

This Article will examine the WCI as an example of the use of subnational cross-border interactions to strengthen traditional local lawmaking—or, as various scholars have dubbed it, “transnational translocalism,” “bottom-up lawmaking,” “paradiplomacy,” or “gubernatorial foreign policy.”¹⁰ In particular, this Article aims to synthesize these theoretical discussions regarding the intersection between globalization and federalism while also analyzing the many legal issues that arise when states undertake such actions.

Part I of this Article discusses the basic details and structure of the WCI. This discussion emphasizes that both the language and the context of the WCI agreement suggest that the WCI is a voluntary, nonbinding collaboration. The language of the agreement does not show that the parties intended to be legally bound, and it does not include any provisions for enforcing the agreement through political sanctions or judicial orders. Similarly, the political context of the agreement shows that many of the parties have adopted GHG regulations independently, either before or after joining the WCI. This Article will then explain how the WCI's cap-and-trade structure allows its members to implement their independent policy preferences in an economically efficient and environmentally effective manner.

Part II discusses international law principles regarding treaties, non-treaty agreements, and federal subunits. Put simply, treaties are binding and enforceable, whereas other agreements are not. Prevailing notions of international law do not recognize political subunits' power to enter into binding treaties. Accordingly, this Article then discusses the WCI as a nonbinding collaboration between federal subunits, explaining that the members are willing to enter into a non-enforceable agreement because the cap-and-trade system improves their independent GHG policies. Essentially, even if the WCI is not legally enforceable, it is self-enforcing because its members benefit from their mutual collaboration.

Parts III and IV then examine whether such a voluntary collaboration between states and provinces is permissible under the U.S. Constitution. The history, text, and judicial

interpretations of the Constitution reveal a series of limitations on state authority regarding foreign affairs issues. Historically, the states have been excluded from foreign affairs since independence. The Constitution provides that federal laws, treaties, and executive agreements can preempt contrary state laws. The Constitution prevents states from entering into treaties with foreign governments, but allows them to enter into non-treaty compacts with other states or foreign governments (though Congress must approve compacts that encroach on federal authority). Finally, implied constitutional doctrines prevent the states from discriminating against or burdening interstate or foreign commerce, and from interfering with the federal government's exercise of foreign affairs.

Following these discussions of constitutional doctrine, Part V offers a brief overview of previous examples of state-province cooperation. These efforts have generally been limited to local issues and have not had widespread political impacts. The most ambitious cross-border initiatives have involved the cooperation of the federal governments. Thus, the WCI is an unprecedented attempt at cross-border cooperation on a major national and international policy issue.

Part VI then analyzes the validity of the WCI under the Constitution. The WCI is not preempted by either domestic law or national foreign policy. Neither the Treaty Clause nor the Compact Clause prevents the states and provinces from pursuing joint regulations. The U.S. Commerce Clause poses potential difficulties for portions of the WCI's particular plan for regulating interstate electricity transmissions, but is not fatal to the basic collaborative project.

Finally, Part VII ultimately argues two separate points. First, it will discuss the relative benefits and drawbacks of state and provincial regulation as compared to national regulation. Second, it will argue that the WCI represents a new, more substantive form of voluntary transborder cooperation. Such cooperation emerges when federalism and globalization intersect, and when states' and provinces' regulatory preferences align. From a constitutional standpoint, such an approach appears to be permissible as an ordinary exercise of state and provincial regulatory authority. From a normative standpoint, such an approach ought to be encouraged as a novel tool for strengthening traditional regulation.

I. Creating a Voluntary and Collaborative Emissions Trading Regime

A. The WCI Agreement

Both the language and the political context of the WCI agreement highlight the organization's fundamentally voluntary nature. The language refrains from creating binding legal obligation between the parties. The political context shows that many of the parties have adopted GHG regulations independently of the WCI, suggesting that these parties joined together in order to strengthen their independent regulatory efforts rather than to create wholly new regulations. Some parties, however, have not independently adopted any regulations whatsoever; this also shows the WCI's voluntary, nonbinding nature.

The WCI emerged in February 2007, when the governors of Arizona, California, New Mexico, Oregon, and Washington partnered to create the Western Regional Climate Action

9. See WCI, WESTERN CLIMATE INITIATIVE UPDATE 1 (2007), available at <http://www.westernclimateinitiative.org/eweeditpro/items/O104F13074.pdf> [hereinafter WCI UPDATE].

10. Ivo D. Duchocek, *Perforated Sovereignities: Towards a Typology of New Actors in International Relations*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 1, 16, 32 n.11 (Hans J. Michelman & Panayotis Soldatos eds., 1990) (“paradiplomacy”); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 40 (2007) (“translocal transnationalism”); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 408-10 (2007) (“bottom-up lawmaking”); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2414 (2006) (“gubernatorial foreign policy”).

Initiative.¹¹ In the ensuing months it went international, adding the premiers of British Columbia, Manitoba, and Quebec, as well as the governors of Utah and Montana.¹² In order to join the WCI, these members and any future members must voluntarily establish a policy goal for reducing GHG emissions in their jurisdiction, and they must voluntarily adopt standards for vehicular GHG emissions.¹³

The language of the WCI Agreement itself shows that the WCI is voluntary and collaborative rather than mandatory and binding. The governors and premiers “jointly establish[ed]” the WCI in order “to collaborate in . . . implementing” GHG reductions in their own states and provinces.¹⁴ More specifically, they agreed to: (1) set an overall limit on total emissions from their jurisdictions that is “consistent with state-by-state goals”; (2) design a “regional market-based multi-sector mechanism” (better known as a cap-and-trade program) to help each jurisdiction achieve these emissions limits; and (3) create and participate in a regional GHG program for the “tracking, management, and crediting” of GHG reductions, while remaining “consistent with state [GHG] reporting mechanisms and requirements.”¹⁵ All of these points reflect the members’ emphasis on their individual role in implementing the WCI. But by collaborating on these independent efforts, the members are aiming for a 15% total regional reduction in GHG emissions from 2005 levels by 2020.¹⁶

The voluntary and collaborative nature of the WCI is further evidenced by the fact that many of the WCI members had enacted emissions regulations or clearly stated a preference for emissions reductions prior to joining the WCI. For example, California enacted the California Global Warming Solutions Act of 2006,¹⁷ which required the state to reduce its GHG emissions to 1990 levels by 2020.¹⁸ In 2006, Oregon implemented the Renewable Energy Act, which requires that renewable energy sources account for 25% of the state’s energy by 2025, and organized the Climate Trust, which uses emissions credits to reduce carbon emissions

from electricity generation.¹⁹ Other member states and provinces issued clear policy goals aimed at reducing emissions.²⁰ All of the policies show that a number of the WCI members were regulating or were planning to regulate GHG before the WCI was even created. This suggests that they joined the WCI in order to further those independent regulatory efforts rather than to establish entirely new regulations.

Some members took action after joining the WCI; these efforts too should be viewed as voluntary and independent decisions to decrease their GHG emissions, as the WCI has not yet established any specific policies. For example, shortly after joining the WCI, Washington enacted a law establishing emissions standards for electricity producers and setting broader emissions reduction goal for the entire state.²¹ Recently, the state has taken additional steps such as requiring large emitters to report their emissions and setting a 2009 deadline for the legislature to consider cap-and-trade proposals.²² British Columbia recently implemented “the continent’s first true carbon tax,” which covers a broader swathe of emissions than the WCI initially plans to cover, such as retail and transportation, which are difficult to include in a cap-and-trade system.²³ These efforts suggest that the WCI need not be fully functional in order for its members to undertake GHG regulations. Perhaps these members are attempting to ease the transition to stronger regulations once the WCI is in place, but this is belied in particular by

11. “Western Regional Climate Action Initiative,” Agreement between Janet Napolitano, Governor of Arizona, Arnold Schwarzenegger, Governor of California, Bill Richardson, Governor of New Mexico, Theodore R. Kulongoski, Governor of Oregon, Christine O. Gregoire, Governor of Washington (Feb. 26, 2007), <http://www.westernclimateinitiative.org/ewebeditpro/items/O104F12775.pdf> [hereinafter WCI Agreement].

12. See WCI UPDATE, *supra* note 9, at 2; WCI Homepage, *supra* note 8 (noting participation of Montana and Quebec).

13. See WCI UPDATE, *supra* note 9, at 1-2. It is unclear whether the WCI will continue to insist that members enact vehicular emissions standards, given that the U.S. government recently denied California the ability to regulate tailpipe GHG emissions, and other states may only regulate these emissions by adopting California’s standards. See Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model-Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12156-57 (Mar. 6, 2008) [hereinafter EPA Denial of Waiver]. Because of the recent EPA action and the uncertainty of the resulting litigation, this Article will largely avoid discussing the automobile emissions portion of the WCI.

14. WCI Agreement, *supra* note 11, at 3.

15. *Id.*

16. WCI, WESTERN CLIMATE INITIATIVE STATEMENT OF REGIONAL GOAL 1 (2007), available at <http://www.westernclimateinitiative.org/ewebeditpro/items/O104F13006.pdf> [hereinafter WCI REGIONAL GOAL].

17. CAL. HEALTH & SAFETY CODE §§38500-38599 (West 2007).

18. *Id.* §38550.

19. Eva Sylwester, *Taking the Lead*, EUGENE WKLY., Nov. 1, 2007. See also Climate Trust, Homepage, <http://www.climatetrust.org> (last visited Mar. 28, 2008).

20. Wash. Exec. Order No. 07-02, http://www.governor.wa.gov/execorders/eo_07-02.pdf (establishing emissions reductions goals and listing implementation); Ariz. Exec. Order No. 2006-13, http://www.governor.state.az.us/dms/upload/EO_2006-13_090806.pdf (establishing reduction goals for 2020 and 2040, and authorizing state agencies to recommend and implement relevant regulations); N.M. Exec. Order No. 2006-69, http://www.gov.state.nm.us/orders/2006/EO_2006_069.pdf (reaffirming state’s reduction goals and ordering state agencies to design and implement action plan); Iona Campagnolo, Lieutenant Governor of British Columbia, Speech From the Throne (Feb. 13, 2007), <http://www.leg.bc.ca/38th3rd/4-8-38-3.htm> (announcing a 33% reduction target by 2020). See also James A. Holtkamp, *Dealing With Climate Change in the United States: The Non-Federal Response*, 27 J. LAND RESOURCES & ENVTL. L. 79, 80-81 (2007) (noting that New Mexico was the “first major energy producing state to announce significant greenhouse gas reduction targets”); Rheel Seguin, *Quebec Unveils Carbon Tax: Province Hopes Levy on Oil and Gas Firms Will Put \$1.2 Billion Toward Its Kyoto Goals*, GLOBE & MAIL (Toronto), June 16, 2006, at A1 (discussing Quebec’s plans to reduce carbon emission through taxation of oil and gas companies); Rheel Seguin & Bill Curry, *Charest to Go It Alone on Kyoto Climate Accord*, GLOBE & MAIL (Toronto), May 24, 2006, at A1 (discussing Quebec premier’s statements that the province would meet Kyoto Protocol’s carbon reduction requirements even if Canada withdrew from the treaty). Cf. Mark Hume, *Can B.C. Make U-Turn to Green?*, GLOBE & MAIL (Toronto), Mar. 26, 2007, at S1 (expressing skepticism that British Columbia’s stated goal would become a reality). Shortly after announcing its involvement in the WCI, Manitoba announced its GHG emissions reduction goals. See Mia Rabson, *Kyoto Here We Come: Manitoba Commits to Meeting Protocol*, WINNIPEG FREE PRESS, Nov. 4, 2007, at A1.

21. 2007 Wash. Laws, ch. 307, §33, 5, <http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Session%20Law%202007/6001-S.SL.pdf> (last visited Mar. 28, 2008).

22. Kathie Durbin, *State Senate OKs Climate Bill*, COLUMBIAN (Vancouver, Wash.), Mar. 6, 2008, at A1. See 2008 Wash. Laws, ch. 14, <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Session%20Law%202008/2815-S2.SL.pdf> (last visited Mar. 28, 2008).

23. Patrick Brethour, *B.C.’s Carbon Tax Will Pay Off When U.S. Brings in Cap-and-Trade*, GLOBE & MAIL (Toronto), Mar. 7, 2008, at B2.

the British Columbian emissions tax—because it goes well beyond the WCI's plan, it appears that it reflects an underlying policy preference for GHG regulation that exists independent of the WCI.

