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Federalism in the Era of Globalization: The Exercise of Foreign Affairs Powers by Subnational Entities

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Federalism In The Era of Globalization: The Exercise Of Foreign Affairs Powers By Subnational Entities

Romney Manassa*

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I. INTRODUCTION

On June 1, 2017, President Donald Trump announced that the United States would no longer be party to the 2015 Paris Agreement on climate change mitigation.¹ Trump cited his “America First” policy, claiming that the nonbinding agreement “handicaps the United States economy” to appease foreign actors “that have long sought to gain wealth at our country’s expense.”² The Agreement had been brokered and entered by the Obama Administration under the auspices of the United Nations.³

¹ Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

² *Statement by President Trump on the Paris Climate Accord*, U.S. EMBASSY & CONSULATES IN IT. (June 1, 2017, 3:32 PM), <https://it.usembassy.gov/statement-president-trump-paris-climate-accord/>.

³ Jonathan Easley, *Trump Cements 'America First' Doctrine with Paris Withdrawal*, THE HILL (June 2, 2017), <http://thehill.com/homenews/administration/336014-trump-cements-america-first-doctrine-with-paris-withdrawal>.

The reaction both at home and abroad was overwhelmingly negative.⁴ Local and state officials, together with business and university leaders, immediately condemned the withdrawal for its betrayal of U.S. commitments.⁵ Just hours after Trump made his announcement, these groups announced they would do “everything America would have done” had it remained a party.⁶

Four days later, this *ad hoc* coalition published the “We Are Still In” Declaration, an “open letter to the international community” on where the U.S. stood with respect to the Paris Agreement.⁷ The entirety of its contents is well worth reading while bearing in mind the country’s federal framework:

We, the undersigned mayors, county executives, governors, tribal leaders, college and university leaders, businesses, faith groups, cultural institutions, healthcare organizations, and investors are joining forces for the first time to declare that we will continue to support climate action to meet the Paris Agreement.

In December 2015 in Paris, world leaders signed the first global commitment to fight climate change. The landmark agreement succeeded where past attempts failed because it allowed each country to set its own emission reduction targets and adopt its own strategies for reaching them. In addition, nations—inspired by the actions of local and regional governments, along with businesses—came to

⁴ See Detroit Free Press Editorial Bd., *Editorial: In exiting Paris accord, President Trump squanders time and degrees*, DETROIT FREE PRESS (June 1, 2017), <http://www.freep.com/story/opinion/editorials/2017/06/01/trump-climate-paris/363812001/>.

⁵ Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

⁶ *Id.* (quoting Michael Bloomberg).

⁷ “*We Are Still In*” Declaration, WE ARE STILL IN (June 5, 2017), <https://www.wearestillin.com/we-are-still-declaration> [hereinafter *We Are Still In*].

recognize that fighting climate change brings significant economic and public health benefits.

The Trump administration's announcement undermines a key pillar in the fight against climate change and damages the world's ability to avoid the most dangerous and costly effects of climate change. Importantly, it is also out of step with what is happening in the United States.

In the U.S., it is local, tribal, and state governments, along with businesses, that are primarily responsible for the dramatic decrease in greenhouse gas emissions in recent years. Actions by each group will multiply and accelerate in the years ahead, no matter what policies Washington may adopt.

In the absence of leadership from Washington, states, cities, counties, tribes, colleges and universities, healthcare organizations, businesses and investors, representing a sizeable percentage of the U.S. economy will pursue ambitious climate goals, working together to take forceful action and to ensure that the U.S. remains a global leader in reducing emissions.

It is imperative that the world know that in the U.S., the actors that will provide the leadership necessary to meet our Paris commitment are found in city halls, state capitals, colleges and universities, investors and businesses. Together, we will remain actively engaged with the international community as part of the global effort to hold warming to well below 2°C and to accelerate the transition to a clean energy economy that will benefit our security, prosperity, and health.⁸

⁸ *Id.*

More than mere rhetoric, the Declaration was backed by an effort to submit a formal pledge to the United Nations committing its signatory cities, states, and other constituents to America's obligations under the Paris Agreement—in effect, going around the federal government and making an international promise alongside other sovereign states.⁹

This coalition—since formalized as the U.S. Climate Alliance (USCA)—now boasts “more than 3,800 leaders from America's city halls, state houses, boardrooms and college campuses, representing more than 155 million Americans and \$9 trillion of the U.S. economy.”¹⁰ In no uncertain terms, it asserts that Trump does not speak for the country, even as its chief executive.¹¹

For its part, the U.N. was unsure how to accept the USCA's proposal, given the lack of any formal protocol for recognizing nonstate actors in the Paris Agreement.¹² For centuries, the prevailing norm has been that the nation-state, represented by a *national* government, is *the* central actor on the international plane.¹³ While nongovernmental organizations (such as civil society groups and business), intergovernmental groups (like the U.N.), and even individuals have *some* role or agency, they are always subordinate to, and driven primarily by, the nation-state.¹⁴

Hence why one need not support Trump's decision to be perplexed or troubled by this Declaration. It presumes that governors, mayors, county officials, and even university presidents, among others, have the authority to defy their chief executive and remain committed to an international agreement that only he has the

⁹ *'We are Still in Coalition' Launched the America's Pledge Report During COP23*, CLIMATE ACTION (Nov. 14, 2017), <https://www.climateaction.org/news/we-are-still-in-coalition-launched-the-americas-pledge-report-during-cop23>.

¹⁰ *We Are Still In*, *supra* note 7.

¹¹ *See id.*

¹² *See generally* Thomas Hale, “All Hands on Deck”: *The Paris Agreement and Nonstate Climate Action*, 16 GLOBAL ENVTL. POL. 12, 14 (2016).

¹³ *See* James Fulcher, *Globalisation, the Nation-State, and Global Society*, 48 THE SOC. REV. 522, 523 (2001).

¹⁴ *See* Jacob L. Shapiro, *International Organizations Are Tools for Powerful Countries*, GEOPOLITICAL FUTURES (Nov. 15, 2017), <https://geopoliticalfutures.com/international-organizations-tools-powerful-countries/>.

constitutional mandate to approve or terminate.¹⁵ It defies both international practice and the U.S. Constitution, which plainly reserves foreign affairs as the exclusive domain of the federal government.¹⁶

Yet, while the Constitution expressly forbids states—much less municipalities, counties, and private entities—from forming or entering into legally *binding* agreements—especially if they conflict with the federal government—it is silent on whether *nonbinding* international instruments fall within the scope of this prohibition.¹⁷ Such “soft law” emerged only a few decades ago and was never remotely contemplated by the Framers¹⁸; it is unclear how this new category of international agreement fits within a constitutional framework that is two and a half centuries old.

While a high-profile example, the attempt by states and cities to salvage the Paris Agreement is hardly exceptional. Even thirty years ago, subnational foreign affairs were common and mundane enough to be acceptable.

[Over] 830 cities and other municipal governments have established official “sister city” relationships with over 1,270 cities and communities in 90 other countries. Almost every state has sent trade missions to other countries to encourage exports and foreign direct investment, and over 40 states have established trade or investment offices in foreign countries. Over 28 cities and communities have

¹⁵ See Madeleine Sheehan Perkins, *A Group Representing \$6.2 trillion of the US Economy Says They’re “Still In” the Paris Climate Agreement*, BUS. INSIDER (June 5, 2017, 6:49 PM), <https://www.businessinsider.com/we-are-still-in-group-represents-62-trillion-of-the-us-economy-plans-to-stay-in-paris-agreement-2017-6>.

¹⁶ Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN REL. (Mar. 2, 2017, 7:00 AM), <https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president#:~:text=The%20president%20is%20%E2%80%9Cthe%20sole,on%20behalf%20of%20the%20court>.

¹⁷ See John O. McGinnis & Peter M. Shane, *Article II, Section 2: Treaty Power and Appointments*, CONSTITUTION CTR. (last visited Feb. 5, 2021), <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346>).

¹⁸ See *id.*

declared themselves “sanctuaries” for refugees from Central America. Some 23 states, 14 counties, 80 cities and the Virgin Islands have enacted various kinds of divestment or procurement legislation or ordinances directed at South Africa's apartheid policies. And states and municipalities have taken a variety of other specific actions to express or implement their foreign policy views.¹⁹

While it is a truism that globalization blurs cultural and economic boundaries, rarely is the same said of legal and political dimensions.²⁰ As some international legal scholars have observed, “while transnational economics has drawn the most attention,” globalization has presaged unprecedented growth in “political cooperation, migration, and communication” while eroding the “concept of physical territory as an organizing principle for social, cultural, economic, or political relations.”²¹ By extension, the laws and legal principles governing these globalizing spheres are impacted as well.²² The rapid proliferation and sophistication of nonbinding international agreements is the most pronounced manifestation of international law and relations.²³ While these arrangements have largely gone unnoticed, much less faced many legal challenges, the fallout over the Paris Agreement has drawn unprecedented attention to the increasingly blurry jurisdictional boundaries between state and federal governments in foreign affairs.²⁴

Most emblematic of this controversy was the 2019 case of *United States v. California*, where the Trump Administration challenged California's cap-and-trade agreement with the Canadian

¹⁹ Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AMERICAN J. INT'L. L. 736, 822 (1989).

²⁰ See Taavet Hinrikus, *The Fall and Rise of Global Borders*, WORLD ECON. F. (June 26, 2017), <https://www.weforum.org/agenda/2017/06/fall-and-rise-global-borders>.

²¹ Julian G. Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 212 (2013).

²² See *id.* at 223–24.

²³ See Michael J. Glennon & Robert D. Sloane, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 35 (2016).

²⁴ Shear, *supra* note 1, at 1.

province of Quebec, on the grounds that it violates several foreign affairs powers exclusive to the federal government.²⁵ Described as “uncharted territory” by legal observers, the case brought to light a practice that will likely increase in the coming decades.²⁶ The forces of globalization will continue to blend and erode cultural and economic boundaries. States and even cities will have unparalleled global connectivity, upending established political and jurisdictional limitations through both formal and informal agreements.²⁷

Even the COVID-19 pandemic, with all its disruptions to global travel, trade, and cooperation, failed to fully dampen this trend. In April 2020, as coronavirus infections began to spike in the U.S., Maryland procured 500,000 test kits from South Korea through negotiations involving “high level state officials” and the South Korean Ministry of Foreign Affairs.²⁸ The same year, Florida moved towards creating an “intergovernmental structure” between its health agency and the Canadian health department to purchase cheaper prescription drugs from Canada.²⁹ These are just two examples of state engagement abroad that managed to receive media attention; as this Note will reveal, such practices are so common and tacitly acceptable that they rarely garner any publicity, much less controversy or legal challenge.