Finally, even though some of the WCI members have not taken significant steps to reduce emissions or even to publicize emissions goals, their inaction underscores the WCI's fundamentally voluntary nature. If a WCI member chooses not to act, the WCI cannot compel it to do so. For example, the Oregon Legislature recently rejected a proposal that required GHG emitters to provide the states with an accounting of their in-state emissions.²⁴ Montana's emissions reduction efforts consist solely of an energy conservation tax break capped at \$500 per year.²⁵ Following Utah's announcement that it would participate in the WCI, the state senate even introduced a bill to prevent the governor from entering into such a regional plan.²⁶ These efforts highlight the fact that the state and provincial legislatures must approve the WCI's methods and goals before the collaborative effort can effect any change in the member jurisdictions.

In short, both the language and the context of the WCI agreement suggest that it is a voluntary, nonbinding collaboration. By joining the WCI, the members have expressed a general policy preference for collaborative GHG reduction. But many of the members have expressed a policy preference for independent reductions outside of the context of the WCI. This strongly suggests that the WCI is a collaborative tool to enable each individual member to meet its independent policy goals.

B. Cap and Trade as a Tool for Environmental Regulation

The WCI's stated goal of achieving 15% reductions by 2020 is not an easy task, and the members' independent actions to date are insufficient to reach this goal. As a reference point, consider that from 1990 to 2002, the overall U.S. CO₂ emissions increased by 24%.²⁷ Needless to say, a 15% reduction will require a marked shift from business-as-usual regulation. To accomplish this goal, the WCI members have opted for a market-based regulatory tool known as cap and trade,

which allows for more predictable emissions reductions and greater economic efficiency than other approaches.

At its core, a cap-and-trade program is relatively simple: the government sets a limit on the overall level of emissions for a particular industry or region²⁸; the government issues permits allowing permit holders to emit a particular amount of pollutant²⁹; and permit holders are allowed to trade the permits.³⁰ If an emitter exceeds its initial allotment, it can buy permits from parties that hold excess permits.³¹ If an emitter does not hold enough permits to match its emissions, it is subject to stringent penalties.³² At its best, a cap-and-trade policy allows for a gradual decrease in the amount of overall emissions so that environmental gains can be achieved with relatively minor economic dislocation.³³

There are a number of virtues to such a system. Chief among these virtues are predictability in emissions, cost savings, and incentives to innovation.³⁴ For an easy example of these three advantages, consider a hypothetical cap-and-trade system that requires the electricity sector, composed of companies A and B, to reduce their emissions by 50% over three years. Both companies produce an equal amount of power and are equally profitable. Overall demand is expected to remain stable, so the companies do not need to increase or decrease their electricity output. The key difference: company A recently replaced its old coal-powered generators with the same models, so that its emissions have not changed; in contrast, company B is considering options to replace its current coal-powered generators, which are set to retire in three years (right when the cap kicks in).

First, and most importantly, the absolute cap on emissions ensures that the policymaker's exact GHG preferences are achieved. Companies A and B must decrease their emissions by 50%; there is no alternative.³⁵ This leads to the second point: cost spreading. Inevitably, some participants face higher costs than others in achieving emissions reductions.³⁶ Companies A and B are illustrative: company A, in addition to the expense of implementing clean technology to reduce its emissions 50%, must also recoup its recent investment in its new plants. In contrast, company B's only cost is that of implementing clean technology to reduce emissions 50%. If the government allows the companies to trade emissions permits, company A may be able to reduce its costs by buying permits from company B; in effect, com-

24. H.B. 3610, 77th Legis. Assem., Reg. Sess. (Or. 2008). See also Eric Lemelson, *In My Opinion Oregon and Climate Change in Urgent Need of Visionary Leadership*, OREGONIAN (Portland), Mar. 7, 2008, at B7 (noting that the Oregon Legislature recently rejected a bill requiring emitters to provide states with accounting of in-state emissions). However, Oregon has enacted into law a GHG reduction target and has sought agency recommendations on reduction options. H.B. 3543, 74th Legis. Assem., Reg. Sess. (Or. 2007) (enrolled), available at <http://www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3543.en.pdf>.

25. Montana Climate Change Advisory Group, *What Montana Is Already Doing*, <http://www.mtclimatechange.us/background-alreadydoing.cfm> (last visited Mar. 13, 2008) (discussing Montana's emissions reductions efforts, listing only tax incentives for energy conservation); Montana Department of Environmental Quality, *Energy Tax Incentives in Your Home*, <http://www.deq.state.mt.us/Energy/EEHome/TaxincentHome.asp> (last visited Mar. 13, 2008) (noting that Montana energy conservation tax incentives limited to \$500 per year).

26. S.B.144, 2008 Gen. Sess. (Utah) (vetoed by governor), available at <http://le.utah.gov/~2008/htm/doc/sbill.htm/SB0144S02.htm>. See also Editorial, *Restricting Governor: Bill to Limit Multistate Pacts Would Be Harmful*, SALT LAKE TRIB., Feb. 11, 2008 (suggesting that senate bill was directed at Utah's participation in WCI).

27. ENERGY INFORMATION ADMINISTRATION, ESTIMATED EMISSIONS FOR U.S. ELECTRIC POWER INDUSTRY BY STATE, 1990-2006 (2007), available at http://www.eia.doe.gov/cneaf/electricity/epa/emission_state.xls.

28. Dallas Burtraw et al., *Chapter 5: Lessons for a Cap-and-Trade Program*, in MANAGING GREENHOUSE GAS EMISSIONS IN CALIFORNIA 10-11 (2006), available at http://calclimate.berkeley.edu/5_Cap_and_Trade.pdf.

29. *Id.* at 13-15.

30. *Id.* at 7.

31. Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97, 142-44 (2005).

32. *Id.*

33. *Id.* at 145, 160.

34. *Id.*

35. *Id.* at 111-12. Of course, a similar level of emissions reductions could be achieved through command-and-control methods, with the same absolute certainty of industrywide compliance. For example, the government could simply force companies A and B individually to reduce their emissions 50%. Or, the government could achieve a 50% reduction by mandating all power companies to derive 50% of their power from zero-emissions energy sources, such as nuclear or wind power. These command-and-control measures would achieve the same overall emissions reductions, but they lack cap and trade's other virtues.

pany A subsidizes company B's surplus emissions reductions because it is less expensive for company A than reducing its own emissions by 50%.³⁷ This leads directly to the third and final virtue of cap and trade: innovation. Because emitters receive revenue from their surplus emissions reductions, new low- and no-emissions technologies become price competitive with existing high-emissions technologies.³⁸ Essentially, firms are incentivized to develop lower cost, emissions reducing technologies.³⁹

II. Federal Subunits in International Law

Generally in international law, treaties are binding obligations that are enforceable through legal, political, or economic processes. In contrast, non-treaty agreements are not binding and enforceable. While the WCI members might prefer to adopt a mutually binding obligation to reduce GHG emissions, international law does not automatically recognize agreements between political subunits as treaties. Yet, even if it is not binding in international law, the WCI may still be a politically effective agreement that allows the members to reduce the costs of GHG regulation and achieve their policy preferences through mutual collaboration. In effect, the WCI may be a self-enforcing, non-treaty agreement.

A. International Agreements: Treaties and Non-Treaties

To the extent that there is an international law definition of international agreements, the Vienna Convention on the Law of Treaties (the Convention) is the governing document.⁴⁰ The Convention, though limited in application to written agreements between states,⁴¹ provides the basic international law framework for understanding the legal status of agreements between federal subdivisions.

There are many legal distinctions between treaties and non-treaty agreements—most notably the agreement's "va-

lidity, operation and effect, execution and enforcement, interpretation, and termination."⁴² Under the Convention, treaties are characterized by their content rather than by their form, with the central requirement being that the parties create "international legal rights and obligations."⁴³ To be a treaty under the Convention, the agreement must include an "intention to create obligations under international law."⁴⁴ The formal appellation given to an agreement, e.g., "treaty," "covenant," "compact," is largely irrelevant, though it may reflect the parties' intent to be bound.⁴⁵ The requirement of an intent to be bound under international law reflects the "universally recognized"⁴⁶ principle *pacta sunt servanda*, which is enshrined in Article 26 of the Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁴⁷ Most importantly, to ensure that parties are indeed bound, breaches of treaties have "legal consequences."⁴⁸ In practice, these consequences include court judgments and unilateral or collective enforcement through military, political, or economic means.⁴⁹

In contrast to treaties, non-treaty agreements (also known as memoranda of understanding) are private expressions of parties' intentions to engage in a particular course of conduct.⁵⁰ As with treaties, appellations are irrelevant.⁵¹ Instead, the key characteristic of non-treaty agreements is that the parties lack the intent to be bound legally.⁵² *Pacta sunt servanda* does not apply; that is, there is no fundamental obligation to obey the agreement.⁵³

36. *Id.*

37. *Id.* at 113-15. In a command-and-control regime, the costs of emissions reduction are not spread evenly throughout an industry. If the government mandates that each hypothetical company (A and B) is individually responsible for reducing its emissions by 50%, company A faces much higher costs than company B.

38. *Id.* For instance, say the hypothetical average cost of producing coal-generated electricity is \$0.05 per kilowatt hour (kwh); wind power is \$0.08 per kwh. If permits were priced at the equivalent of \$0.03 per kwh of coal-generated electricity, prices for the coal- and wind-based generators would be exactly equal at \$0.08, and the coal generator pays \$0.03 per kwh to the wind generator in exchange for the wind generator's emissions allowances. See *Special Report: Trade Winds*, THE ECONOMIST, June 21, 2008, at 8.

39. *Id.* Continuing the example discussed *supra* note 38, if someone created a zero-emission technology that were less expensive to implement than existing zero-emission technologies, that person could then sell excess allowances and effectively emerge with the lowest cost electricity source. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1342 (1985) (noting that a cap-and-trade system "will provide positive economic rewards for polluters who develop environmentally superior products and processes").

40. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. It is important to point out that the United States appears to have accepted the principles of the Convention as binding customary international law. See Letter of Submittal from the Secretary of State to the President, S. Exec. Doc. No. L, at I (1971) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

41. See Vienna Convention, *supra* note 40, art. 2(a).

42. *Id.*

43. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 17 (2000).

44. International Law Commission, Commentary to the Draft Articles cmt. 6, in UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, FIRST AND SECOND SESSIONS, VIENNA, 26 March-24 May 1968 and 9 April-22 May 1969, OFFICIAL RECORDS: DOCUMENTS OF THE CONFERENCE 9 (1971) [hereinafter Draft Articles]. The drafters decided not to include a specific requirement of intent because "the element of intention is embraced in the phrase 'governed by international law.'" *Id.*

45. *Id.* cmt. 3 at 8. See also LUIGI DI MARZO, COMPONENT UNITS OF FEDERAL STATES AND INTERNATIONAL AGREEMENTS 96-100 (1980) (analyzing language of agreements between political subunits and noting discrepancies between content and appellations).

46. Vienna Convention, *supra* note 40, pmb1.

47. *Id.* art. 26.

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §301 cmt. d (1987) [hereinafter RESTATEMENT].

49. ULRICH BEYERLIN ET AL., ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 4, 10-11 (2006); Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 33-34. In reality, though, such enforcement measures are rarely necessary. Louis Henkin famously said: "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) [hereinafter HENKIN, HOW NATIONS BEHAVE].

50. AUST, *supra* note 43, at 18.

51. *Id.* at 20-21. Aust notes that common names include "memorandum of understanding," "gentlemen's agreements," "non-binding agreements," "de facto agreements," and "non-legal agreements," but that "memorandum of understanding" is "the name most often given to them." *Id.* at 18.

52. *Id.* at 17-18.

53. MALGASIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 34-37 (2005).

B. International Law and Cross-Border Subnational Agreements

On its face, the Convention appears irrelevant to the international law surrounding federal subunits' conduct in international agreements. In its ratified form, the scope of the Convention is limited specifically to agreements concluded "between States."⁵⁴ Yet the initial drafters recognized that political subdivisions might qualify as "States" capable of concluding international agreements "if such capacity is admitted by the federal constitution."⁵⁵ To the drafters, this construction acknowledged the practical reality that "frequently, the treaty-making capacity is vested exclusively in the federal government," while admitting that "there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States."⁵⁶

The Convention's ratification debates do not clearly establish that federal subunits can or cannot enter into treaties.⁵⁷ The debates over the wording of the Convention suggest that transnational agreements between federal subunits are different from agreements between nation-states, in that they are not necessarily "governed by international law" and thus subject to punishment for noncompliance. Yet, the Convention contemplates a limited international law role for federal subunits, since the debates leave open the question of whether a nation may delegate its treaty-making power or ratifying its subunits' agreements.⁵⁸ It is necessary, then, to examine the Constitution to determine how the United States treats agreements by its subunits. Before doing this, however, it is helpful to understand whether the WCI members would be willing to enter into a nonbinding agreement in the absence of constitutional authority to enter binding agreements.

C. Why Would States and Provinces Enter the WCI?

It is important to remember that each WCI member could have eschewed the WCI's collaborative transnational approach and instead focused on independently regulating GHG emissions in its own jurisdiction. Indeed, some of the members had done so before joining the WCI.⁵⁹ So now we must ask a fundamental question about the WCI: would the states and provinces choose to enter a nonbinding agreement with each other, and if so, why? Ultimately, the answer is simple: they are willing to do so because it is rational to do so. This explanation does not inquire into a legislature's normative decisions for entering into an environmental agreement. Rather, it begins from the assumption that the WCI participants have a preference for regulating emissions. Thus, the question is how the WCI furthers that goal.

Each of the WCI members has expressed a preference for reducing GHG emissions (either prior to joining the WCI or through the act of joining).⁶⁰ There are at least two reasons to

prefer a collaborative regional approach to emissions trading over independent local regulations. First, the emissions trading market is more effective when there are more buyers and sellers. Second, the parties avoid the "race-to-the-bottom" problem; when neighboring jurisdictions have a similar regulatory scheme (especially in the electricity market, where electricity grids span multiple jurisdictions), collaboration prevents industries from fleeing to neighboring jurisdictions to avoid costs of compliance.

The benefits of emissions trading increase in proportion to the size of the affected market. Market liquidity increases as more buyers and sellers take part. In a liquid market, it is easier for buyers to find sellers and vice versa; an illiquid market has a harder time matching buyers and sellers.⁶¹ In a liquid market, prices are more accurate and stable, allowing parties to assess the cost-effectiveness of possible emissions reductions and to plan for future costs or revenues related to buying and selling allowances.⁶² Additionally, a geographically broader trading program reduces regulatory burdens on businesses that operate in multiple jurisdictions.⁶³

Regional collaboration also allows the members to avoid the race to the bottom. Traditionally, jurisdictional competition in environmental regulations leads jurisdictions to undertake weak regulation or lax enforcement in an effort to attract industry and commerce.⁶⁴ Any state regulations of in-state production or consumption place a burden on these economic activities, effectively reducing the state's economic competitiveness vis-à-vis nonregulating jurisdictions.⁶⁵ Thus, federal subunits face a coordination problem. By coordinating their efforts, they avoid the harms that would accrue to each one individually if it were the only jurisdiction to impose regulations.

In short, the WCI enables the member states and provinces to achieve their policy goals more efficiently. The agreement solves a classic coordination problem: they "have a common interest in achieving a common objective"⁶⁶—reducing GHG emissions—and they "receive higher payoffs if they engage in identical or symmetrical actions than if they do not"⁶⁷—a more efficient GHG trading market. The solution is simple: the parties should coordinate their policies in order to achieve their desired goal of GHG reductions.⁶⁸

61. Burtraw et al., *supra* note 28, at 7, 16-17; Christopher S. Hooper, *Limiting the Use of Emissions Allowances*, 5 N.Y.U. ENVTL. L.J. 566, 579 (1996).

62. Nordhaus & Danish, *supra* note 31, at 116-17, 142-44; Hooper, *supra* note 61, at 579, 599.

63. Burtraw et al., *supra* note 28, at 16.

64. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1213-19 (1992); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977).

65. Robert B. McKinstry Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Legislation: How to Function in a Global Marketplace When States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 64 & n.7 (2007).

66. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 136 (1995) (citing EDNA ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* 78 (1977)).

67. GOLDSMITH & POSNER, *supra* note 60, at 12.

68. Of course, this solution of policy coordination "is neither complex nor particularly demanding." John Gerard Ruggie, *Multilateralism:*

54. Vienna Convention, *supra* note 40, art. 2(a).

55. Draft Articles, *supra* note 44, art. 5(2), at 11.

56. *Id.* cmt. 3 at 8.

57. DI MARZO, *supra* note 45, at 21.

58. *Id.*

59. See *supra* notes 17-20 and accompanying text.

60. See JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 1 (2005) (defining interest as "preferences about outcomes").

D. Summary of International Law and Subnational Agreements

Ultimately, international law provides no answers about the legality of agreements between federal subunits. International law neither expressly allows nor prohibits such agreements. In both theory and practice, federal subunits are willing to enter such agreements despite the absence of formal international channels for ensuring compliance. However, we must turn to relevant domestic laws to see if the WCI members are legally permitted to enter these agreements.

III. Federalism and Foreign Relations in the United States

The federal government possesses a wide range of exclusive powers related to foreign relations, while the states are subject to a number of constitutional limitations in international and interstate affairs. Historically, the states were powerless in international relations even before the Constitution. The Constitution limited states' authority by granting preemptive effect to federal laws, treaties, and even some non-treaty agreements. The Constitution also prevents the states from entering treaties with foreign governments or from entering certain non-treaty compacts without congressional consent. Finally, judicial doctrines inferred from the Constitution prevent the states from interfering with interstate commerce or international affairs. In short, the Constitution designates the federal government as the sole actor in most national and international matters.

A. Federal Supremacy in Foreign Relations

The Framers enshrined in the Constitution a basic structural principle relating to foreign relations: federal supremacy. This basic idea strongly resembles the main principles from Articles of Confederation era⁶⁹; however, the 1787 Constitutional Convention arose largely because of the Articles' failure to ensure federal supremacy and state compliance in foreign affairs.⁷⁰ Consensus was so great among delegates to the Convention that they largely ignored foreign relations issues during their debates.⁷¹ Even during the ratification debates, the federal government's foreign affairs power vis-à-vis the states was largely an afterthought. Tellingly, James Madison believed the prohibitions on states entering treaties were so self-evident that he declined to defend them

in the *Federalist* papers.⁷² Few of the *Federalist* papers discussed foreign relations in any depth.⁷³

The basic principle of federal supremacy is clearly enunciated in the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁷⁴ When combined with the legislature's power to regulate foreign commerce,⁷⁵ the executive's power to make treaties,⁷⁶ and the judiciary's power to construe treaties and federal law,⁷⁷ the Supremacy Clause is a powerful statement of federal primacy in foreign relations. Little appears to be left for the states.

The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law."⁷⁸ The clearest cases arise when the separate branches of the federal government combine to pursue an explicit policy, such as a ratified treaty or an enacted federal law.⁷⁹ Even in other cases, the federal government's preemptive power has steadily been expanding. Under the guise of the federal government's foreign relations power, the courts have increased the powers of Congress and the president to create treaties, agreements, and legislation that preempt state law and override state authority.

Preemption can take the form of "express," "field," "conflict," or "obstacle" preemption—categories that are "not 'rigidly distinct'" but are instructive nonetheless.⁸⁰ Under express preemption, a state law is preempted if a federal law (be it treaty or statute) explicitly overrides related state laws.⁸¹ Under field preemption, a federal law preempts state law if Congress displays a "clear and manifest" intent to preempt state law,⁸² determined "from the depth and breadth of a congressional scheme that occupies the legislative field."⁸³ Under conflict preemption, a state law is preempted if compliance with the state law leads to noncompliance

The Anatomy of an Institution, 46 INT'L ORG. 561, 582 (1992). But this simplicity is, of course, the beauty of strategic coordination.

69. See Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period*, 60 TENN. L. REV. 783, 784 (1993) ("Some of the most familiar parts of the Constitution . . . were drawn directly from the Articles of Confederation, while many of the additional textual powers granted to the new government were ones that the old government had been exercising in practice.").

70. See generally FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (2d ed. 1986).

71. See BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE: 1776-1865*, at 58 (1993) ("If there was comparatively little discussion at Philadelphia of diplomatic and even military matters, it was because almost everyone agreed that the mechanisms of foreign policy had to be changed.").

72. See THE FEDERALIST NO. 44 (James Madison) ("The prohibition against [states entering] treaties, alliances and confederations, makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution.").

73. Only 5 of the 85 essays (about 6%) discussed foreign relations at length. See THE FEDERALIST NOS. 3 (John Jay), 4 (John Jay), 5 (John Jay), 42 (James Madison), and 80 (Alexander Hamilton).

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

75. *Id.* art. I, §8, cl. 3.

76. *Id.* art. II, §2, cl. 2.

77. *Id.* art. III, §2, cl. 1.

78. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712, 24 ELR 21569 (1985) (misquoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

79. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("[an action] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it").

80. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73, 372 n.6 (2000) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

81. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983).

82. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

83. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citing *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

with a federal law, or if compliance with a federal law leads to noncompliance with the state law.⁸⁴ Finally, under obstacle preemption—which is closely related to and arguably indistinguishable from conflict preemption⁸⁵—a state law is preempted if it poses a barrier to the “accomplishment and execution of the full purposes and objectives of Congress.”⁸⁶

Treaties are one source of preemptive law. In *Ware v. Hylton*,⁸⁷ a case of “very great importance,”⁸⁸ the Supreme Court invalidated a 1780 Virginia law that conflicted with the 1783 Treaty of Paris between Great Britain and the United States. The state law allowed Virginia citizens who owed money to British creditors to extinguish their debts by paying the state treasury.⁸⁹ The peace treaty required U.S. citizens to repay their debts to British creditors.⁹⁰ The Court determined that Virginia retained the sovereign authority to establish such a law confiscating British property during the war,⁹¹ but that the peace treaty superseded the state law.⁹² Justice Samuel Chase relied on the simple logic of the Supremacy Clause: “A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way.”⁹³ The clear conflict between the federal treaty and the state law required the preemption of the state law.

The Court recently reaffirmed federal primacy in foreign relations after Massachusetts enacted a statute barring state entities from doing business with legal persons who in turn did business with Burma.⁹⁴ Soon after Massachusetts began its boycott, Congress did the same, granting the president wide latitude to impose additional sanctions and engage in multilateral diplomacy aimed at improving human rights in Burma.⁹⁵ Cutting through the thicket of preemption law, the Court determined that the Massachusetts law undermined the purpose and effects of the federal law by creating *potential* conflicts with Congress’ scheme: Congress had enacted a limited set of sanctioned activities, granted the executive flexibility in creating new sanctions, and authorized the executive to exert multilateral diplomatic pressure.⁹⁶ It was particularly noteworthy that executive branch officers had attested to the impediments created by the state law and foreign governments had officially protested against the law.⁹⁷ These facts underscored the law’s harmful impact on the nation’s foreign relations, thus strengthening the case for preemption.

State laws may even be preempted by valid executive agreements. Most recently, the Court applied this doctrine to preempt a California statute that required insurance companies to disclose their ties to the Nazi regime in Germany and the Holocaust.⁹⁸ The Court held that the president’s executive agreement with Germany, which provided a remedy for Holocaust-related claims against foreign governments and businesses, preempted the state’s disclosure requirement.⁹⁹ The state requirement created a conflict with the executive agreement’s policy of encouraging voluntary settlements of Holocaust-related claims.¹⁰⁰ The Court held that “resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive’s responsibility for foreign affairs.”¹⁰¹ Some commentators have interpreted this result as a limitless expansion of the Supremacy Clause and preemption doctrine.¹⁰² But the executive’s ability to preempt state law must be done “within the President’s constitutional authority”—otherwise the executive action would not be part of the laws or treaties of the United States, as required by the Supremacy Clause.¹⁰³

Thus, the Supremacy Clause and the federal government’s treaty power provide a broad basis for federal primacy in foreign affairs. Though the nuances of individual cases may require different interpretations of the various doctrines of preemption, the fundamental supremacy of federal laws prevents states from acting in a manner contrary to treaties and federal statutes.