Notwithstanding the surprising commonality of such arrangement, this Note will explore whether state and local governments in the United States have the power to conduct foreign

²⁵ *United States of America v. State of California et. Al.*, No. 2:19-cv-02142-WBS-EFB (Cal. Dist. Ct. App. Filed Oct. 23, 2019).

²⁶ Ellen M. Gilmer, *Trump's Latest California Swipe Wades Into Murky Legal Territory*, BLOOMBERG L. (Oct. 29, 2019, 5:00 AM), <https://news.bloombergenvironment.com/environment-and-energy/trumps-latest-california-swipe-wades-into-murky-legal-territory>.

²⁷ See Tripti Lamba & Harmeet Malhotra, *Role of Technology in Globalization with Reference to Business Continuity*, 1 GLOBAL J. OF ENTERPRISE INFO. SYS. 70, 71 (2009).

²⁸ Lillian Reed, *Who is Yumi Hogan? Maryland's First Lady Helped Secure Coronavirus Tests from Her Native South Korea*, BALTIMORE SUN (Apr. 20, 2020, 8:29 PM), <https://www.baltimoresun.com/coronavirus/bs-md-pol-who-is-yumi-hogan-20200420-20200420-k5kivvix4fgkvbgdzrpop7bfhe-story.html>.

²⁹ John Haughey, *Canadian Drug Import Plan in Florida Draws Legal Challenge From Pharmaceutical Industry*, WASH. EXAM'R (Nov. 25, 2020, 9:00 AM), <https://www.washingtonexaminer.com/politics/canadian-drug-import-plan-in-florida-draws-legal-challenge-from-pharmaceutical-industry>.

relations independently of the federal government. Part I explores how Subnational Foreign Relations (SFR)—known variably as “paradiplomacy” or “glocalization³⁰—fit within the U.S. federal framework, both constitutionally and customarily. Part II examines how the courts have scrutinized SFR in all its manifestations, striking it down in some forms and circumstances, and allowing them in others. Part III looks at the political response, particularly by Congress and the Executive, as well as by state and local officials. Part IV will compare how other countries address the use of such “soft law” by their subnational entities. Part V analyzes how subnational foreign relations operate within international legal norms and principles. Finally, Part VI will consider how governments at all levels rely on informal or nonbinding international agreements to further their interests and those of their constituents, whether in response to pressing challenges like climate change or as part of routine affairs of state.

This Note will conclude that subnational entities in the U.S. can and *should* have relations with foreign governments and entities. Contrary to popular belief, states and even cities are permitted far more legal and political flexibility to fulfill their interests vis-à-vis the international community. Subnational Foreign Relations can and do operate within the reasonable limits set by the U.S. Constitution, Congress, and the judiciary. The forces of globalization—which had just begun sprouting when the Constitution was ratified—warrant redefining the federalist framework adequate with the realities and challenges of the twenty-first century.

II. SUBNATIONAL FOREIGN RELATIONS IN THE U.S. FEDERAL SYSTEM

A. *Foreign affairs in the U.S. Constitution*

Section 10 of the Constitution begins by placing explicit limits on state action abroad. “No State shall enter into any Treaty,

³⁰ Samuel Lucas McMillan, *Foreign Relations of Subnational Governments*, Oxford Research Encyclopedia of Politics (Sep. 26, 2017), <https://doi.org/10.1093/acrefore/9780190228637.013.460>

Alliance, or Confederation,”³¹ nor shall they “enter into any Agreement or Compact with another State, or with a foreign Power” without the consent of the federal government, namely Congress.³² Barring Congressional approval, U.S. states are also prohibited from levying duties or tariffs on imports or exports.³³

Further, the Treaty Clause confers upon the President the “[power], by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur...”³⁴ As evidenced by the saga of the Paris Agreement, the President’s foreign affairs power has long been broadly construed as allowing so-called “executive agreements” without the Treaty Clause process.³⁵ (Indeed, President Biden re-entered the climate accord with as much ease as President Trump had withdrawn from it.)³⁶ The President is also granted exclusive responsibility for receiving ambassadors and “other public ministers” of foreign states.³⁷

Additionally, there are implicit doctrines that further distinguish state and federal powers on the international plane. The Dormant Foreign Affairs Preemption (also known as the Foreign Affairs Doctrine) prohibits states from passing laws that conflict with the federal government’s exclusive authority to conduct foreign affairs.³⁸ Similarly, the Dormant Foreign Commerce Clause preempts states from passing laws that interfere with Congress’ express constitutional power to “regulate Commerce with foreign Nations.”³⁹

Louis Henkin, one of the most influential contemporary scholars of international relations and U.S. foreign policy, acknowledges that

³¹ U.S. CONST., art. I, § 10, cl. 1.

³² *Id.* art. I, § 10, cl. 3.

³³ *Id.* art. I, § 10, cl. 2.

³⁴ *Id.* art. II, § 2, cl. 2.

³⁵ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 391 (1998).

³⁶ H.J. Mai, *U.S. Officially Rejoins Paris Agreement On Climate Change*, NPR (Feb. 19, 2021), <https://www.npr.org/2021/02/19/969387323/u-s-officially-rejoins-paris-agreement-on-climate-change>.

³⁷ U.S. CONST., art. II, § 3.

³⁸ Aaron Messing, *Nonbinding Subnational International Agreements: A Landscape Defined*, 30 THE GEO. ENVTL. L. REV. 173, 179 (2017).

³⁹ *Id.* at 183.

while the “language, the spirit, and the history of the Constitution” exclude states from foreign affairs, constitutional theory does not render states wholly “irrelevant or insignificant.”⁴⁰ Rather, state policies, actions, and interests directly and indirectly shape national foreign policy.⁴¹

To that end, states have a variety of both formal and informal mechanisms through which they engage on the international plane. The Constitution does not define or distinguish between a treaty, alliance, confederation, or compact.⁴² Nor is it clear whether comparable classes of instruments—such as an agreement, protocol, memorandum of understanding (MOU), or pact, among others—fit in this framework.⁴³ Such ambiguity has created an environment wherein state-foreign relations thrive in many forms.

B. *Subnational Foreign Relations in Practice*

International agreements between subnational units and foreign entities take many forms, some differing only semantically, others not even entailing formal agreements of any kind. Hence this Note uses the broad term “Subnational Foreign Relations” (SFR) to describe any and all means by which states, cities, and private actors participate in the international plane.

SFR manifests in at least five forms: (1) near-binding arrangements (NBA); (2) Memoranda of Understanding (MOU); (3) third-party representation, (4) unilateral declarations; and (5) foreign-state interactions (FSI).⁴⁴ Each differs in substance, purpose, methodology, and level of political and judicial scrutiny, albeit with some overlap.⁴⁵ All share an informal, extra-legal basis

⁴⁰ Louis Henkin, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (3d ed. 2002).

⁴¹ *Id.*

⁴² Abraham C. Weinfeld, *What Did the Framers of the Constitution Mean by “Agreements” and “Compacts”?*, 3 U. OF CHI. L. REV. 453, 453 (1936).

⁴³ See LEGAL SIDEBAR, CRS REPORT AND ANALYSIS, CONSTITUTIONAL LIMITS ON STATES’ EFFORTS TO “UPHOLD” THE PARIS AGREEMENT (2017); see also *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (Federal government may speak with “one voice” in regulating commerce with foreign countries).

⁴⁴ Messing, *supra* note 38, at 185.

⁴⁵ See *id.* at 194.

reflecting a legal and political milieu that is vague and uncertain towards SFR generally.

1. Near-Binding Arrangements

By definition, agreements under this category skirt closely with the sort of legally binding agreements explicitly prohibited by the Constitution.⁴⁶ They are almost binding in that they are backed not by a legal obligation *per se*, but by “tangible political pressure” placed on each party to fulfill their respective commitments.⁴⁷ The most emblematic example is the Conference of Great Lakes and St. Lawrence Governors and Premiers (GSGP), comprised of the chief executives of eight U.S. states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin) and two Canadian provinces (Ontario and Quebec).⁴⁸ The GSGP was formed with the explicit purpose of working “as equal partners to grow the region’s \$6 trillion economy and protect the world’s largest system of surface fresh water.”⁴⁹

The GSGP also serves as the secretariat of the Great Lakes–St. Lawrence River Basin Water Resources Agreement.⁵⁰ This “good-faith agreement” was signed in 2005 to further the goals of the 1985 Great Lakes Charter, under which the parties coordinate their efforts to preserve and manage the Great Lakes they each border.⁵¹ The parties were bound to fulfill their duties by nothing more than “good faith,” and at least once annually were to review their progress and advise one another on implementation.⁵² In 2008, the Great Lakes–St. Lawrence River Basin Water Resources Compact was ratified by the U.S. federal government to bind the states to the Great Lakes Agreement—but not their Canadian counterparts, which maintain their obligations through the Agreement and any implementing provincial legislation made therefrom.⁵³ Hence, this complex and

⁴⁶ *Id.* at 185.

⁴⁷ *Id.* at 185–86.

⁴⁸ *Id.* at 186.

⁴⁹ *History*, GREAT LAKES ST. LAWRENCE GOVERNORS & PREMIERS, <https://www.gsgp.org/about-us/history/> (last visited Feb. 7, 2021) [hereinafter GSGP].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See id.*

interwoven series of arrangements—made over the span of nearly forty years—is near binding in that the foreign parties remain committed for nonlegal reasons, such as goodwill and a mutual interest in sustaining a vital and shared water resource.⁵⁴

The GSGP has also served as the forum for numerous other collaborative initiatives, such as promoting tourism and developing uniform maritime standards for shipping. In 1990, it opened a “shared” trade office in Toronto, Canada that was the first to represent business interests across multiple states.⁵⁵ Several more offices were launched between 1992 and 2003 in Brazil, Chile, Argentina, South Africa, Australia, and China.⁵⁶ Since 2015, many more have been launched in Germany, the United Kingdom, the United Arab Emirates, Singapore, South Korea, and most recently Israel; trade missions are scheduled in 2021 in Brazil, Colombia, Japan, and South Korea.⁵⁷ As of 2021, the GSGP’s trade network reaches 91 countries on six continents.⁵⁸ These American and Canadian subnational units continue to cooperate across borders and the world on numerous shared interests—without any discernable legal or political challenge.⁵⁹

2. Memoranda of Understanding (MOU)

An MOU is only one degree lower in authority than a near-binding agreement, relying on political pressure and good faith to be fulfilled, but with fewer specific commitments and duties.⁶⁰

A quintessential MOU is the Global Climate Leadership Memorandum of Understanding, also known as the “Under2 MOU” for its central goal of lowering emissions to mitigate global warming to 2°C by the year 2050.⁶¹ Not unlike the U.S. Climate Alliance, it is explicitly pertains to subnational governments, boasting a community of 220 governments of all levels of political authority; a

⁵⁴ See generally GSGP, *supra* note 49.