B. Express Limits on the States

The Constitution goes beyond the Supremacy Clause—which alone would appear sufficient to block the states from claiming any foreign affairs powers—and flatly prohibits the states from entering a “Treaty, Alliance or Confederation.”¹⁰⁴ But a small niche is carved out for the states, which may enter an “Agreement or Compact” with either another state or a foreign power if Congress consents.¹⁰⁵ Presumably, the states may only do so in exercise of their inherent police power.¹⁰⁶ Of course, the Constitution does not actually define the distinctions between “treaty,” “alliance,” or “confederation,” (in this discussion, collectively referred to as “treaties”),¹⁰⁷ and “agreement,” or “compact” (collec-

84. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

85. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228, 232 (2000) (discussing obstacle preemption as a “branch” of conflict preemption).

86. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

87. 3 U.S. 199 (1796).

88. *Id.* at 221.

89. *Id.* at 220-21.

90. *Id.* at 238-45.

91. *Id.* at 222-29.

92. *Id.* at 235-36.

93. *Id.* at 236.

94. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-67 (2000).

95. *Id.* at 368-70.

96. *Id.* at 374-86.

97. *Id.* at 383-86.

98. *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401, 408-10 (2003).

99. *Id.* at 421, 423.

100. *Id.* See also *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1879-80 (2006).

101. *Garamendi*, 539 U.S. at 423.

102. See, e.g., Resnik, *supra* note 10, at 74-77, 84.

103. RESTATEMENT §1 cmt. n.5; see also *Medellin v. Texas*, No. 06-984, slip. op. at 30-35 (U.S. Mar. 25, 2008) (refusing to grant preemptive effect to presidential memorandum attempting to implement treaty obligations where neither the treaty nor congressional actions had authorized the president to do so).

104. U.S. CONST. art. I, §10, cl. 1.

105. *Id.* cl. 3. The requirement of congressional consent appears to acknowledge that Congress remains supreme in the national and international arena. Congress remains supreme in this area, and its plenary powers include the power to authorize states to exercise subsidiary powers.

106. See *id.* amend. X.

107. See, e.g., JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1403 (1833) [hereinafter STORY, COMMENTARIES].

tively, “compacts”).¹⁰⁸ This task has instead been left to the courts, who have offered some guidance—but not much.

The strongest prohibition, the Treaty Clause, is the least judicially developed. The only major decision to interpret the clause is Chief Justice Roger B. Taney’s plurality opinion in *Holmes v. Jennison*.¹⁰⁹ The case involved the arrest of a Canadian citizen by Vermont authorities on the basis of a grand jury indictment in the District of Quebec, then part of the British province of Lower Canada.¹¹⁰ Following the arrest, Vermont’s governor ordered the local sheriff to deliver George Holmes to Canadian authorities.¹¹¹ Chief Justice Taney would have ruled that Vermont had improperly attempted to enter into a treaty.¹¹²

Chief Justice Taney attempted to clarify the Constitution’s distinction between treaties and agreements. Chief Justice Taney emphasized that these distinctions were based on “the essence and substance of things, and not . . . mere form.”¹¹³ He noted that the Treaty Clause “necessarily . . . recogni[z]ed and enforce[d] . . . the principles of public [international] law.”¹¹⁴ Quoting Emmerich de Vattel, an “eminent writer on the laws of nations,” Chief Justice Taney explained that treaties aim at securing “public welfare” and apply “for a considerable time.”¹¹⁵ In contrast, agreements differ from treaties in their “duration” and “object.”¹¹⁶

Chief Justice Taney voted to invalidate the state’s efforts because the state’s attempt to extradite the fugitive conflicted with the international principle that only nations—not political subunits or private parties—could enter into extradition treaties.¹¹⁷ The four opposing Justices agreed that an extradition treaty or agreement between Britain (or the Canadian province) and Vermont would in fact be prohibited by the Constitution, as there was no congressional approval; however, they disagreed with Chief Justice Taney on the nature of Vermont’s action, believing it to be a unilateral action that lacked the mutual assent necessary to create an international agreement or treaty.¹¹⁸

Though Chief Justice Taney’s substantive distinction between treaties and agreements has received support elsewhere,¹¹⁹ no subsequent holdings have applied his analysis¹²⁰ for a pair of reasons. First, it is inherently difficult for courts and commentators to distinguish between treaties and agreements, and without a large volume of cases¹²¹ it is possible that no workable doctrine will emerge. Second, Congress may be willing to consent to problematic state agreements, so that a supposedly prohibited state treaty might be construed by courts as valid under Congress’ foreign relations powers.¹²² Felix Frankfurter and James M. Landis offer a nice summary of the practical effects of the Treaty Clause: “There is no self-executing test differentiating ‘compact’ from ‘treaty.’ . . . The attempt [to distinguish the terms] is bound to go shipwreck for we are in a field in which political judgment is, to say the least, one of the important factors.”¹²³

Given the inconclusive nature of the Treaty Clause, it might be more helpful to analyze the substance of the Compact Clause instead. Historically, the Compact Clause analysis has largely been used for domestic compacts; however, compacts involving foreign entities such as provinces should be subject to the same basic analysis.¹²⁴ In ei-

for why there was no agreement between Britain (or the province) and Vermont. *See id.*

108. *See, e.g., Virginia v. Tennessee*, 148 U.S. 503, 520 (1893) (“[W]e do not perceive any difference in the meaning [of the terms ‘compact’ and ‘agreement’], except that the word ‘compact’ is generally used with reference to more formal and serious engagements than is usually implied in the term ‘agreement.’”).

109. 39 U.S. 540, 561 (1840) (Taney, C.J.). The Court divided 4-4 on the outcome of the case; Chief Justice Taney’s opinion received the support of three Justices, while the other four Justices wrote separate opinions disagreeing in the outcome. The four Justices who disagreed with Chief Justice Taney believed that no agreement or treaty existed. *See infra* note 118 and accompanying text. However, all eight Justices agreed that if an agreement or treaty did exist, it would be invalid. *See id.*

110. *Holmes*, 39 U.S. at 561.

111. *Id.*

112. *Id.* at 572-73.

113. *Id.* at 573.

114. *Id.*

115. *Id.* at 571. Chief Justice Taney did not elaborate on the meaning of “alliances” and “confederations.” *See id.*

116. *Id.* Chief Justice Taney adopted Vattel’s approach of using the word “compact” broadly to describe any instrument conveying an agreement between two parties. *See id.*

117. *Id.* at 569, 572-73 (“[T]he rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law.”).

118. *See, e.g., id.* at 595-96 (Catron, J.). Of the Justices opposed to Chief Justice Taney, Justice John Catron provided the fullest explanation

119. *See, e.g., STORY, COMMENTARIES, supra* note 107, §1403 (arguing that “treaty, alliance, or confederation” might be interpreted to refer “to treaties of a political character,” such as political, military, and commercial matters, while “compacts and agreements” might be interpreted to refer to “mere private rights of sovereignty,” such as boundary disputes and domestic regulations). It is worth noting that Justice Joseph Story joined Chief Justice Taney’s opinion in *Holmes*. *Holmes*, 39 U.S. at 561.

120. *See* the Court’s discussion of *Holmes* and the Compact Clause in *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 464-66 (1978). *See also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 152 (2d ed. 1996) (“No agreement between a state and a foreign power has been successfully challenged on the ground that it is a treaty which the state is forbidden to make.”) [hereinafter HENKIN, *FOREIGN AFFAIRS*].

121. *See* both *cites supra* note 120.

122. In particular, courts have recently recognized a form of congressional treaty-making power through so-called congressional-executive agreements. *See* HENKIN, *FOREIGN AFFAIRS, supra* note 120, at 215-18. A prominent example of this type of agreement is the North American Free Trade Agreement (NAFTA). For a thorough (though vacated) analysis of NAFTA’s constitutionality under the Foreign Commerce Clause, see *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1317-23 (N.D. Ala. 1999), *vacated as a nonjusticiable political question* at 242 F.3d 1300 (11th Cir. 2001).

123. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 695 n.37 (1925).

124. *See* RESTATEMENT §201 n.9, §302 cmt. f (analogizing state compacts with foreign powers to interstate compacts). *See also* North-eastern Interstate Forest Fire Protection Compact, 66 Stat. 71 (1952) (granting congressional authorization to a compact and allowing Canadian provinces to join); JOSEPH F. ZIMMERMAN, *INTERSTATE CO-OPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* 111 (2002) (noting that Quebec, New Brunswick, and Nova Scotia have joined the Forest Fire compact). However, it might be argued that compacts involving foreign governments should be subjected to additional scrutiny, much as state regulations affecting foreign commerce receive greater scrutiny than state regulations affecting domestic interstate commerce. *See infra* Part IV.C (discussing dormant Commerce Clause and dormant foreign Commerce Clause). But the dormant foreign Commerce Clause analysis is essentially a form of foreign affairs preemption analysis. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 350-51 (2d ed. 2006). Accordingly, for purposes of this Article, it is sufficient to point out that a “foreign compact clause” analysis would essentially be the same as the dormant foreign affairs pre-

ther case, a compact is essentially a binding agreement between states governed by federal law, just as a treaty is a binding agreement between nations governed by international law.¹²⁵

There are two basic inquiries in a Compact Clause analysis.¹²⁶ The first inquiry is whether the compact or agreement increases the political authority of the member states and encroaches on federal supremacy.¹²⁷ If not, the compact is valid because it “does not fall within the scope of the [Compact] Clause.”¹²⁸ But if the compact does increase the state’s authority, the next inquiry is whether Congress has authorized the compact, either implicitly or explicitly, and either *ex ante* or *ex post*.¹²⁹

To determine whether an Article 1, §10 compact exists, courts determine whether the agreement exhibits the “classic indicia of a compact” and increases the political strength of the compacting states.¹³⁰ These indicia include the following: evidence of cooperation among lawmakers, the creation of a joint regulatory organization, the reciprocal effectiveness of state legislation (that is, the effectiveness of each state’s legislation is conditioned on other states enacting similar legislation), and the inability of each state “to modify or repeal its law unilaterally.”¹³¹ But ultimately the Compact Clause analysis focuses more on the substance rather than the form of the agreement.¹³² The real issue is whether the compact actually or potentially¹³³ “encroach[es] upon or impair[s] the supremacy of the United States” in a subject area that is the province of the federal government.¹³⁴ It should be noted, however, “that no court has ever voided a state agreement” for encroaching on federal supremacy and “failing to obtain congressional assent.”¹³⁵

The leading Compact Clause case involved the Multistate Tax Commission, a collaborative effort aimed at approxi-

ing and streamlining state taxation of multistate businesses.¹³⁶ The member states authorized the central commission to compile studies and relevant information on state taxation, propose rules and regulations that would become legally binding only after implementation by the state legislatures, and to perform audits (which included the power to exercise compulsory process) on a state’s behalf if the state requested it to do so.¹³⁷ Member states were free to withdraw from the commission through proper legislation.¹³⁸

The Court determined that although the commission increased the member states’ bargaining power over in-state corporations, it did not allow the member states to exercise any powers they did not otherwise possess.¹³⁹ Because the commission’s powers arose from the member states’ inherent power to audit and tax in-state businesses, the Court rejected the appellants’ arguments that the commission encroached on federal supremacy by interfering with interstate commerce, conflicting with foreign relations, and impairing the sovereignty of non-member states.¹⁴⁰

However, even if an Article 1, §10 compact encroaches on federal supremacy, the compact is still valid if it receives congressional authorization.¹⁴¹ The easiest cases involve express authorization before the compact is created or goes into force.¹⁴² Authorization may also be inferred *ex post facto* from congressional acquiescence¹⁴³ or explicit retroactive ratification.¹⁴⁴ Overall, while congressional consent is an easy path to validity, it has been described as a “political obstacle course,” and scholars suggest that Congress takes a troublingly long time to approve compacts.¹⁴⁵ But once approved, a compact reaps some notable benefits over non-congressionally approved compacts. In approving a compact, Congress may allow the state members to establish a centralized regulatory body to oversee the project,¹⁴⁶ or to provide for collective enforcement powers.¹⁴⁷ Con-

emption analysis in *Zschernig v. Miller*, 389 U.S. 429 (1968), discussed *infra* Part IV.C.