⁵⁵ GSGP, *supra* note 40.

⁵⁶ *Id.*

⁵⁷ News, GREAT LAKES ST. LAWRENCE GOVERNORS & PREMIERS, <https://gsgp.org/projects/international-trade/> (last visited Apr. 10, 2021).

⁵⁸ *Id.*

⁵⁹ See generally *id.*

⁶⁰ Messing, *supra* note 38.

⁶¹ *Under2 Coalition*, THE CLIMATE GROUP, <https://www.theclimategroup.org/under2-coalition> (last visited Feb. 6, 2021).

map of signatories and “endorsers” shows a patchwork of countries, regions, provinces, and municipalities spanning six continents (including several U.S. states and cities).⁶² Yet the four-page MOU makes clear it is “neither a contract nor a treaty.”⁶³ Rather, the “[p]arties each have their own strategies to implement and achieve their goals and targets,” and agree broadly to cooperate and collaborate across a range of areas, from sharing methods to reduce pollution to exchanging ideas and technology for mitigating climate change.⁶⁴

As opposed to the near-binding Great Lakes Agreement, which establishes specific initiatives and projects, the Under2 MOU is essentially a set of guidelines backed by a symbolic expression of solidarity towards a shared goal.⁶⁵ Goodwill, good faith, and mutual interests are still motivating factors, but there is little in the way of political pressure, much less legal binding.⁶⁶

Two other subnational MOUs bear out their typical reliance upon the initiative of each party. In the early 2000s, California promulgated separate MOUs with the German *landers* (states) of Bavaria and North Rhine-Westphalia.⁶⁷ Each MOU aimed for cooperation in promoting and developing commercially and technologically viable green technology.⁶⁸ Neither agreement fully materialized, for the simple reason that their goals were never fleshed out, let alone implemented and institutionalized, by either of the parties.⁶⁹ Consequently, once the political leaders who negotiated the MOUs left power, these arrangement essentially left with them.⁷⁰

⁶² *Id.*; *States and Regions*, THE CLIMATE GROUP, <https://www.theclimategroup.org/our-work/states-and-regions-under2-coalition> (last visited Feb. 6, 2021).

⁶³ *Global Climate Leadership Memorandum of Understanding (MOU)*, UNDER2 COAL (last visited Feb. 7, 2021) <https://www.theclimategroup.org/sites/default/files/2020-09/under2-mou-with-addendum-english-us-letter.pdf>.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See* Messing, *supra* note 38, at 187.

⁶⁷ *Id.* at 189.

⁶⁸ *Id.*

⁶⁹ *See id.* at 189-90

⁷⁰ *See id.* at 190.

By contrast, a substantially similar MOU between Wisconsin and Bavaria in 1998—aimed at establishing “joint projects” to foster public-private partners in environmental management systems—was broadly successful, not only in “[achieving] its original objectives,” but in facilitating several other initiatives that were developed in subsequent years.⁷¹ This effectiveness was due to several reasons, including cultural affinity—Wisconsin delegates played up the state’s large population of German ancestry—support from nonstate actors such as businesses, and each party’s leadership working quickly to implement the necessary legal and regulatory changes.⁷² Both sides were driven by genuine enthusiasm, with “key bureaucrats” utilizing their skills and personal rapport to advance the MOU.⁷³

While the foregoing examples show MOUs as characteristic creatures of soft law—i.e., lacking any means of enforcement—such arrangements reflect the many tools and method that seek to achieve mutual goals without relying on the blunt instrument of state-backed law. The same informal, noncommittal agreements that make MOUs toothless—and therefore largely under the radar of courts and legislatures—also provide the flexibility for subnational entities to engage in foreign relations without coming into conflict with the Constitution.

3. Third Party Representation

This category of SFR is often superficially similar to an NBA or MOU except that “the formation and governance of the commitments [is taken] out of the hands of the subnational governments” and instead placed with a third party, which also has an administrative or implementing role.⁷⁴ In that respect, TPR is most characteristic of globalization’s ability to blur boundaries between governments, civil society, and the public.⁷⁵

⁷¹ *Id.* at 189–90.

⁷² HOLLEY ANDREA RALSTON, SUBNATIONAL PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT: TRANSATLANTIC COOPERATION BETWEEN THE UNITED STATES AND GERMANY, 85–86, 88–89, (Edward Elgar Pub. ed. 2013).

⁷³ *See id.* at 84–85, 88–89, 104 (describing strategies used by individuals whose work to were integral to MOUs).

⁷⁴ Messing, *supra* note 38, at 190.

⁷⁵ *Id.*

A case in point is the International Zero-Emission Vehicle Alliance (ZEV Alliance), which, while comprised of national, subnational, and municipal governments, is operated by a nonprofit organization: The International Council on Clean Transportation (ICCT). ZEV Alliance also receives some funding from private foundations.⁷⁶ Members endeavor to support one another in promoting the adoption of zero emission vehicles. Each member also commits itself to do whatever it can within its jurisdiction to meet this goal.⁷⁷ The ICCT serves as ZEV Alliance's secretariat and provides reports and publications to member governments.⁷⁸

The Global Covenant of Mayors for Climate & Energy (GCoM) is the result of a merger of two transnational coalitions: The Compact of Mayors, a group of mayors and city officials from across the Americas, and the Covenant of Mayors, a contemporaneous association of municipal leaders from across the European Union.⁷⁹ Membership is contingent on the city making commitments to reduce greenhouse gas emissions and implement climate change adaptation and mitigation.⁸⁰ The GCoM does not develop new standards or commitments of its own but serves as a transparent platform through which cities can track and support one another's progress.⁸¹ Cities that meet their goals receive an official seal from the GCoM, though those falling short incur no express penalty (other than perhaps some lost glory or standing).⁸²

Sister Cities International (SCI), a nonprofit organization based in Washington, D.C., seeks to forge and facilitate partnerships between U.S. and foreign municipalities, namely through sister-city

⁷⁶ *International Zero-Emission Vehicle Alliance (ZEV Alliance)*, UNEP, [http://climateinitiativesplatform.org/index.php/International_Zero-Emission_Vehicle_Alliance_\(ZEV_Alliance\)](http://climateinitiativesplatform.org/index.php/International_Zero-Emission_Vehicle_Alliance_(ZEV_Alliance)) (last visited Mar. 28, 2021).

⁷⁷ Press Release, ZEV Alliance, International ZEV Alliance Announcement (Dec. 3, 2015) (on file with author).

⁷⁸ See Messing, *supra* note 38, at 190.

⁷⁹ *About Us*, GLOBAL COVENANT OF MAYORS FOR CLIMATE AND ENERGY, www.globalcovenantofmayors.org/about/ (last visited Feb. 14, 2021).

⁸⁰ *Join Us*, GLOBAL COVENANT OF MAYORS FOR CLIMATE AND ENERGY, <https://www.globalcovenantofmayors.org/join-us/> (last visited Feb. 14, 2021).

⁸¹ Messing, *supra* note 38, at 191.

⁸² *Id.*

agreements.⁸³ Its network includes over 2,000 cities, states, and counties across more than 140 nations.⁸⁴ SCI accomplishes its work through a variety of activities and initiatives, such as showcasing the artwork of students from different member cities, hosting student exchanges, and holding summits and conferences for city residents.⁸⁵

Tellingly, many forms of SFR pertain to the environment, particularly climate change. This reflects the crux of subnational cooperation at the international: That some issues are too big, or too politically and legally diffuse, to be handled by, or entrusted to, one national entity.

4. Unilateral Declarations

Unlike other types of SFR, unilateral declarations (UDs) do not involve direct engagement with a foreign entity.⁸⁶ Instead, they express a subnational government's positions, policies, or actions with respect to an international issue.⁸⁷ UD's manifest in a variety of ways, from statements of solidarity with a cause or community, to articulations of disagreement with the foreign policy or action of the national government.⁸⁸ In all forms, universal declarations aim to "raise public consciousness, stimulate public discussion, and persuade or influence the federal Government to consider or reexamine particular policies," especially with respect to human rights.⁸⁹

Notable examples of UD's include Massachusetts announcing sanctions against Burma (Myanmar) over human rights abuses; Takoma Park, Maryland declaring itself a "nuclear free zone" (just before Congress failed to ratify the Comprehensive Nuclear Test Ban Treaty); and San Francisco (soon followed by Boston and Chicago) unilaterally implementing provisions of the Convention on

⁸³ *About Us*, SISTER CITIES INT'L, <https://sistercities.org/about-us/> (last visited Mar. 2, 2021).

⁸⁴ *Id.*

⁸⁵ *What We Do*, SISTER CITIES INT'L, <https://sistercities.org/what-we-do/programs/> (last visited Feb. 14, 2021).

⁸⁶ See Messing, *supra* note 38, at 192.

⁸⁷ See *id.*

⁸⁸ Bilder, *supra* note 19, at 826.

⁸⁹ *Id.*

the Elimination of all Forms of Discrimination Against Women (CEDAW), after the U.S. rejected its adoption. (Dozens of cities, counties, and states have since followed suit with their own declared implementation of CEDAW.)⁹⁰

Most UD's are symbolic and therefore avoid public, political, legal pushback—even when conflicting with official federal policy. A high-profile exception was Massachusetts' sanctions against Burma, which the U.S. Supreme Court unanimously struck down on the grounds that it interfered with a similar federal act, and thus encroached on the foreign affairs powers of Congress and the President.⁹¹ Otherwise, UD's that are narrowly tailored to policies within the purview of the state or city are at least tacitly allowed.⁹² When challenged, courts uphold UD's that merely “mimic international doctrine” without implicating any international action (such as sanctions);⁹³ thus, the legality of UD's, as with so many other types of SFR, remains largely ambiguous.⁹⁴

Also uncertain is whether UD's come under First Amendment guarantees of freedom of speech, peaceful assembly, and the right to petition the government. The flurry of state and city proclamations in support of international climate treaties, like the Kyoto Protocol and Paris Agreement, went largely unchallenged, even as they led to the establishment of formal international platforms for subnational participation, such as the Non-State Actor Zone for Climate Action (NAZCA) and the aforementioned Global Covenant of Mayors for Climate & Energy.⁹⁵

5. Foreign-State Interactions

While the term “Foreign-State Interactions” could arguably be interchangeable with Subnational Foreign Relations, it is used in this Note as a “catch-all” for any connection between a subnational unit

⁹⁰ *Cities for CEDAW, Resources: Sample Resolutions, Ordinances and Executive Directives*, CITIES FOR CEDAW, <http://citiesforcedaw.org/resources/>. (last visited Mar. 2, 2021).

⁹¹ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 363 (2000).

⁹² Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 *GEO WASH. INT'L L. REV.* 537, 541, 550, 552, (2005).

⁹³ *Id.* at 548-49, 551-52.

⁹⁴ *See id.* at 551-52.

⁹⁵ Messing, *supra* note 38, at 193-94.

and foreign entity that fails to fit neatly into a single category. Such relationships are generally characterized by their “soft” nature—lacking a formal agreement, framework, or mechanism—and/or by their manifestation solely through personal or economic ties between actors of both jurisdictions.⁹⁶ FSI is often facilitated by private forces such as nonprofits, chambers of commerce, businesses, media, civil society groups, and even specific individuals.⁹⁷

A quintessential example is the previously mentioned deal on COVID-19 test kits between Maryland and South Korea. Dissatisfied with the Trump Administration’s handling of the pandemic, particularly the slow distribution of desperately-needed diagnostic equipment, the administration of Republican Governor Larry Hogan looked abroad for assistance—namely by utilizing the foreign ties of his Korean-born wife Yumi Hogan.⁹⁸ Maryland’s First Lady, lacking any political or diplomatic background, made a personal appeal to South Korea’s ambassador in Korean, stressing the “special relationship” between her adopted state and native country.⁹⁹ Several other “high-level state officials” took part in the negotiations, which Governor Hogan dubbed “Operation Enduring Friendship.”¹⁰⁰ The nearly month-long effort culminated in the purchase of half a million test kits by Maryland’s government from a Korean firm.¹⁰¹ Hogan announced the deal alongside a high-ranking official from South Korea’s foreign ministry; the South Korean flag was displayed with those of the U.S. and Maryland.¹⁰²

⁹⁶ *Hard Law/Soft Law*, ECCHR, <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (last visited Feb 14, 2021).

⁹⁷ See Tanja A. Börzel, *Private Actors on the Rise? The Role of Non-State Actors in Compliance with International Institutions*, 2000/14 MPI COLLECTIVE GOOD PREPRINT, Apr. 2001, at 1-2.

⁹⁸ Pamela Wood & Luke Broadwater, *Maryland Secures 500,000 Coronavirus Tests from South Korea; Hogan’s Initiative Sparks Criticism from Trump*, BALTIMORE SUN (Apr. 20, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-hogan-testing-20200420-atxs3grvbjdgpzzt4tfhuhnbm-story.html>.

⁹⁹ Lilian Reed, *Who is Yumi Hogan? Maryland’s First Lady Helped Secured Coronavirus Tests From Her Native South Korea*, BALTIMORE SUN (Apr. 20, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-pol-who-is-yumi-hogan-20200420-20200420-k5kivvix4fgkvbgdzrpop7bfhe-story.html>.

¹⁰⁰ Wood & Broadwater, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² *Id.*

Hogan spoke glowingly of the South Korean president's remarks recognizing the special partnership.¹⁰³

This was not the state's first foray into international relations: In 2015, the Hogans conducted several "international trade missions" to East Asia on behalf of Maryland.¹⁰⁴ Two years later, First Lady Hogan visited South Korea to promote Maryland, its flagship university, and its business opportunities; she even met with South Korea's first lady in the official residence of the South Korean president.¹⁰⁵ Mrs. Hogan further solidified the relationship by establishing a sister-state relationship between Maryland and her home province in South Korea.¹⁰⁶ Leveraging these personal and quasi-political connections proved pivotal to securing the test kits; it even earned Yumi Hogan South Korea's highest civilian honor.¹⁰⁷

Similar, if less dramatic, examples manifest in other ways, usually spurred by larger global events seemingly far removed from state and local concern. Amid the Trump Administration's growing animus towards Mexico, the *Houston Chronicle* stressed the importance of Texas-Mexico relations, highlighting the significant amount of bi-national trade that supports jobs in the state.¹⁰⁸ When U.S.-Canada relations similarly cooled over trade disputes, one of Florida's leading publications stressed the "indispensable" relationship between the state and America's northern neighbor—including the widespread investment by Canadian firms and the billions spent by Canadian tourists and homebuyers.¹⁰⁹ Despite an

¹⁰³ *Id.*

¹⁰⁴ Reed, *supra* note 99.

¹⁰⁵ *Id.*

¹⁰⁶ Ben Leonard, *Yumi Hogan, Maryland's First Lady, Receives South Korea's Highest Civilian Honor*, BALT. SUN (Nov. 19, 2020), <https://www.baltimoresun.com/politics/bs-md-pol-yumi-hogan-south-korea-honor-order-of-civil-merit-maryland-20201119-osjerofnp5cmbomx4dz7x7dmom-story.html>.

¹⁰⁷ *Id.*

¹⁰⁸ Tony Payan, *Texas Benefits Most in a Collaborative U.S.-Mexico Relationship*, HOUS. CHRON. (June. 2, 2018), <https://www.houstonchronicle.com/opinion/outlook/article/Texas-benefits-most-in-a-collaborative-12963037.php>.

¹⁰⁹ *Canada and Florida are Indispensable Business Partners. We Need to Expand the Relationship*, SUN SENTINEL (Apr. 26, 2019), <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-fla-canada-trade-20190426-story.html>.

all-out trade war and diplomatic spat between the U.S. and China, the country's largest state and economy, California, announced in 2019 a "multi-organizational partnership focused on expanding California's trade and investment efforts in China."¹¹⁰ This network was the fruit of an earlier partnership between California and the Bay Area Council, a nonprofit focused on promoting trade relations between the state and China.¹¹¹

Foreign-State Interactions best reflect how the impact of larger geopolitical issues unavoidably seep into smaller jurisdictions that are otherwise far removed from the formal levers of foreign policy—hence the use of localized tools like newspapers or business associations. State, local, and nongovernment actors increasingly take matters into their own hands through an array of accessible channels, from the bully pulpit of news media to personal ties abroad.

III. JUDICIAL SCRUTINY OF SUBNATIONAL FOREIGN RELATIONS

A. *Decisions Constraining Subnational Foreign Relations*

Courts have consistently held that foreign affairs are the purview of the federal government, which exercises "full and exclusive responsibility and control over our nation's foreign relations."¹¹² In particular, the President serves as the "sole organ" of the country in international affairs.¹¹³ The very purpose of the Constitution, as opposed to the Articles of Confederation, was to ensure that the country could speak as "one nation,"¹¹⁴ particularly "in respect of

¹¹⁰ Press Release, The State of California, Statewide Partners Bolster Trade and Investment Efforts in China (Sept. 10, 2019) <https://static.business.ca.gov/wp-content/uploads/2019/12/CTIN-Press-Release-2019-f.pdf> (on file with the California Governor's Office of Business and Economic Development).

¹¹¹ *Id.*

¹¹² Bilder, *supra* note 19, at 823-24 (citing *United States v. Pink*, 315 U.S. 203, 233 (1942)); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

¹¹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

¹¹⁴ THE FEDERALIST NO. 42 (James Madison).

all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.¹¹⁵

Cases delineating the foreign relations powers of states are few and far in between.¹¹⁶ The earliest and best known federal decision on the matter is the 1840 case, *Holmes v. Jennison*, which arose when the governor of Vermont ordered the arrest and extradition of a Canadian fugitive absent an extradition treaty between the U.S. and Canada.¹¹⁷ In a plurality decision, the Court held that Vermont's governor exceeded his authority under the Constitution, as the power to extradite is "confided to the federal government,"¹¹⁸ specifically the President, and is "essentially national in its character."¹¹⁹ The Court also reaffirmed that under the Constitution, "the states are prohibited from entering into any treaty, agreement, or compact, with a foreign state:"¹²⁰

Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government: and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors; both of which are immediately connected with the question before us, and undoubtedly belong exclusively to the federal government. It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states, is utterly incompatible with this evident intention; and would expose us to one of those dangers, against which the

¹¹⁵ *United States v. Belmont*, 301 U.S. 324, 331 (1937).

¹¹⁶ International Law Behind the Headlines, *Episode 14: Is California's Climate Accord with Quebec Illegal? With Jean Galbraith*, AM. SOC'Y OF INT'L L. (Oct. 3, 2019), <https://www.asil.org/resources/podcast/ep14>.

¹¹⁷ *Holmes v. Jennison*, 39 U.S. 540, 540 (1840).

¹¹⁸ *Id.* at 588.

¹¹⁹ *Id.* at 582.

¹²⁰ *Id.* at 588.

framers of the Constitution have so anxiously endeavoured to guard.¹²¹

Holmes stands for the proposition that the Constitution irrefutably relegates foreign affairs exclusively to the federal government.¹²² The Court reasoned that to find otherwise would lead down a dangerous road of “confusion and disorder,” with several states exercising conflicting powers and “distinct wills” vis-à-vis each other and the national government.¹²³

Yet there are some caveats in the decision. The Court concedes that the matter before it is a “single isolated case” of a governor acting unilaterally without any governing framework—be it federal law, a treaty, or some sort of agreement with Canada or its provinces.¹²⁴ The controversy was narrowly centered on extradition, which was already well established as exclusively the purview of treaty law.¹²⁵ Moreover, towards the end of his controlling opinion, Chief Justice Taney grants that agreements between states and foreign entities could pass constitutional muster under the right parameters:

Under the second clause of the tenth article of the first section of the Constitution, any state, with the consent of Congress, may enter into such an agreement with the Canadian authorities. The agreement would, in that event, be made under the supervision of the United States, and the particular offences defined in which the power was to be exercised; and the national character of the persons who were to be embraced in it, as well as the proof to be required to justify the surrender. The peculiar condition of the border states would take away all just cause of complaint from other nations, to whom

¹²¹ *Id.* at 575-76.

¹²² *Id.* at 549-550.

¹²³ *Holmes*, 39 U.S. 450 at 578.

¹²⁴ *Id.* at 584.