125. See ZIMMERMAN, *supra* note 1244, at 51-53; Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 2-3 (1997).
126. See, e.g., *Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power*, 786 F.2d 1359 (9th Cir. 1986). This Article’s analysis leaves out the preliminary step of the analysis, which is to examine whether or not an agreement even exists. See *id.* If there is no agreement at all, the Compact Clause obviously does not apply. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). It is quite clear, however, that the WCI is indeed an agreement for purposes of the Compact Clause. See, e.g., *supra* Part III.C.
127. See *infra* notes 133-40 and accompanying text.
128. *Cuyler*, 449 U.S. at 440.
129. See *infra* notes 141-44 and accompanying text.
130. *Northeast Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).
131. *Id.* The *Northeast Bancorp* Court discussed an additional case-specific factor (“regional limitation”) regarding regional preferences of the compact at issue. *Id.* at 174-75. See *Seattle Master Builders Ass’n*, 786 F.2d at 1363 (omitting “regional limitation” from its discussion of the indicia of compacts) (citing *Northeast Bancorp*, 472 U.S. at 175).
132. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 470-71 & n.23 (1978). In particular, reciprocal legislation is not necessarily insulated from challenge under the Compact Clause. See *id.* at 471 n.23.
133. *U.S. Steel Corp.*, 434 U.S. at 472.
134. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (Field, J.).
135. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 294 & n.15 (2003) (citing David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 70-71 (1965)).

136. *U.S. Steel Corp.*, 434 U.S. at 456.

137. *Id.* at 456-57.

138. *Id.* at 457.

139. *Id.* at 473.

140. *Id.* at 473-78.

141. U.S. CONST. art. I, §10, cl. 3.

142. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 277-78 (1959) (finding express *ex ante* authorization of two-state bridge commission) (citing Pub. L. No. 411, 63 Stat. 930 (1949) (“the consent of Congress is hereby given to the compact or agreement set forth below, and to each and every term and provision thereof”)); *Crime Compact Act of 1934*, ch. 406, 48 Stat. 909 (1934).

143. See *Virginia v. Tennessee*, 148 U.S. 503, 525 (1893) (“The compact in this case [has] received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective”). In *Virginia*, the Court determined that Congress recognized the two states’ 99-year-old boundary agreement by using the boundary as a marker for electoral, judicial, and tax districts. *Id.* at 522.

144. ZIMMERMAN, *supra* note 124, at 49.

145. Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 78 (2008); Hasday, *supra* note 125, at 19 (noting that “writers frequently cite studies indicating that compacts take between four and nine years to enact”).

146. See, e.g., *Delaware River Basin Compact*, Pub. L. No. 87-328, 75 Stat. 688 (1961); *Susquehanna River Basin Compact*, Pub. L. No. 91-575, 84 Stat. 1509 (1970). See generally ZIMMERMAN, *supra* note 124, at 69-132 (discussing various examples of compact commissions and other administrative bodies).

147. *Ohio River Valley Water Sanitation Commissions*, 54 Stat. 752 (1940).

gressional authorization even allows the compact's members to enforce the compact in federal court.¹⁴⁸

In summary, the Treaty Clause and Compact Clause expressly limit states' flexibility to reach binding agreements with other foreign and domestic government bodies. Yet, despite these limits, states are able to enter into cooperative agreements with other states or foreign governments, either with or without congressional consent, depending on the subject matter of the agreement.

C. Implied Limits on the States

Federal courts have also developed various constitutional doctrines that do not appear on the face of the Constitution but are rooted in its text, structure, and history.¹⁴⁹ The relevant implied doctrines are the dormant Commerce Clause and dormant foreign affairs preemption. The Commerce Clause rulings prevent states from facially discriminating against or unduly burdening interstate commerce. The foreign affairs rulings prevent states from interfering with the federal government's conduct of foreign affairs.

1. Dormant Commerce Clause Preemption

The Commerce Clause itself grants Congress the power to "regulate commerce with foreign Nations, and among the several States."¹⁵⁰ From this positive grant of authority, the Court has inferred a negative corollary: the states may not interfere with foreign or interstate commerce. This principle has been turned into a two-part test: first, courts determine whether the law discriminates against out-of-state interests on its face or in its effects; second, courts determine whether the law's burden on interstate commerce outweighs its benefit to the state.

Under the first line of analysis, a law that discriminates on its face or in its effects against out-of-state interests is assumed to be "simple economic protectionism" and is presumptively invalid.¹⁵¹ Alternatively, courts will generally uphold a statute that applies evenly to in- and out-of-state entities.¹⁵² Impermissibly discriminatory regulations have included Oklahoma's requirement that in-state utilities use at least 10% Oklahoma-produced coal,¹⁵³ New Jersey's outright ban on the importation of out-of-state waste,¹⁵⁴ New Hampshire's prohibition on the out-of-state sale of New

Hampshire-produced hydroelectric power,¹⁵⁵ and Oklahoma's prohibition on the creation of gas pipelines that would transmit gas out of state.¹⁵⁶

Even if a statute is deemed valid under the first line of analysis, courts undertake the second line of analysis and examine whether the statute serves a legitimate local purpose and "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."¹⁵⁷ This balancing is a "question . . . of degree" that largely "depend[s] on the nature of the local interest involved" and the availability of less-restrictive alternatives.¹⁵⁸ This "fact-dependent"—if not entirely ad hoc—approach "has been criticized for being unpredictable and arbitrary."¹⁵⁹ Generally speaking, the courts will strike down state regulations that "afford residents an economic advantage at the expense of a free-flowing national market," and uphold "local economic measures . . . if there is no discriminatory purpose or effect."¹⁶⁰

2. Dormant Foreign Relations Preemption

A broad reading of the federal government's foreign relations power requires the preemption of any state laws that affect foreign affairs. The Court endorsed this view in *Zschernig v. Miller*,¹⁶¹ a cold war-era case that involved an Oregon law preventing nonresident aliens from inheriting an estate unless Americans enjoyed reciprocal inheritance rights in the foreign country and the foreign heirs could show that they would control the property "without confiscation" by their home government.¹⁶² The Court determined that the state statute affected foreign policy "in a persistent and subtle way" by leading state courts "into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements," and into "unavoidable judicial criticism of nations established on a more authoritarian basis than our own."¹⁶³

In its key holding, the Court ruled that such "state involvement in foreign affairs and international relations" was impermissible because these matters are "entrust[ed] solely to the Federal Government."¹⁶⁴ Regardless of the subject matter of the state regulation (here, inheritances), the Constitution does not permit the state "to establish its own foreign policy" or even to "impair the effective exercise of the Nation's foreign policy."¹⁶⁵ Note, however, that this holding has never been explicitly followed by the Supreme Court,¹⁶⁶

148. ZIMMERMAN, *supra* note 124, at 51-53. See, e.g., *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (noting federal judiciary's "power . . . to provide one State a remedy for the breach of another"). See also *Culyer v. Adams*, 449 U.S. 433, 438 (1981) (congressional approval "transforms an interstate compact . . . into a law of the United States").

149. Cf. Resnik, *supra* note 10, at 36-37 ("[T]he United States Constitution never even uses the word federalism, let alone terms like foreign affairs preemption.").

150. U.S. CONST. art. I, §8.

151. *New Jersey v. Philadelphia*, 437 U.S. 617, 624, 8 ELR 20540 (1978) (invalidating facially discriminatory law that differentiated between in-state waste and out-of-state waste); *Hunt v. Washington*, 432 U.S. 333, 353-54 (1977) (invalidating facially neutral law that burdened out-of-state sellers but did not affect in-state sellers).

152. See *New Jersey*, 437 U.S. at 624. Courts will also uphold a facially discriminatory statute if it is narrowly tailored to "serve[] a legitimate local purpose." *Maine v. Taylor*, 477 U.S. 131, 138, 148 (1986).

153. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

154. *New Jersey*, 437 U.S. at 624.

155. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

156. *West v. Kansas Nat. Gas Co.*, 221 U.S. 229 (1911).

157. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

158. *Id.*

159. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 443 (3d ed. 2006).

160. RONALD D. ROTUNDA & JOHN E. NOWAK, 2 *TREATISE ON CONSTITUTIONAL LAW* 251-52 (4th ed. 2007).

161. 389 U.S. 429 (1968).

162. *Id.* at 430-31.

163. *Id.* at 435, 440.

164. *Id.* at 436.

165. *Id.* at 440-41. Justice John Harlan concurred in the result, reading the case as one of treaty interpretation rather than constitutional analysis. *Id.* at 457 (Harlan, J., concurring). In contrast with Justice Harlan's concurrence, the majority opinion does not address issues of treaty interpretation and instead clearly announces a constitutional doctrine of dormant foreign affairs preemption.

166. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) ("We have not relied on *Zschernig* since it

and the case has often been distinguished as a relic of the cold war, when states were eager to demonstrate their anti-Communist bona fides regardless of the constitutional implications of their actions.¹⁶⁷ Commentators from both ends of the political spectrum have argued that there is little constitutional basis for such an intrusive judicial doctrine.¹⁶⁸ Yet, its logic is analogous to that of the well-established dormant Commerce Clause, and it should be taken seriously until the Court expressly overrules it.

D. Summary of the States, Federalism, and Foreign Relations

The Constitution establishes broad federal authority in foreign relations and interstate affairs. Federal laws, treaties, and even non-treaty agreements preempt contrary state laws. States may not enter into treaties with foreign governments, and must receive congressional authority before entering into compacts with other states and foreign governments if the compact will encroach on federal supremacy. They may, however, enter into some agreements without congressional assent. Even so, the states face implied constitutional limitations in interstate commerce and foreign affairs. In short, the Constitution establishes broad federal authority on international and interstate issues, and limits the states from interfering too much in these federal arenas.

IV. The States and Provinces in Action

Having sketched the outlines of the relevant American constitutional doctrines, it is worth asking whether states have previously engaged in cross-border collaboration with Canadian provinces. The history of state-province relations is overwhelming, to say the least.¹⁶⁹ There have been a number of instances of successful cooperation, but these successes have been limited to relatively mundane areas of lo-

cal border-related regulations. The larger schemes have largely been a story of good intentions with few results.

The successful agreements are united by a common factor: they are extremely limited in scope. Generally, these agreements involve matters of an administrative or technical nature, and take effect locally.¹⁷⁰ For example, states and provinces have coordinated policies relating to river drainage,¹⁷¹ acid rain prevention,¹⁷² traffic fines,¹⁷³ forest fire prevention, road and bridge maintenance, waterway traffic, and scientific research.¹⁷⁴ They have engaged in mutual assistance, such as New York's efforts to train Canadian fire fighters,¹⁷⁵ and have entered into broader emergency aid agreements.¹⁷⁶ They have also cooperated through less formal mechanisms, such as conferences and summits between governors and premiers.¹⁷⁷ Such summits often lead to policy statements that are largely for public relations purposes, with questionable regulatory impact.¹⁷⁸

Much more significant cooperation has occurred at the national level,¹⁷⁹ or at least with the consent of the national government.¹⁸⁰ For example, the bilateral Great Lakes Wa-

was decided, and I would not resurrect that decision here.”); MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 263 (2007). The Court discussed *Zschemig* at some length in *Garamendi*, 539 U.S. at 417-20 (majority opinion). But that case did not specifically apply *Zschemig*’s doctrine of dormant preemption because it involved an executive agreement that expressed a federal foreign policy in “clear conflict” with the state law. *Id.* at 421. *But see* Resnik, *supra* note 10, at 74-77 (discussing *Zschemig*, *Crosby*, and *Garamendi* as related examples of a troubling new “foreign affairs preemption” doctrine that promotes “the exclusivity of national power based on general assertions of the risk of potential harms”).

167. See *Zschemig*, 389 U.S. at 435 & n.6, 347-48 & n.8 (“[W]e find that [recent cases] radiate some of the attitudes of the ‘cold war,’ where the search is for the ‘democracy quotient’ of a foreign regime as opposed to the Marxist theory. . . . [I]t seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata.”). See also HENKIN, *FOREIGN AFFAIRS*, *supra* note 120, at 164.

168. See, e.g., Resnik, *supra* note 10, at 84 (“A review of foreign affairs preemption cases suggests that judges are easily impressed by the invocation of the ‘foreign,’ fearful of the risk that a court’s judgment could have an effect on international relations, and eager to extract themselves and lower courts from adjudicating such questions.”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1698 (1997) (finding “little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption”).

169. Or as one scholar has put it: “[I]t is . . . important not to overstate these developments.” Christopher J. Kukucha, *Expanded Legitimacy: The Provinces as International Actors*, in READINGS IN CANADIAN FOREIGN POLICY 210, 226 (Duane Bratt & Christopher J. Kukucha eds., 2007).

170. See ANNE-MARIE JACOMY-MILLETTE, *TREATY LAW IN CANADA* 71 (1975).

171. *Freeman v. Trimble*, 129 N.W. 83, 84-85 (N.D. 1910). A subsequent decision on the same agreement, *McHenry County v. Brady*, 163 N.W. 540 (N.D. 1917), appears to be the only American court decision to rule on the validity of an agreement between an American state and a local Canadian government (in this case, a municipality). The court upheld the river drainage agreement under two relevant theories: under the Compact Clause analysis discussed *supra* Part IV.B, the agreement did not encroach on federal sovereignty, 163 N.W. at 547, and under the treaty preemption analysis discussed *supra* Part IV.A, the contemporary treaty between the United States and Canada did not regulate the drainage of surface water, 163 N.W. at 547-48. The case’s precedential value is of course limited to North Dakota courts, and serves as persuasive authority only to the extent that it conforms to current Supreme Court doctrines regarding states, international agreements, and federal foreign affairs powers.

172. ZIMMERMAN, *supra* note 124, at 177 (noting that after 25 years of cooperation on acid rain, collaborative effort between governors and premiers developed action plan for controlling acid rain).

173. *Id.* at 186 (noting “administrative reciprocity agreements” between New York, Ontario, and Quebec whereby the state and provinces suspend the licenses of truck drivers who fail to pay fines in the other jurisdictions) (citing Kenneth C. Crowe, *Policy a Roadblock to Speeding Truckers*, TIMES UNION, Aug. 26, 2001, at E1, E11).

174. *Id.* at 70-71; Kukucha, *supra* note 169, at 224; ACID RAIN: THE VIEW FROM THE STATES 57, 78 (James C. White ed., 1988).

175. ZIMMERMAN, *supra* note 124, at 175.

176. E.g., Duchocsek, *supra* note 10, at 24.

177. See Kukucha, *supra* note 169, at 223-25.

178. See, e.g., ZIMMERMAN, *supra* note 124, at 165 (discussing “statement of principle against oil drilling in the lakes signed by Great Lakes governors and Canadian provincial premiers in 1986”).

179. See, e.g., Agreement Between the Government of Canada and the Government of the United States of America on Air Quality, Mar. 13, 1991, 30 I.L.M. 676 (1991); Agreement Between the United States of America and Canada on Great Lakes Water Quality, Nov. 22, 1978, Can.-U.S., 1468 U.N.T.S. 411. There are currently 686 bilateral treaties in force between the United States and Canada. See Canada Treaty Information, <http://www.treaty-accord.gc.ca/Main.asp?Language=0> (last visited Mar. 27, 2008). Nevertheless, bilateral cooperation may be eroding due to increasing American unilateralism and Canadian unease with NAFTA and American militarism. See Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT’L L. 1, 14, 20-24 (2007).

180. For example, the agreement between Ontario and New York power authorities regarding the division of Niagara River in accordance with bilateral treaty of 1950. JACOMY-MILLETTE, *supra* note 170, at 73. See also Treaty Between the United States of America and Can-

ter Quality Agreement led to cooperation between “various federal agencies in both nations, eight U.S. states, two Canadian provinces, major ports and municipalities throughout the region, Native American tribes (U.S.) and First Nations (Canada), local and regional [nongovernmental organizations], leading businesses and trade associations, and the independent scientific community.”¹⁸¹ Such far-reaching collaboration between federal governments, local governments, and nongovernmental organizations would not have been possible without the support and agreement of the two federal governments.

Accordingly, even if the WCI were legally viable, it would be unprecedented in practice. Previous state-province collaboration has been limited to local border-related matters rather than statewide and provincewide regulatory regimes. Also, historically, the strongest state-province collaboration has received federal sanction. However, this federal approval is not always legally necessary, as this Article will now discuss.

V. The Legal and Practical Viability of the WCI

This part will analyze the legal and practical viability of the WCI. It will briefly discuss relevant federal GHG policies, setting the stage for later finding an absence of clear federal preemption. There do not appear to be any preemptive federal policies, either domestic or foreign. There are no problems under the Treaty Clause or the Compact Clause, as the WCI is entirely voluntary and nonbinding. Finally, there are minor difficulties under the Commerce Clause, but the WCI's core regulations are legally permissible. Ultimately, though, the outlook for the WCI's future depends more on political events than legal challenges. Even if the states and provinces are able to agree to the details of the WCI and enact the plan into local law, the U.S. federal government may preempt the states' efforts at any time, thus leaving the WCI in the dustbin of history.

A. Existing National GHG Efforts

The United States has expressly rejected the Kyoto Protocol, the most prominent international GHG effort.¹⁸² But the United States remains committed to the basic international GHG framework,¹⁸³ and recently participated in negotiations to extend Kyoto beyond 2012, its current expiration date.¹⁸⁴ While there are a number of legislative proposals floating around Congress, there is a general consensus that there will be no uniform federal climate change policy until a new administration takes over the White House in

2009.¹⁸⁵ In the absence of federal policymaking on the issue, 25 states have undertaken regional efforts.¹⁸⁶

B. Legal Issues in the United States

There are three major constitutional issues in the United States: (1) preemption (by domestic law or foreign policy); (2) the Compact and Treaty Clauses; and (3) the dormant Commerce Clause. Foreign affairs and dormant Commerce Clause preemption present potential barriers to the WCI as it is currently planned, but ultimately the WCI can survive even these legal challenges.

1. Domestic Law Preemption

Currently, no federal law, treaty, or executive agreement expressly preempts state efforts to regulate GHG emissions.¹⁸⁷ Accordingly, we must search for potential conflict preemption, obstacle preemption, field preemption, or implied foreign affairs preemption.

One potential source of preemption is the federal Clean Air Act, which permits EPA to regulate air pollutants from both stationary sources (such as power plants) and mobile sources (such as vehicles).¹⁸⁸ It is clear that the federal government is willing to assert its supremacy in vehicular regulations, as EPA recently denied California's request for a waiver so that it could impose additional regulations on tailpipe emissions.¹⁸⁹ However, in rejecting California's bid to regulate vehicular emissions, EPA reaffirmed that “California has independent authority to directly regulate stationary sources [of air pollutants] in the State.”¹⁹⁰ Even if EPA's regulations were preemptive, it has been exceedingly slow in developing economywide GHG standards.¹⁹¹ Thus, federal law only imperils the WCI's plan to regulate the transportation sector, and this is only a small portion of the WCI's program and is not even part of the initial planning recommendations. EPA may force the WCI to rethink its scope but will not imperil the broader effort.

Another potential source of preemption is that federal law has established the Federal Energy Regulatory Commission (FERC) as the central regulatory authority over interstate electricity transmission and wholesaling.¹⁹² FERC's main

ada Relating to the Uses of the Waters of the Niagara River, Feb. 27, 1950, 132 U.N.T.S. 223.

181. Bradley Karkkainen, *Marine Ecosystem Management & A “Post-Sovereign” Transboundary Governance*, 7 SAN DIEGO INT'L L.J. 113, 131 (2004) (citations omitted).

182. Brad Knickerbocker & Francine Kiefer, *The Costs of Bowing Out of Global Warming Treaty*, CHRISTIAN SCI. MONITOR, Mar. 29, 2001, at 3 (noting “President Bush's decision to reject the [Kyoto] treaty on global warming”).

183. See The United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

184. Peter N. Spotts, *Bush's Much Maligned Climate Talks May Yet Help Global Warming Treaty*, CHRISTIAN SCI. MONITOR, Jan. 30, 2008, at 2.

185. See Thomas Oliphant (Editorial), *America's Energy Future*, BOSTON GLOBE, Dec. 23, 2007, at 9E.

186. See John Ibbotson, *Regions Take Action as Federal Leaders Dither*, GLOBE & MAIL (Toronto), Nov. 16, 2007, at A24 (discussing the Midwestern Regional Greenhouse Gas Reduction Accord and the Regional Greenhouse Gas Initiative).

187. See Nordhaus & Danish, *supra* note 31, at 102-09; David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 79 (2003).

188. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462, 37 ELR 20075 (2007) (“Because greenhouse gases fit well within the Clean Air Act's capacious definition of ‘air pollutant,’ we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”).

189. See EPA Denial of Waiver, *supra* note 13, at 1-2. Note, however, that California and other states are currently suing EPA to allow them to set higher tailpipe standards. Edward Walsh, *Oregon Part of California Lawsuit*, OREGONIAN (Portland), Feb. 27, 2008, at A2.

190. EPA Denial of Waiver, *supra* note 13, at 28.

191. Ian Talley, *EPA Delays CO₂ Ruling, Angering Bush Critics*, WALL ST. J., Mar. 28, 2008, at A6.

192. 16 U.S.C. §824(b)-(c) (2006).

role is to oversee pricing and reliability of interstate transmission grids.¹⁹³ Yet, this grant of federal power over wholesale electrical energy does not prevent states from enacting any regulations on electricity generation and transmission within the state.¹⁹⁴ The WCI's plan is for the members to impose caps on the "first jurisdictional deliverer" of electricity—that is, the first electricity provider over which the WCI member has regulatory authority. Though such a regulatory scheme raises Commerce Clause concerns,¹⁹⁵ it does not interfere with FERC's authority to regulate pricing and reliability. There is no conflict preemption, as the WCI's imposition of costs on GHG emissions will not necessarily conflict with FERC regulations, such that compliance with the WCI would prevent compliance with FERC. Finally, there is no field preemption, as there is no evidence that Congress intended FERC to occupy the field of electricity regulation such that states are prevented from imposing any regulation whatsoever on electrical power generation, distribution, and sales.¹⁹⁶

Finally, the federal government has expressed preferences for voluntary emissions reduction. The Energy Policy Act of 2005 included tax credits for renewable energy programs, but no mandatory GHG emissions limits.¹⁹⁷ It is difficult to conclude from these limited regulations and initiatives that the federal government has truly occupied the field of GHG regulation.¹⁹⁸ These general policy statements and limited mandates do not constitute a "broad and complex" regulation scheme that preempts more rigorous state efforts.

2. Foreign Affairs Preemption

The strongest argument for foreign affairs preemption relates to the "bargaining chip theory"—any state-led efforts to reduce GHGs weaken the executive's ability to negotiate GHG reduction agreements with foreign nations. However, there is no evidence of an articulated executive policy regarding bargaining leverage; in fact, the executive branch has articulated a policy encouraging voluntary GHG reductions and state efforts.

Factually, there is no real American "foreign policy" regarding GHG reductions. The District Court for the Eastern

District of California, after receiving briefs and exhibits solely on this issue, determined that U.S. foreign policy toward climate change consists mainly of a commitment to "individually negotiated voluntary agreements, partnerships or economic initiatives with foreign countries (rather than through binding international treaties, such as Kyoto, that omit developing nations)."¹⁹⁹ The court also determined that this foreign policy does not "hold in abeyance internal [i.e., state] efforts to reduce greenhouse gas emissions in order to leverage foreign cooperation."²⁰⁰

Indeed, the U.S. Department of State (DOS)²⁰¹ noted the president's "commitment to reduce the GHG intensity of the U.S. economy by 18 percent by 2012,"²⁰² which would seem to be consistent with state efforts. The DOS even acknowledged that "[a] number of U.S. states and cities are implementing a range of voluntary, incentive-based, and locally relevant mandatory measures."²⁰³ As this Article has argued, the WCI is a "locally relevant," market-based effort, thus falling neatly under the DOS statement of federal policy.²⁰⁴

Legally, then, there are no federal policies leading to preemption as in *Ware, Crosby v. National Foreign Trade Council*²⁰⁵ and *American Insurance Ass'n v. Garamendi*.²⁰⁶ The WCI does not conflict with an international treaty, as with the Virginia statute that conflicted with the Treaty of Paris in *Ware*.²⁰⁷ Congress has not occupied the field of GHG regulations as it did in *Crosby* by enacting comprehensive sanctions against Burma.²⁰⁸ Finally, the president has not exercised one of his constitutional powers foreign affairs as he did in *Garamendi* by entering into an executive agreement to extinguish Americans' claims against foreign governments and businesses.²⁰⁹ Thus, there are no sources of treaty, statutory, or executive preemption.