¹²⁵ *See id.* at 545; *see also The World's Oldest Extradition Treaty*, THE WORLD (June 27, 2013), <https://www.pri.org/stories/2013-06-27/worlds-oldest-extradition-treaty> (noting tradition goes as far back as 3,000 years ago with extradition agreement between Egypt and Hittite Empire).

the same comity was not extended; and at the same time, the proper legal safeguards would be provided, for the protection of citizens of other states, who might happen to become obnoxious to the Canadian authorities, and be demanded as offenders against its laws. They would not be left to the unlimited discretion of the states in which they may happen to be found, when the demand is made; as must be the case, if the power in question is possessed by the states.¹²⁶

As of January 2020, *Holmes* appears to have been cited only once, in the 1917 decision in *McHenry County v. Brady*.¹²⁷ The case regarded a dispute over water use and management between the residents of North Dakota and their Canadian neighbors.¹²⁸ The Supreme Court of North Dakota construed the *Holmes* ruling as narrowly applying to extradition, and thus that it did not rule out state-foreign agreements categorically, “but only those agreements or compacts which affect the supremacy of the United States, or its political rights, or which tend in any measure to increase the political power of the states as against the United States or between themselves.”¹²⁹

It would be another century before the Court explicitly revisited the issue of SFR in *United States v. Pink*.¹³⁰ There, it reaffirmed that foreign affairs powers were vested exclusively in the federal government and could be exercised even if in conflict with state laws or policies.¹³¹ Echoing Taney’s warning in *Holmes*, the Court’s majority warned that:

¹²⁶ *Holmes*, 39 U.S. 340 at 578-79.

¹²⁷ *McHenry County v. Brady*, 163 N.D. 540, 544 (1917).

¹²⁸ *Id.* at 542.

¹²⁹ *Id.* at 545.

¹³⁰ *U.S. v. Pink*, 315 U.S. 203, 231 (1942).

¹³¹ *Id. State Laws Affecting Foreign Relations-Dormant Federal Power and Preemption*, CORNELL L. SCH. LEGAL INFO. INST., www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/state-laws-affecting-foreign-relations-dormant-federal-power-and-preemption#fn502art2 (last visited Mar. 5, 2021); *see also* Bilder, *supra* note 19, at 825.

[If] state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Certainly, the conditions for “enduring friendship” between the nations, which the policy of recognition in this instance was designed to effectuate, are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.¹³²

Specifically, New York’s policy toward the state branch of a bank owned by the Soviet Government risked undermining U.S. recognition of the Soviet Union.¹³³ (Though unmentioned in the 1942 *Pink* decision, the U.S. had just entered the Second World War, where the Soviet Union was a key combatant and ally; it is possible that this context informed the Court’s restrictive approach to state involvement in the foreign domain.)

Nevertheless, the Court has only once invoked the doctrine of Dormant Foreign Relations Power to strike down a state law that otherwise did not conflict with explicit federal policy.¹³⁴ In its 1968 decision in *Zschernig v. Miller*, it invalidated an Oregon law that effectively prevented inheritance by citizens of communist countries.¹³⁵ Unlike in *Pink*, there was no formal federal policy or relationship that was infringed upon by this statute; on the contrary, an *amicus* brief by the Department of Justice stated that the law would not interfere with U.S. foreign relations.¹³⁶ Notwithstanding such assurances from the federal government, nor the Court’s own admission that probate is wholly within the jurisdiction of states, the Court ruled that disadvantaging heirs in communist countries would

¹³² *Id.* at 232-33

¹³³ *Id.* at 231-32

¹³⁴ *State Laws Affecting Foreign Relations-Dormant Federal Power and Preemption*, CORNELL L. SCH. LEGAL INFO. INST., www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/state-laws-affecting-foreign-relations-dormant-federal-power-and-preemption#fn502art2 (last visited Mar. 5, 2021); *see also* Bilder, *supra* note 19, at 825.

¹³⁵ *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

¹³⁶ *Id.* at 434.

“impair the effective exercise of the Nation’s foreign policy;”¹³⁷ only the federal government could engage in such actions.¹³⁸

Since *Zschernig*, the Court has repeatedly struck down various state laws for intruding on specific foreign policies or relationships of the federal government. In *Barclays Bank PLC v. Franchise Tax Bd. of California*, it articulated the Dormant Foreign Commerce Clause, whereby state laws that encroach upon foreign commerce—such as taxing “an activity lacking a substantial nexus to the taxing state—are unconstitutional even if there is no federal law or regulation over the activity in question.¹³⁹ In *Crosby v. National Foreign Trade Council*, it ruled unconstitutional a Massachusetts law prohibiting state residents from conducting business with Myanmar, finding that it conflicted with a federal statute giving the President authority over economic sanctions.¹⁴⁰ In *Massachusetts v. EPA*, the Supreme Court held that U.S. states inherently “[surrender] certain sovereign prerogatives,” such as the power to “negotiate an emissions treaty with China or India ...”¹⁴¹

On similar grounds, in *American Insurance Ass’n v. Garamendi*, the Court struck down California’s Holocaust Victim Insurance Relief Act (HVIRA), which required all insurance companies in the state to publish information on policies held by persons in Europe from 1920 to 1945, including the names of the owners and the status of the policies. The law’s intention was to facilitate reparations of insurance policies or proceeds that had been confiscated by Nazi Germany.¹⁴² Citing its decisions in *Zschernig*, *Pink*, and *Crosby*, the Court reasoned that the HVIRA “[interfered] with the president’s ability to conduct the nation’s foreign policy,” since it was “longstanding practice” to rely upon executive agreements with Germany and other European countries to resolve such claims.¹⁴³

¹³⁷ *Id.* at 440.

¹³⁸ *Id.* at 441.

¹³⁹ *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 310-311 (1994).

¹⁴⁰ *Crosby v. National Foreign Trade Council*, 530 U.S. at 363; *see also* *Japan Line v. County of Los Angeles*, 441 U.S. at 446 (striking down a California property tax on foreign-owned cargo ships under the dormant Foreign Commerce Clause).

¹⁴¹ *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007).

¹⁴² *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003).

¹⁴³ *Id.* at 419-20.

The Court affirmed that the President had the “lead role” in foreign policymaking, including the authority to execute agreements without Senate approval.¹⁴⁴

The opinion in *Garamendi* is notable for its dictum distinguishing between two forms of the Dormant Foreign Affairs Preemption—field preemption and conflict preemption:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government.

Where, however, a State has acted within what Justice Harlan called its “traditional competence,” but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.¹⁴⁵

Applying the *Garamendi* standard, the Court determines whether a state law triggers the Dormant Foreign Affairs Preemption by balancing “the executive authority underlying the foreign policy, any historical tradition supporting the state law, and the degree to which the two conflict.”¹⁴⁶ The *Zschernig* decision is most illustrative of field preemption, as it concerned whether the state’s actions had a “direct impact on foreign relations” and whether it may “adversely affect the power of the central government to deal with those problems.”¹⁴⁷ This standard is further articulated in the Ninth Circuit Court’s decision in *Movsesian v.*

¹⁴⁴ *Id.* at 415.

¹⁴⁵ *Id.* at 419.

¹⁴⁶ Messing, *supra* note 38, at 180.

¹⁴⁷ *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

Victoria Versicherung AG: That the state law must have an impact on foreign affairs that is “more than ... incidental or indirect,” including displaying “a distinct political point of view on a specific matter of foreign policy” that is controversial or sensitive.¹⁴⁸ In essence, the law is preempted if it risks putting the federal government in a difficult or even potentially dangerous position in global affairs.¹⁴⁹ Hence the Court in *Zschernig* warned that international controversies arising out of “real or imagined wrongs” by a government could potentially lead to war.¹⁵⁰

Illuminating this standard further is *Clark v. Allen*, which held that the foreign affairs power of the federal government does not preempt state or local legislation that has only “some incidental or indirect effect on foreign countries.”¹⁵¹ The Court observed that many state laws have some bearing on the foreign domain without necessarily “[crossing] the forbidden line” into federal territory.¹⁵² Examples would ostensibly include “resolutions urging nuclear arms control and respect for human rights [which] seem intended primarily to raise public consciousness, stimulate public discussion, and persuade or influence the federal Government to consider or reexamine particular policies.”¹⁵³ The Court in *Zschernig* explicitly cited *Clark* in permitting states to engage in actions and relations on the world stage—albeit along ill-defined and unclear lines.¹⁵⁴

Based on the foregoing decisions, for any form of SFR to pass constitutional muster, they must meet the following criteria:

1. Avoid conflicting with existing treaties, executive agreements, or federal policy;
2. Remain within the domain of accepted state-level power;
3. Avoid interfering with explicit federal powers or dormant powers (such as over foreign commerce); and
4. Promote merely symbolic or “expressive” objectives.

¹⁴⁸ *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076 (9th Cir. 2012).

¹⁴⁹ *Id.*

¹⁵⁰ *Zschernig*, 389 U.S. at 441

¹⁵¹ *Clark v. Allen*, 331 U.S. 503, 517 (1947).

¹⁵² *Id.*

¹⁵³ *Bilder*, *supra* note 19, at 826.

¹⁵⁴ *Henkin*, 389 U.S. at 432.

Aside from the first criterion, which is relatively concrete—relying on explicitly articulated laws and agreements—the latter remain underdeveloped and vague, as evidenced by the sequence of U.S. Supreme Court decisions attempting to delineate, case-by-case, what matters fall within the federal domain or potentially impact foreign relations.

B. *Decisions Favoring or Supporting Subnational Foreign Relations*

As early as 1796—less than a decade after the Constitution was ratified—the U.S. Supreme Court addressed the parameters of state and federal governments with regards to foreign policy.¹⁵⁵ *Ware v. Hylton* centered on a Virginia law that allowed citizens of the state to renege on their debts to British subjects.¹⁵⁶ The law was struck down because it contravened the Treaty of Paris with Great Britain, which obligated both countries to allow one another’s creditors to collect their debts.¹⁵⁷ Laying down perhaps the earliest foundation for Dormant Foreign Affairs Preemption, the Court primarily cited the Supremacy Clause of the Constitution, which holds that “all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, [anything] in the Constitution, or laws, of any State to the contrary notwithstanding.”¹⁵⁸ The *Ware* opinion also makes repeated references to the “law of nations,” as international law was then known.¹⁵⁹ On that note, the Court found that both federal and state governments were obligated to conform with the customs and practices of foreign states, which Virginia’s law had violated.¹⁶⁰

¹⁵⁵ *Ware v. Hylton*, 3 U.S. 199, 281 (1796).

¹⁵⁶ *Id.* at 199-200.

¹⁵⁷ *Id.* at 236.

¹⁵⁸ *Id.* (citing U.S. CONST. art. VI, cl. 2).

¹⁵⁹ *Ware*, 3 U.S. at 215.