Yet the specter of *Zschemig* looms as a "brooding omnipresence in the sky," to steal the immortal words of Justice Oliver Wendell Holmes.²¹⁰ *Zschemig*'s dormant foreign affairs doctrine is flexible enough to be used to strike down any state regulation by finding that it "impair[s] the effective exercise of the Nation's foreign policy."²¹¹ Obviously, then, it is impossible to predict how the courts might apply *Zschemig* to the WCI, other than to note that the judges will be animated at least in part by "their own

193. *Id.* §§824a-2, 824d, 824e, 824o, 824s, 824t. *See also* New York v. Federal Energy Regulatory Comm'n, 535 U.S. 1, 6-7 (2002) (discussing history of federal regulation of interstate electricity transmissions); Jeffrey S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause*, 43 NAT. RESOURCES J.615, 625 (2003).

194. Dennis, *supra* note 193, at 629-30 (discussing state regulation of electricity).

195. *See infra* Part V.B.3.

196. *Cf.* Yvonne Gross, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO₂ Cap-and-Trade Programs*, 28 THOMAS JEFFERSON L. REV. 205, 230-31 (2005) ("Because FERC's regulation in the area of interstate transmission and wholesale of electric energy is broad and complex, the logical inference is that Congress intended FERC to occupy the field of any regulations relating to GHGs in the electric power sector."). Such an inferential leap—that FERC's authority over pricing and reliability of interstate standards constitutes a "broad and complex" regulatory regime—is one this Article is unwilling to take.

197. 42 U.S.C. §§15801 et seq. (2006).

198. *Cf.* Gross, *supra* note 196, at 232-33 (suggesting "a strong inference is that at least for the present, Congress intends a voluntary market-based approach towards the regulation of CO₂ emissions, rather than mandatory measures"; failing to recognize, however, that Congress' inferred intent is an insufficient basis for ordinary statutory preemption).

199. *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1185-86, 37 ELR 20309 (E.D. Cal 2007).

200. *Id.* at 1187.

201. The Supreme Court helped clarify this matter by specifying that the DOS is ultimately responsible for formulating and promulgating this policy. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463, 37 ELR 20075 (2007) ("Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate.").

202. U.S. DOS, U.S. CLIMATE ACTION REPORT 3 (2006), available at <http://www.state.gov/documents/organization/89646.pdf>.

203. *Id.*

204. *Supra* Part II.

205. 530 U.S. 363 (2000).

206. 539 U.S. 396 (2003).

207. *See supra* notes 87-93 and accompanying text.

208. *See supra* notes 94-97 and accompanying text.

209. *See supra* notes 98-103 and accompanying text.

210. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

211. 389 U.S. at 441.

views on climate change policy and their level of sympathy with the state's approach."²¹² The best argument to be made in the WCI's favor is that, unlike the Oregon statute and court decisions at issue in *Zschernig*, the WCI is a measure designed to strengthen local regulation rather than to affect foreign countries' behavior.²¹³ And in the absence of a clear federal policy on GHG regulation, it is unclear that there is a "[n]ation[al] foreign policy" that the WCI could "impair."²¹⁴

If a court attempted to apply the "bargaining chip theory" under *Zschernig*, it would be wise to consider that such an argument could eviscerate the states' ability to regulate just about anything. Judge Anthony W. Ishii of the Eastern District of California offered this devastating critique:

The "bargaining chip" theory of interference [with foreign policy] also embraces an impermissibly broad range of activities that fall within the traditional powers of states to regulate under their own police powers for the health and welfare of their own citizens. If states can be barred from taking action to curb their greenhouse emissions, then the efforts of the various states to encourage the use of compact fluorescent light bulbs, subsidize the installation of solar electric generating panels, grant tax rebates for hybrid automobiles, fund renewable energy start-ups, specify enhanced energy efficiency in building codes, or any other activity that results in lower fuel or energy use would likewise constitute an interference with the President's alleged "bargaining chip policy."²¹⁵

Needless to say, if the courts adopted such an overbroad theory of foreign affairs preemption, a great deal of state legislation would be invalidated along with the WCI.²¹⁶ It seems unlikely that courts would be willing to take that step.

However, given the Supreme Court's occasional willingness to use a broad form of foreign affairs preemption, it is worth considering whether the Court would develop a new doctrine to prevent cross-broader subnational agreements. Some would distinguish between political subunits' involvement with domestic governments or nongovernmental entities (acceptable) and foreign governments (unacceptable).²¹⁷ But the existing foreign affairs preemption doctrine probably cannot strike down a voluntary and collaborative WCI unless it is seen as a form of subnational foreign policy that is aimed at impacting national and international GHG

policy.²¹⁸ This problem can be avoided if the WCI members frame their actions as an effort to strengthen local regulations rather than influence national foreign policy.

3. Treaty Clause

The WCI is unproblematic under the Treaty Clause because the WCI is not a treaty. The various Justices in *Holmes* agreed that the Treaty Clause incorporates the "principles of public [international] law,"²¹⁹ and the WCI agreement does not include any indicia of a treaty under international law. The WCI members are not bound to comply as a matter of international law, and the agreement contains no political, economic, or legal enforcement mechanisms. The WCI members have not expressed any intent to be bound to the agreement. Thus, even if international law were to recognize subnational agreements as treaties—a notion that was rejected during the drafting of the Vienna Conventions²²⁰—the WCI would not constitute a treaty under international law. Accordingly, assuming that the *Holmes* decision correctly incorporated the international law definition of treaties into the Treaty Clause, the WCI does not violate that provision of the Constitution.

4. Compact Clause

The two-part Compact Clause analysis first asks whether the agreement encroaches on federal supremacy, and second whether Congress has approved the compact. Depending on how it is incorporated into state law, the WCI may be valid without congressional consent, as it does not encroach on federal supremacy. In its current form, the WCI appears to be valid under the first part of the Compact Clause analysis. But if the members grant the WCI stronger central regulatory functions, it would require congressional consent under the second part of the analysis.

As it is currently constituted, the WCI does not raise Compact Clause concerns. Comparing the WCI to the Supreme Court's list of the "indicia of a compact,"²²¹ it is clear that the WCI agreement does not create a joint regulatory organization; it does not condition the effectiveness of the law in each state on other states' adopting similar laws; and it allows states to modify or withdraw from the WCI unilaterally.²²² Most importantly, it does not encroach on federal authority. As noted, the WCI is not preempted by any federal law or foreign policy, so there is no direct conflict with federal authority under the Compact Clause analysis.²²³ Additionally, as with the Multistate Tax Commission, the WCI members are simply coordinating their laws in order to strengthen their inherent regulatory powers. The WCI is simply a more effective form of traditional regulation that avoids the collective action problems associated with local environmental regulation. Thus, it remains an exercise of

212. *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, *supra* note 100, at 1896. See also Hannah Chang, *Foreign Affairs Federalism: The Legality of California's Link With the European Union Emissions Trading Scheme*, 37 ELR 10771, 10778-79 (Oct. 2007) (discussing uncertainty of *Zschernig* doctrine as applied to state GHG regulations).

213. See *supra* notes 17-23 and accompanying text (discussing WCI members' GHG policies adopted independent of WCI requirements, suggesting that members are fundamentally concerned with reducing local GHG emissions); *supra* notes 162-65 and accompanying text (discussing *Zschernig*'s critique of state regulations that required state courts to sit in judgment of foreign governments).

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

215. *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1187-88 (E.D. Cal. 2007).

216. See, e.g., *supra* notes 17-23 and accompanying text (discussing WCI members' GHG policies adopted independent of WCI requirements).

217. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1237-45 (2000).

218. One scholar suggested that efforts such as the WCI are "subvert[ing] the President's choice not to join Kyoto." Levit, *supra* note 10, at 404.

219. *Holmes v. Jennsion*, 39 U.S. 540, 569 (1840).

220. *Supra* Part II.B.

221. *Northeast Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

222. See *id.*

223. *Supra* Part V.B.1.

the state's inherent police powers and is accordingly permissible under the Compact Clause.²²⁴

However, the WCI members might want to incorporate stronger regulatory teeth into the organization in order to improve the likelihood of its success; these changes might improve the WCI's chances of success but would invite additional Compact Clause scrutiny. The WCI members might require implement legislation to be reciprocal; that is, the one member's laws do not take effect until the other members enact similar ones, and members who unilaterally modify their laws are to be excluded from the reciprocal system. But under such a scheme, the individual members would simply be exercising their inherent regulatory authority over local matters and refusing to grant special privileges (permit trading) to noncompliant states and provinces. A reciprocal implementation system, in the words of the leading Compact Clause case, does not "purport to authorize the member States to exercise any powers they could not exercise in its absence."²²⁵

The members might even elect to incorporate more rigorous regulatory requirements. They could create a central regulatory organization in order to oversee the allocation and monitoring of emission permits, and to punish deviations from the agreement. Under the Compact Clause, however, the WCI members would not be able to delegate their sovereign powers to a central organization without Congress's support. The creation of a multistate regulatory entity is not an inherent state power; instead, such a regulatory body resembles an administrative agency established under Congress's power to regulate interstate commerce.²²⁶ Through the central regulatory body, the members would gain new powers over each other to enforce compliance with the WCI's standards. At the same time, they would be giving up their own inherent authorities in an impermissible manner.²²⁷ Accordingly, if the WCI is to be enacted with centralized regulatory teeth, congressional authorization would be necessary.²²⁸

Thus, under the Compact Clause the WCI appears valid in its current form. If the members increase the WCI's regulatory authority, they will likely need congressional consent.

5. Commerce Clause

The dormant Commerce Clause is the final possible challenge to the WCI under the Constitution. The WCI is structured to apply evenly to in-state and out-of-state entities, not to protect in-state businesses. Courts could conceivably find the regulations impose an excessive burden in comparison to the local benefits, but given the nature of cap and trade, it

is likely that the WCI will be environmentally effective and economically efficient.

The WCI inevitably affects interstate commerce. Electricity "transmission is inherently interstate. It takes place over a network or grid, which consists of a configuration of interconnected transmission lines that cross state lines."²²⁹ The WCI members export and import significant amounts of electricity.²³⁰ Yet the Commerce Clause does not prohibit all burdens on interstate commerce; it prohibits *discriminatory* and *unreasonable* burdens.

The WCI appears to be carefully planned to avoid Commerce Clause problems. The electricity plan might appear to discriminate facially against non-WCI imports because it specifically targets imported electricity transmissions.²³¹ However, in-state electricity producers are also regulated in the same manner. The "first jurisdictional deliverer" approach regulates imported electricity in order level the playing field between in- and out-of-state producers, not to allow non-WCI members to import unregulated electricity at significantly lower prices. The system regulates in a fair and even manner "the first entity that the WCI partner has jurisdiction over that delivers power onto the WCI grid."²³² Framed in this manner, the WCI members have consciously refused to discriminate unevenly against out-of-state entities; instead, their proposed regulations will discriminate evenly against entities that emit higher levels of carbon, regardless of where the entity is located.²³³

But even facially neutral laws are subject to invalidation under the Commerce Clause if they place an unreasonable burden on interstate commerce. The *Pike (Pike v. Bruce Church, Inc.)*²³⁴ balancing test is unpredictable and fact-specific. But the WCI appears to satisfy both of *Pike*'s requirements: it regulates an important local interest, and does so in a cost-effective manner. The Supreme Court has recognized that states have a significant interest in reducing GHG emissions in order to reduce the threat of global warming.²³⁵

224. Accord Michael S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387, 407-11 (2007) (analyzing GHG agreement between northeastern states and determining that it is valid under the Compact Clause without congressional authorization).

225. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978).

226. See *id.* at 473.

227. See *id.* (disapproving of states' "delegation of sovereign power" through a compact).

228. Accord Smith, *supra* note 224, at 411-15 (analyzing GHG agreement between northeastern states and suggesting that the inclusion of a centralized regulatory authority would require congressional authorization).