¹⁶⁰ *Id.* at 266 (“[T]he acts were not for that reason void, but the State was answerable to the United States, for a violation of the law of nations, which the nation injured might complain of to the sovereignty of the Union.”); *see also id.* at 269 (“I believe there can be no doubt, but that according to the law of nations, even on the most modern notions of it, a sequestration merely for the purpose of recovering the debts, and preventing the remittance of them to the enemy, and

In effect, the Court privileged international law and the federal government's duty to comply with it, as it would reaffirm a little over a century later in *The Paquete Habana; The Lola*.¹⁶¹ There, the Court also appears to suggest that, absent a conflict with federal law, a treaty, or international law, states can engage in the foreign sphere, either through domestic laws with international implications, or through direct relationships with foreign entities.¹⁶² This is also alluded to in the *Paquete Habana* decision, which found that:

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.¹⁶³

Although *Paquete Habana* concerned violations of international law by the federal government, it reflects a consistent theme since *Ware* of privileging foreign relations and conformity to international norms without necessarily excluding states.¹⁶⁴

Two decades after the *Paquete Habana* decision, the Court reaffirmed the supremacy of treaties—and by extension

thereby strengthening him, and weakening the government, would be allowable...”).

¹⁶¹ See generally *The Paquete Habana; The Lola*, 175 U.S. 677, 700 (1900).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *Ware*, 3 U.S. at 223-24 (1796) (“If Virginia as a sovereign State, violated the ancient or modern law of nations . . . she was answerable in her political capacity to the British nation, whose subjects have been injured in consequence of that law. Suppose a general right to confiscate British property, is admitted to be in Congress, and Congress had confiscated all British property within the United States, including private debts: would it be permitted to contend in any court of the United States, that Congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in Congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode, and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided she had not delegated such power to Congress, before the making of the law of October 1777 . . .”).

international legal principles—in *Missouri v. Holland*.¹⁶⁵ There, the Court addressed the federal government’s ability to enter treaties that abrogated powers arguably reserved for the states by the Tenth Amendment.¹⁶⁶ Missouri challenged federal legislation that implemented a treaty with the United Kingdom banning the hunting of certain migratory birds, arguing that regulating game was not an express power of the federal government in the Constitution; thus, per the Tenth Amendment, the regulation of game was relegated to the states.¹⁶⁷

Citing, in part, its decision in *Ware*, the Court’s majority ruled that treaties “are as binding within the territorial limits of the States as they are elsewhere” in the country, and that while “the great body of private relations usually fall within the control of the State,” treaties, through the Supremacy Clause, may supersede even these powers.¹⁶⁸ Consistent with the Court’s precedent, *Missouri* once again elevates America’s commitment to its international obligations, specifically with respect to treaties, even at the apparent expense of state autonomy.¹⁶⁹

For the purpose of this Note’s argument, however, *Missouri* is notable for Justice Holmes’ dictum that the Constitution is a living instrument:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does

¹⁶⁵ *State of Missouri v. Holland*, 252 U.S. 416, 419 (1920).

¹⁶⁶ *Id.* at 423.

¹⁶⁷ *Id.* at 429.

¹⁶⁸ *Id.* at 434-35.

¹⁶⁹ *Id.* at 435.

not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.¹⁷⁰

The foregoing excerpt—read in consideration of earlier decisions favoring international law and comity—reasonably supports the proposition that the Constitution allows for Subnational Foreign Relations. Accepting the doctrine of an organic Constitution that can change in the absence of express “prohibitory words,” the advent of globalization, as well as inherently global problems such as climate change, warrants an interpretation of the Constitution that allows for a commensurate response.¹⁷¹ Even in the early nineteenth century, the Court found that the Constitution was intended “to be adapted to various crises of human affairs.”¹⁷²

Although it did not concern an agreement with a foreign power, the 1893 case *Virginia v. Tennessee*¹⁷³ provides another accepted standard that is broadly favorable to the constitutionality of SFR.¹⁷⁴ There, the Compact Clause was implicated by a boundary between the two states that had not received any explicit congressional approval.¹⁷⁵ In its review of the Virginia-Tennessee agreement, the Court found no violation of the Compact Clause, determining that there was “implicit congressional consent.”¹⁷⁶ The Court reasoned that the boundary agreement did not increase the political power of the states such that it encroached upon the domains and powers of the federal government.¹⁷⁷ Based on the *Virginia* decision, the Constitution’s prohibition of interstate agreements lacking congressional consent is not absolute; rather, it is conditioned on

¹⁷⁰ *Id.* at 433-34.

¹⁷¹ *Holland*, 252 U.S. at 433.

¹⁷² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

¹⁷³ *Virginia v. Tennessee*, 148 U.S. 503, 504 (1893).

¹⁷⁴ *Glennon & Sloane*, *supra* note 23, at 35.

¹⁷⁵ *Virginia*, 148 U.S. at 503.

¹⁷⁶ *Id.* at 521.

¹⁷⁷ *Id.* at 519.

whether the agreements cover matters determined to be outside the ambit of state powers.¹⁷⁸

The Interstate Compact Doctrine that emerged from the *Virginia* decision has been relied upon by jurists, scholars, and some courts in testing the constitutionality of SFR.¹⁷⁹ However, the Court itself has never invoked the doctrine in its assessment of SFR,¹⁸⁰ and it remains an unsettled question as to whether the “*Virginia* standard applies to state compacts with foreign powers.”¹⁸¹ Nevertheless, *Virginia* remains key in shifting the Constitution’s “textual default rule” from one that regards SFR as “presumptively invalid absent congressional approval to one that regards them as *presumptively valid* absent congressional *disapproval*” (emphasis added).¹⁸²

Indeed, from *Holmes* to *Garamendi*, no judicial decision has ever interpreted the Constitution as categorically prohibiting states from conducting foreign affairs. Instead, states acting in the international sphere or passing legislation with international implications need only follow certain parameters that have gradually but consistently been developed since *Ware*—parameters that have yet to be fully clarified.

By that token, it is worth revisiting the *Holmes* decision, Justice Baldwin’s opinion on the international implications of Vermont’s unilateral extradition of a Canadian fugitive:

By the course which has been taken, all danger of interfering with the relations of the United States and foreign powers, either on matters of commercial intercourse, or diplomatic concern is avoided; such interference could happen only on the refusal to deliver up the fugitive, on the demand or request of the authorities of Canada; for a compliance with either, would rather add strength to, than tend to weaken the pre-existing relations of amity and comity between the two nations. On the other hand,

¹⁷⁸ *Id.* at 522.

¹⁷⁹ Glennon et al., *supra* note 23, at 281.

¹⁸⁰ *Id.*

¹⁸¹ Letter from William H. Taft IV, Legal Adviser of the Department of State, to Senator Byron L. Dorgan of North Dakota (Nov. 20, 2001) (on file with the U.S. Department of State).

¹⁸² Glennon et al., *supra* note 23, at 283.

if the delivery was spontaneous, and made in the true spirit of border peace, and mutual safety from crime, the boon would be the more acceptable; or if the authorities of the state should send the fugitive back whence he came, those of Canada would have no cause of complaint, because they had made no reclamation, or because Vermont was unwilling to incorporate among its citizens a foreigner whom his own government was disposed not to take back.¹⁸³

Justice Baldwin, and the three justices who joined his opinion, concedes that even if Vermont's actions contravened the Compact Clause and foreign relations domain of the federal government, they were nonetheless invaluable both morally and practically.¹⁸⁴ The state was promoting a mutually beneficial policy of crime control and ensuring good relations with a neighboring country that could later be reciprocated.¹⁸⁵ Far from undermining the national government's international standing, Vermont was helping to enhance it.

Pursuant to Justice Baldwin's view, allowing states their constitutional right to engage in positive foreign relations is not only proper but generally beneficial. This reasoning may account for why courts have not categorically invalidated any type of Subnational Foreign Relations. The coalition of subnational entities and civil society groups that sought to salvage the Paris Agreement is one key example of the merits of SFR—but far from the only one. The potential boon of allowing states to conduct (limited) foreign relations may account for why the response by the political branches has been even more muted than that of the judiciary.

¹⁸³ *Holmes v. Jennison*, 39 U.S. 614, 619-20 (1840).

¹⁸⁴ *Id.* at 620.

¹⁸⁵ *Id.*

IV. POLITICAL RESPONSES

Notwithstanding the Trump Administration's suit against California,¹⁸⁶ "the scope and extent of this recent state and local involvement in foreign affairs [...] occasioned little reaction from Congress or the Executive..."¹⁸⁷ Notably, none of the specific instances of Subnational Foreign Relations discussed in previous sections were challenged by the federal government. Even the forms of SFR that require express congressional approval have been overlooked.¹⁸⁸

In some instances, state actions on the international plane have received at least tacit support by the federal government. Congress explicitly drafted the 1986 Comprehensive Anti-Apartheid Act to avoid conflicting with dozens of existing state and local antiapartheid laws across the country.¹⁸⁹ Some years later, Congress left it to the states to carry out implementation of parts of the Uruguay Round Agreement Act, which was passed to incorporate several international trade agreements entered by the U.S.¹⁹⁰ Similar implementation powers were granted in the ratifications of the International Covenant on Civil and Political Rights and of the Covenant on the Elimination of all Forms of Racial Discrimination.¹⁹¹

In 2003, Kansas concluded an agreement with Cuba, which was then designated a state sponsor of terrorism by the U.S. Department of State.¹⁹² Cuba agreed to buy \$10 million of Kansas' agricultural products in exchange for the state endorsing an end to the embargo.¹⁹³ Two years later, a Kansas representative introduced a bill in Congress to repeal trade and travel restrictions against Cuba,

¹⁸⁶ See generally *United States v. California*, No. 19-cv-02142 (E.D. Cal. Mar. 12, 2020) (order granting partial summary judgment).

¹⁸⁷ Bilder, *supra* note 19, at 823.

¹⁸⁸ Glennon et al., *supra* note 23, at 284.

¹⁸⁹ *Id.*

¹⁹⁰ Henkin, *supra* note 38, at 151; See Uruguay Round Agreements Act, Pub. L. No. 103-465 (1994).

¹⁹¹ Henkin, *supra* note 40, at 170 n.5.

¹⁹² Duncan B. Hollis, *Unpacking the Compact Clause*, TEXAS L. REV. (May 5, 2009); *State Sponsors of Terrorism*, U.S. DEPT. OF STATE, <https://2001-2009.state.gov/s/ct/c14151.htm> (last visited Mar. 4, 2021).