229. New York v. Federal Energy Regulatory Comm'n, 535 U.S. 1, 31-32 (2002) (Thomas, J., dissenting).

230. See ENERGY INFORMATION ADMINISTRATION, STATE ELECTRICITY PROFILES 2006, at 15, 25, 135, 160, 190, 225, 340 (2007), http://www.eia.doe.gov/cneaf/electricity/st_profiles/sep2006.pdf.

231. WESTERN CLIMATE INITIATIVE, DRAFT ELECTRICITY POINT OF REGULATION RECOMMENDATIONS FOR PUBLIC REVIEW AND COMMENT 2-3 (2008), available at <http://www.westernclimateinitiative.org/ewebeditpro/items/O104F15951.PDF> [hereinafter WCI ELECTRICITY REGULATION]. Cf. Heddy Bolster, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737, 744-47 (2006) (discussing difficulties of regulating electricity imports under Commerce Clause). Though the plans for transportation and commercial regulation have not yet been drafted, one can assume that any remaining concerns about uniformity will be addressed in a similar manner.

232. WCI ELECTRICITY REGULATION, *supra* note 231, at 3.

233. Cf. Gross, *supra* note 196, at 224-26 (2005) (describing a possible California cap-and-trade program as having discriminatory effect on interstate commerce because California energy producers are generally cleaner, but failing to acknowledge that California's regulations would also benefit cleaner out-of-state producers and burden dirtier in-state producers).

234. 397 U.S. 137 (1970).

235. Massachusetts v. EPA, 127 S. Ct. 1438, 1456, 37 ELR 20075 (2007). In that case, the Court recited evidence regarding the specific threats to petitioner Massachusetts. The WCI states face similar localized threats, such as coastal flooding, melting of snowpack, drought, and wildfires. See EPA Denial of Waiver, *supra* note 13, at 30-32, 39-40, 42-44.

And the WCI's cap-and-trade approach is a cost-effective method of regulating GHG emissions.²³⁶ Accordingly, it appears that "the burden imposed on commerce" by the WCI is not "clearly excessive in relation to the putative local benefits."²³⁷ It would be a troubling act of judicial interventionism to strike down state GHG initiatives on the "unpredictable and arbitrary" basis of the *Pike* test.²³⁸

6. Summary of Constitutionality

The WCI will be constitutionally valid if it is designed and implemented as a voluntary and collaborative partnership aimed at strengthening local regulations. Problems may arise, however, if it is formed as a coercive centralized regulatory authority without congressional consent, or if it attempts to exert political influence outside of domestic borders. As it is currently framed, it probably satisfies each individual doctrine: statutory preemption, foreign affairs preemption, Compact and Treaty Clauses, and Commerce Clause. The two negative doctrines—foreign affairs preemption and the dormant Commerce Clause—pose potential legal threats, but the WCI can succeed given the strength of the local interests and the localized (rather than national or international) impact of the planned regulations.

D. The Prognosis for the WCI

The shadow of Congress looms large. Depending on political moods, it may facilitate the WCI by consenting to it as a formal compact. But it may also inhibit the WCI by preempting it with weaker regulations that occupy the field.²³⁹ One author has suggested three broad factors to consider when assessing the likelihood of congressional approval: first, whether the proposal is partisan or bipartisan; second, whether the proposal is supported by the affected stakeholders, such as industry and activists; and third, whether the proposal interferes with interstate commerce, as Congress would be unlikely to approve "blatant regional protectionism."²⁴⁰

However, the WCI does not require congressional approval—it only requires Congress to refrain from preempting it. It is unlikely that Congress will act specifically to preempt the WCI, as half of the states now participate in regional efforts to reduce GHG emissions.²⁴¹ However, it is very likely that Congress will expand on the WCI's effort and implement a similar program on a national scale, as countless proposals are currently floating around Congress.²⁴² Thus, while the WCI itself might not live to achieve

its GHG goals by 2020, its basic policy goal will likely be achieved or exceeded.

VI. The Meaning of the WCI

A. The Benefits and Drawbacks of Federal Systems

There are two basic views of state-based regulation. The first view praises such regulations as beneficial "experiments"; the second derides them as an unhelpful "patchwork."

We need not delve too deeply into the litany of praises of federal systems. We know Justice Louis Brandeis' famed statement that "courageous state[s] may . . . choose [to] serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."²⁴³ We know that these experiments can be more narrowly and effectively tailored to the states' and provinces' particular needs and opportunities.²⁴⁴ We know that these experiments can lead to beneficial competition to develop the strongest and best regulatory regimes.²⁴⁵ We also know that these experiments can spur nation action and serve as models or anti-models those national policies.²⁴⁶ Finally, if national efforts ever come to fruition, states and provinces are better able to adapt to the new regulations if they have regulations already in place.²⁴⁷

But there are concerns as well. The patchwork of state and provincial regulation is not as comprehensive as a national regulation, thus frustrating progressives seeking greater and more effective regulation. Nor is the patchwork uniform, thus frustrating regulated entities that must comply with an "impossible labyrinth of regulations."²⁴⁸ A patchwork of strong regulations might encourage federal preemption with weaker standards,²⁴⁹ or might discourage federal preemp-

236. See *supra* Part II.B.

237. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

238. CHEMERINSKY, *supra* note 159, at 443.

239. ZIMMERMAN, *supra* note 124, at 214, 217-18.

240. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 455 (2006).

241. See *supra* note 186.

242. See, e.g., Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal Is "Best"?*, 102 NW. U. L. REV. COLLOQUY 123, 123, 135 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/32/> (noting that as of October 2007, vast majority of pending congressional climate change bills were cap-and-trade plans).

243. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

244. Kevin L. Doran, *Can the U.S. Achieve a Sustainable Energy Economy from the Bottom-Up? An Assessment of State Sustainable Energy Initiatives*, 7 VT. J. ENVTL. L. 95, 97-98 (2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 315 (1998).

245. Revesz, *supra* note 64, at 1233-44; Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23, 29-33 (1983).

246. See, e.g., Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1028 (2001); Dorf & Sabel, *supra* note 244, at 314-15 (arguing that regulation by "subnational, pragmatist government . . . allow[s] local jurisdictions to learn from one another. Arguments in any one jurisdiction, and the performance to which they lead, become considerations in the deliberation of similar jurisdictions.").

247. See, e.g., Brethour, *supra* note 23 (suggesting that industries in British Columbia "will have a comparatively lighter burden thrust upon them" by a national cap-and-trade system because of the existence of a provincial carbon tax).

248. *Ahead of the Pack: GE's Jeffrey Immelt on Why It's Business, Not Personal*, WALL ST. J., Mar. 24, 2008, at R3. More colorfully, Immelt referred to this labyrinth as "a certain kind of hell." Jeffrey Ball, *ECOnomics: Creating Environmental Capital*, WALL ST. J., Mar. 24, 2008, at R1. Similar sentiments have been aired in Canada. For example, Canada's Finance Minister Jim Flaherty worried that divergent provincial regulations would hamper international investment in Canada; at a speech in Vancouver, the CEO of international mining giant Rio Tinto concurred. Brethour, *supra* note 23.

249. Kirsten H. Engel & Scott R. Saleska, *SubGlobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 224 (2005).

tion with stronger standards.²⁵⁰ Or a patchwork could encourage states and provinces to race to the bottom, attracting industry and population through an attractively lenient regulatory regime.²⁵¹

Ultimately, neither this Note nor the WCI can fully satisfy both sides of the federalism debate. But regional efforts such as the WCI may be able to split the baby, as it were. The WCI members are implementing localized, experimental regulations, but they are doing so in a uniform manner across a number of jurisdictions. Thus, the WCI is more of an “experiment” than a national system would be, and less of a “patchwork” than state-by-state or province-by-province regulations would be. Partisans on both sides of the federalism debate can find something to like about the WCI.

B. The WCI as a New Form of Domestic Lawmaking

The WCI is an unusual and novel form of international cooperation. Though this Article’s analysis of the WCI agreement used the language of the realist school of international relations—self-interest, rational choices, etc.—the WCI is not at all traditional. Rather, it is an example of what Judith Resnik refers to as “translocal transnationalism,” a form of cross-border interaction that takes place at the subnational level.²⁵² Others have referred to these interactions as “bottom-up international lawmaking,”²⁵³ “paradiplomacy,”²⁵⁴ and “gubernatorial foreign policy.”²⁵⁵ These local, cross-border efforts are consistent with Anne-Marie Slaughter’s notion of the modern “disaggregating” state. Rather than viewing the state as a unitary sovereign that alone possesses the capacity to engage with foreign governments, she sees it as a diverse assortment of government actors that are all amenable to involvement in transnational rulemaking.²⁵⁶ Disaggregated transnational regulation is especially useful in the environmental realm, where problems tend to be localized and nations are inattentive and ill-equipped to respond.²⁵⁷ In such situations, traditional notions of national sovereignty impede effective regulation, leading scholars to carve out a niche for collaborative “post-sovereign governance” that involves subnational and non-state actors.²⁵⁸

But in the case of the WCI, all of these contemporary theories about globalization are channeled through a traditional legal institution: the federal form of government. In a sense, then, the WCI is better viewed as the culmination not of the processes of the “disaggregating state” or “bottom-up international lawmaking,” but of a more tradition-bound Rehnquistian “Federalist revolution.”²⁵⁹ Indeed, state-oriented Americans ought to embrace transnational efforts in cases

such as WCI. One might modestly conclude that these cross-border collaborations offer significant benefits in addressing local and regional problems, even though they may not “be of monumental importance” at the global level.²⁶⁰

On the other hand, the WCI does indeed mark a transition in Federalist majoritarianism lawmaking—from an insular form of majoritarianism to a more open and internationalist one. Resnik argues that law is “formative and expressive of national identity,” and that doctrines such as foreign affairs preemption reflect a legal and political culture is unilateral and isolationist.²⁶¹ But she also notes that this “exclusivist” American culture derives generally from notions of American exceptionalism and self-definition, and more particularly from fundamental values such as democratic majoritarianism and federalism.²⁶² The WCI shows the limits of American law’s insularity. Here, transnational efforts are furthering the fundamental American values of democratic majoritarianism and federalism. The WCI shows that when federalism and globalization intersect, traditional American values can take on very unusual forms.

Ultimately, this transnational form of federalism opens the door both to stronger local regulations and stronger international connections. In their decades-old study of interstate compacts, Felix Frankfurter and James Landis stated that “[t]he imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions.”²⁶³ Their article helped spur the growth of interstate cooperation in the 20th century.²⁶⁴ In the 21st century, social and economic interdependence have spread across national borders, so that Frankfurter and Landis’ call for greater cooperation between political subunits now applies transnationally. The WCI may very well stand as a model for future voluntary cross-border cooperation between states, provinces, and other political subunits around the globe.

VIII. Conclusion

The WCI may or may not succeed in achieving its members’ goals of reducing GHG emissions to 15% below 2005 levels by 2020. As a regulatory effort, it will likely be preempted when the U.S. federal government implements nationwide GHG regulations. However, this analysis of the WCI’s legal viability ought to encourage future attempts at cross-border subnational regulatory cooperation. Both international law and domestic constitutional law permit states to enter into voluntary cooperative agreements. Properly designed, these efforts can strengthen both local regulations and cross-border relations—without running afoul of constitutional limitations. In the future, federalism and globalization will intersect more and more often.

250. Doran, *supra* note 244, at 116.

251. *Id.* at 98.

252. Resnik, *supra* note 10, at 40.

253. Levit, *supra* note 10, at 408-10.

254. Duchocek, *supra* note 10, at 16, 32 n.11.

255. Ku, *supra* note 10, at 2414.

256. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 31-32 (2004).

257. Karkkainen, *supra* note 181, at 119-25.

258. *Id.* at 124.

259. See generally David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 46-47 & n.20 (2006) (discussing the Rehnquist Court’s Federalist Commerce Clause jurisprudence).

260. DI MARZO, *supra* note 45, at 212.

261. Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT’L J. CONST. L. 33, 34-35, 40-41 (2008); Resnik, *supra* note 10, at 86-87.

262. Resnik, *supra* note 10, at 34-35, 40-41.

263. Frankfurter & Landis, *supra* note 123, at 729.

264. ZIMMERMAN, *supra* note 124, at 204-05.