¹⁹³ Hollis, *supra* note 192, at 185.

which was officially endorsed by the Lieutenant Governor of Kansas.¹⁹⁴

Any amicable arrangement between one of America's most conservative states and one of its major (and officially socialist) foreign adversaries would be unthinkable in any context—let alone in post 9/11 America. Yet the Kansas-Cuba agreement garnered no constitutional scrutiny, public attention, or repudiation by either Congress or the Bush Administration.¹⁹⁵

Such apathy is par for the course for SFR.¹⁹⁶ In the century leading up to 2009, only a handful of agreements between states and foreign entities were formally reviewed by Congress, of which only one was explicitly rejected.¹⁹⁷ This is not for lack of opportunity: Since 1955, over 340 types of SFR have been created by all but nine states, with 200 being concluded between 1999 and 2009 alone.¹⁹⁸ These agreements attract so little attention that there is no official monitoring body or mechanism for keeping track of them—meaning the actual number may be far higher.¹⁹⁹ Knowingly or not, Congress appears to accede to the *Virginia* decision's finding of SFR as presumptively valid.²⁰⁰

The Executive has similarly been loath to monitor, much less review, instances of Subnational Foreign Relations; the few times it has done so have only been by request.²⁰¹ Before its lawsuit against California in October 2019, only once did the Executive conduct a “sustained analysis” of any SFR: An MOU between Missouri and the Canadian province of Manitoba on water resource management.²⁰² An assessment by the State Department—which considered, *inter alia*, the decisions in *Virginia*, *McHenry County*, and *Holmes*—concluded that the Missouri-Manitoba MOU “*potentially* implicates several constitutional doctrine” (emphasis

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 4.

¹⁹⁹ Hollis, *supra* note 192, at 4.

²⁰⁰ *Id.* at 39-41.

²⁰¹ *Id.* at 2.

²⁰² Press Release, Manitoba Government, Memorandum of Understanding (MOU) Signed Between Manitoba and Missouri to Protect Water Resources (Jan. 25, 2001) (on file with author).

added).²⁰³ The analysis found that further evaluation would be needed to determine whether the MOU is preempted by the Supremacy Clause (per the test in *Crosby*) and/or interferes with the federal government's foreign affairs powers per *Zschernig*.²⁰⁴

The State Department's review of the Missouri-Manitoba MOU made a passing, uncited reference to a "1981 case" regarding a proposal between Quebec and Vermont for a shared water district.²⁰⁵ There, the agency determined that the proposed agreement did not implicate the Compact Clause since "federal permitting procedures would still apply and the district's activities would be limited to traditionally local functions (e.g., water service) rather than political functions."²⁰⁶ In 2010, Quebec and Vermont concluded an MOU to "provide stable, clean, renewable power at a competitive price" to Vermont residents until 2038.²⁰⁷ The MOU appears to have escaped any judicial or political scrutiny—most likely because electrical service constitutes a "traditionally local" function.²⁰⁸

A. *United States v. California: Federal Overreach*

The Executive seems to echo the Supreme Court's finding that SFR is not wholly unconstitutional but could concern broad swathes of activities and sectors that do not infringe on explicit political powers or dormant foreign affairs powers.²⁰⁹ Even the Trump Administration's suit against California's emissions agreement with Quebec did not appear to take an absolutist view against SFR.²¹⁰ The complaint cited the familiar textual language of the Constitution—*inter alia*, the Supremacy, Compact and Commerce clauses—as well as the decisions in *Massachusetts*, *Barclays Bank PLC*, and *American Ins. Ass'n*.²¹¹ The federal government qualified its claim

²⁰³ Letter from William Howard Taft IV, *supra* note 181.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Press Release, Government of Québec, Governor, Premier announce preliminary Vermont-Hydro-Québec agreement (Mar. 11, 2010) (on file with author).

²⁰⁸ Letter from William Howard Taft IV, *supra* note 181.

²⁰⁹ See Complaint for Declaratory and Injunctive Relief at 74, *United States v. California*, 2:19-at-01013 (2019) (No. 219-cv-02142).

²¹⁰ *Id.*

²¹¹ *Id.* at ¶¶ 20-31.

by emphasizing the agreement's "effect of undermining the President's ability to negotiate competitive international agreements in the area of environmental policy;"²¹² its potential to harm "the United States' ability to manage its relations with foreign states;"²¹³ and its "[interference] with the United States' foreign policy on greenhouse gas regulation."²¹⁴ These arguments are consistent with the Dormant Foreign Affairs Preemption established by the Supreme Court in *Barclays Bank PLC*, which the complaint cites as favorable to its position.²¹⁵

Yet a thorough legal analysis by Sharmila Murthy of Suffolk Law School found little merit to the Trump Administration's claims, arguing that the complaint on several faulty premises:²¹⁶

President Trump's preemption argument is weak because he is not acting "pursuant to an express or implied authorization of Congress." Congress has not passed legislation preempting cross-border emissions trading programs. In addition, California's cap-and trade program is arguably consistent with the Clean Air Act, which covers the regulation of greenhouse gases and which expressly preserves the authority of states to implement stricter air pollution standards, with certain exceptions. The US Senate also provided the necessary consent for the United States to ratify the United Nations Framework Convention on Climate Change (UNFCCC). In fact, in rejecting a foreign affairs challenge to state-based regulation of greenhouse gases from motor vehicles, a US District Court held that "state and local efforts

²¹² *Id.* at ¶ 74.

²¹³ *Id.* at ¶¶ 75.

²¹⁴ *Id.* at ¶ 103.

²¹⁵ *Supra* note 209, at ¶ 25.

²¹⁶ Sharmila Murthy, *California's Cap-and-Trade Agreement with Quebec: Surviving Constitutional Scrutiny*, ENVTL. AND ENERGY L. PROGRAM AT HARV. L. SCH. (Nov. 4, 2019), <https://eelp.law.harvard.edu/2019/11/californias-cap-and-trade-agreement-with-quebec-surviving-constitutional-scrutiny/>.

in concert with federal programs contribute to the UNFCCC's ultimate objective."²¹⁷

Moreover, environmental policy is not the traditional domain of the Executive, echoing the Department of State's acceptance of the Quebec-Vermont agreement on the grounds that it reflected the traditional local domain of water policy.²¹⁸ As Murthy observes, it is Congress that enacts environmental laws, typically along the lines of "cooperative federalism," wherein states explicitly play a role.²¹⁹ Many of the key policies and actions related to addressing climate change, including zoning laws and public transportation, are carried out at the state and local level.²²⁰ Hence the Trump Administration relied on the argument that the California-Quebec agreement implicates national security, a fundamental and indisputable power of the federal government.²²¹ But given the standards set forth in *Garamendi* and *Clark*, it is difficult to conclude, even facially, that a market-based cap-and-trade scheme falls within the national security domain.²²²

In fact, the federal government's argument in *California* risked undermining the "federalism and separation of powers" so central to Constitution—principles that are central to the Republican Party then in power.²²³ "If a Cap-and-Trade Agreement falls within the executive's national security powers, then, by extension, so would every single state or local action to address climate change, from zoning decisions to investments in public transportation to changes in building codes."²²⁴ Furthermore, the facts in *Garamendi* relied upon by the Trump Administration are distinguishable from those in

²¹⁷ *Id.*

²¹⁸ Letter from William H. Taft, *supra* note 181.

²¹⁹ Murthy, *supra* note 212, fn. 22.

²²⁰ *Id.*

²²¹ *Supra* note 205, at ¶¶ 32, 72.

²²² Murthy, *supra* note 212.

²²³ *Preamble*, REPUBLICAN PARTY PLATFORM 2016 i, i (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf?_ga=2.5735024.292042121.1584416742-2118454910.1584416742 ("We believe our constitutional system—limited government, separation of powers, federalism, and the rights of the people—must be preserved uncompromised for future generations.").

²²⁴ Murthy, *supra* note 212.

California.²²⁵ The Court in *Garamendi* struck down a California statute for interfering with a matter already addressed by federal policy and practice.²²⁶ The California-Quebec Agreement seeks to address climate change through a market-based cap-and-trade scheme that has no antecedent in any federal agreement or policy.²²⁷

Considering the foregoing, Trump's best way to end the California-Quebec agreement would have been by persuading Congress to pass legislation preempting it. Otherwise, the district court presiding over the case would be departing from existing and well established precedent, "potentially [opening] the floodgates to litigation over the hundreds to thousands of cross-border agreements that states and cities have entered into on a myriad of issues."²²⁸ Given the hundreds of examples of SFR that have been concluded over the last several decades—virtually all of them under the radar of both Congress and the Executive, as well as the public—a decision favoring the Trump Administration would have upset a cornerstone of local and state activity.

Such a decision would also have been contrary to longstanding acceptance by the political branches that SFR is not only harmless, but valuable. It was the Republican Eisenhower Administration that initiated the now-ubiquitous sister-city agreements to foster cultural and commercial ties following the discord of the Second World War.²²⁹ State trade missions abroad promote "American exports, [encourage] foreign direct investment in the United States, and [stimulate] domestic employment," while state offices oversee encourage tourism.²³⁰ Given its "America First" policy, the Trump Administration would have ostensibly not wanted to risk undermining or severing the hundreds of state and local ties and agreements that have benefited Americans across the nation.

Many of these questions will remain unsettled for the time being. In July 2020, the federal district court for the Eastern District of

²²⁵ *Id.*

²²⁶ *American Ins. Ass'n v. Garamendi*, 539 U.S. at 401.

²²⁷ Murthy, *supra* note 212.

²²⁸ *Id.*

²²⁹ Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *YALE L. J.* 1564, 1649 (2006); *United States v. California*, 444 F. Supp. 3d. 1181, 1182 (2019).

²³⁰ Glennon et al., *supra* note 23, at 285.

California ruled that California's cap-and-trade program with Quebec was not preempted by the Foreign Affairs Doctrine nor violative of the Treaty and Compact Clauses of the Constitution.²³¹ An appeal to the Ninth Circuit Court of Appeals filed by the Trump Administration September 2020 remains pending as of April 2021.²³² With Trump's departure and his successor's favorable attitude towards climate change action, the issues raised by *U.S. v. California* will likely be shelved—leaving yet another aspect of Subnational Foreign Relations uncertain.

If it is any consolation to Trump and his supporters, the United States is far from the only nation grappling with how or whether SFR fit within its constitutional framework.

V. SUBNATIONAL FOREIGN RELATIONS IN OTHER FEDERAL SYSTEMS

Sister-city agreements, by their very nature, would seem the least likely of any Subnational Foreign Relations to garner national, much less international, controversy. Yet through just such an agreement, the capital and largest city of the Czech Republic, Prague, caused an unlikely diplomatic rift between the Central European country and the world's largest nation and rising superpower.²³³ In 2016, city officials established a sister-city relationship with Beijing, China; this included recognition of the Chinese government's "One China" policy, which holds that the *de facto* sovereign nation of Taiwan is part of China.²³⁴ The agreement was established just one month before a state visit to the Czech Republic by the Chinese president—indicative of how national interests can be linked to even local-level SFR.²³⁵ In 2019, a new municipal administration in Prague called for the One China

²³¹ *United States v. California*, 444 F. Supp. 3d. 1181, 1182 (2019).

²³² *Id.*

²³³ Rob Schmitz, *Czech-Chinese Ties Strained As Prague Stands Up To Beijing*, NPR (Oct. 30, 2019, 5:05 AM), <https://www.npr.org/2019/10/30/774054035/czech-chinese-ties-are-affected-as-prague-stands-up-to-beijing>.

²³⁴ *Id.*

²³⁵ *Id.*

provision to be removed from the agreement, arguing that a “sister-city agreement should not include things that are not related to the cities’ relationship.”²³⁶

In response, Beijing swiftly terminated the sister-city agreement, while the Chinese government targeted Prague for punishment; most notably, a planned tour of China by the Prague Philharmonic Orchestra—its largest-ever project—was cancelled after over two years and \$200,000 in preparations.²³⁷ The Czech president personally appealed to his Chinese counterpart that he disagreed with Prague’s decision and urged the two countries to continue maintaining their ties and investment agreements.²³⁸ Meanwhile, the city’s actions became a worldwide *cause célèbre* for critics of the Chinese government’s heavy-handed approach to the One China policy.²³⁹

This unlikely episode is very telling of how subnational entities can and do exercise outsized influence in a globalized world. The term “local internationalism” has been used to describe the phenomenon of “state and local officials ... [venturing] into an international arena that, until comparatively recently, they regarded as forbidden territory.”²⁴⁰ The “globalizing forces” that have eroded national boundaries have given officials of even small subnational polities the chance to go head-to-head with counterparts that exercise far greater power and significance.²⁴¹ Consider that Prague’s municipal administration governs roughly 1.5 million people—compared to over 1.5 billion under the jurisdiction of the Chinese government. Yet the former managed to attract the attention and ire of the latter, at relatively little cost to itself.²⁴²

However, lest the critics and doubters of SFR point to the Prague-Beijing kerfuffle as validating their concerns, the Czech Republic is not a federal state, and thus arguably lacks the balanced

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Schmitz, *supra* note 223.

²³⁹ *See id.*

²⁴⁰ Glennon et al., *supra* note 23, at 35.

²⁴¹ *Id.*

²⁴² *Countries in the World by Population (2021)*, WORLDOMETER.INFO, <https://www.worldometers.info/world-population/population-by-country/> (last visited Feb. 4, 2021).

framework articulated in previous sections of this Note.²⁴³ It is best to compare the situation of SFR in the United States to other federal systems that bear a similar framework of shared powers between central and subnational agreements.

Aside from Mexico, Canada, and Germany—for which this Note has already provided examples of established SFR with U.S. counterparts—the subnational entities of Austria, Belgium, the Russian Federation, and Switzerland have also concluded international agreements.²⁴⁴ By contrast, the federal governments of India and Malaysia provide no capacity for their states to enter foreign agreements, although tellingly, both nations regularly consult with state governments directly with respect to national treaties and/or their implementation.²⁴⁵

On the other side of the coin is Belgium, whose constitutional provisions on foreign law are “virtually without precedent.”²⁴⁶ The Belgian Constitution is unique in allowing certain treaties to be entered *only* by subnational governments, and provides for “mixed treaties” that require both national and subnational consent.²⁴⁷ This was demonstrated most dramatically in the 2016 “Walloon CETA saga,” in which the parliament of Wallonia, one of the two major autonomous regions of Belgium, initially blocked the national government from signing the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada.²⁴⁸ CETA could only be concluded if all EU member states approved it.²⁴⁹ In effect, this subnational entity of roughly 3.6 million people—part of only one of the 27 countries comprising the

²⁴³ Ustavní zákon č. 1/1993 Sb., Ústava České republiky [Constitution of the Czech Republic].

²⁴⁴ Hollis, *supra* note 192, at 12.

²⁴⁵ JOHN THRONE, *FEDERAL CONSTITUTIONS AND INTERNATIONAL RELATIONS* 50 (Univ. of Queensl. Press 2001).

²⁴⁶ *Id.* at 31.

²⁴⁷ *Id.* at 21-30.

²⁴⁸ David Kleimann & Gesa Kübek, *The signing, provisional application, and conclusion of trade and investment agreements in the EU: the case of CETA and Opinion 2/15* (Eur. Univ. Inst., & Robert Schuman Centre for Advanced Studies, Working Paper No. 2016/58).

²⁴⁹ Markus W. Gehring, *Subnational Participation in International Trade Law: Options for the European Union*, CTR. FOR INT’L GOV’T INNOVATION 1, 3-4 (April 2018).

512-million-strong EU—managed to derail a massive agreement that took seven years to negotiate.²⁵⁰

Australia and Austria also stand out in allowing their subnational entities to pass implementing legislation for treaties entered by the national government.²⁵¹ While much rarer in practice, Canada's constitution similarly provides for certain federal treaties to be implemented solely by provincial governments.²⁵² While a separate power from the ability to carry out SFR, these practices/provisions arguably give weight and legitimacy to the subnational entities of these countries when they engage with the international plane.

Furthermore, Austria, Germany, and Switzerland are unique for their constitutions' explicit language conferring subnational entities with foreign relations powers—albeit within very tight constraints. The Austrian Constitution allows the country's *länder* to make treaties with foreign entities on issues within their “independent area of competence.”²⁵³ However, the federal government must be informed of the *länder*'s intention to conclude a treaty before it can begin negotiations.²⁵⁴ Further, this power is greatly circumscribed by the narrow scope of matters deemed within the exclusive purview of *länder*.²⁵⁵ Germany's constitution similarly allows its first-order subnational entities (also called *länder*) to make treaties within their “exclusive legislative jurisdiction,” albeit only with federal consent.²⁵⁶ Among the few subject matters permitted for German SFR are those concerning culture.²⁵⁷ Perhaps reflecting a shared Germanic political tradition, the Swiss Constitution also has provisions allowing the country's *cantons* to engage in SFR within their “scope of ... competencies,” again only with federal approval.²⁵⁸

Brazil, one of the largest federal republics in the world, is most comparable to the U.S. in its approach to SFR. As in U.S. law, treaties are the explicit purview of the federal government, with both

²⁵⁰ *Id.*

²⁵¹ *See id.* at 9-14.

²⁵² *Id.* at 7-8.

²⁵³ Trone, *supra* note 245, at 58.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 52.

²⁵⁷ *Id.* at 54.

²⁵⁸ *Id.* at 55.

the executive and the legislature playing a role.²⁵⁹ Like the U.S., there exists a “twilight zone” between international treaties and other international instruments due to uncertainty about any substantive difference between them.²⁶⁰ Since Brazilian states and cities can exercise any power not explicitly prohibited by the Brazilian Constitution, this would ostensibly include the power to negotiate “contracts” with foreign entities, “because they are not treaties, and because their nature under the Constitution has not been challenged, these contracts do not fall within the categories of the treaty-making process.”²⁶¹ However, Article 53 of the Brazilian Constitution gives the federal Senate of Brazil the power to “authorize foreign transactions of a financial nature, of interest to the Republic, the States, the Federal District, the Territories, and the Municipalities.”²⁶² This essentially combines the Foreign Commerce Clause of the U.S. Constitution, which prohibits states from encroaching on federal responsibility for commerce with foreign nations, with the Compact Clause’s requirement of congressional approval (be it explicit or implied).²⁶³ The key difference is that Brazil’s national government ultimately has full jurisdiction to conduct foreign relations on behalf of its states and municipalities, even concerning the sort of cross-border agreements that are practically a given in the U.S.²⁶⁴ Brazil’s subnational entities lack the “international personality to enter into relationships with foreign countries.”²⁶⁵ It still remains to be seen how this framework will address France’s announcement in December 2019 of a partnership with several Brazilian states to preserve the Amazon rainforest—sought with the explicit intention of bypassing Brazil’s recalcitrant federal government.²⁶⁶

²⁵⁹ Guido F. Soares, *The Treaty-Making Process under the 1988 Federal Constitution of Brazil - Latin America*, 67 CHI.-KENT L. REV. 495, 499 (1991), <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/11>.

²⁶⁰ *Id.* at 498.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 52 (Braz.); *see also* U.S. CONST. art. 1, § 8, cl. 3.

²⁶⁴ Soares, *supra* note 256, at 498-99.

²⁶⁵ *Id.*

²⁶⁶ Reuters, *France to Partner with Brazil States on Amazon, Bypassing Bolsonaro*, N.Y. TIMES (Dec. 9, 2019),

In any event, the advent of globalization has left virtually no nation untouched by the subsequent perforation of national borders. As worldwide initiatives like the ZEV Alliance, the Global Covenant of Mayors, and Sister Cities International make clear, Subnational Foreign Relations will very likely continue proliferating in various forms, especially in the face of diffuse challenges like climate change. Ironically, the rise of nationalism, economic protectionism, and isolationism—as seen in the U.S. and Brazil—makes it all the more likely that subnational polities within these anti-globalist governments will attempt to circumvent them through SFR of one kind or another.

VI. SUBNATIONAL FOREIGN RELATIONS IN INTERNATIONAL LAW

A. *Tacit Acceptance and Allowance*

If decisions like *Ware* and *Paquete Habana* enshrine U.S. commitments to international law, then it stands to reason that the legality and constitutionality of Subnational Foreign Relations must also be consistent with international legal norms and principles.

At first glance, SFR does not seem to fare well within the international legal framework. The sovereign nation-state—as represented by a *national* government—has long been *the* pillar of the international legal order.²⁶⁷ This was affirmed in one of the earliest U.S. Supreme Court cases, *Schooner Exchange v. McFaddon*.²⁶⁸ Chief Justice John Marshall wrote that a nation's sovereignty is “exclusive and absolute” within its territorial jurisdiction, such that any limitation on a sovereign nation, even by international law, can only be consented to by the sovereign itself.²⁶⁹ It is reasonable to infer that such absolute sovereignty could be exercised only by a national government that behaves uniformly and

<https://www.nytimes.com/2019/12/09/world/americas/france-to-partner-with-brazil-states-on-amazon-bypassing-bolsonaro.html>.

²⁶⁷ Ku & Yoo, *supra* note 21, at 227-28.

²⁶⁸ *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812).

²⁶⁹ *Id.*

speaks with one voice;²⁷⁰ that is what prompted the warning in *Holmes* that “conflicting exercises of the same power [by the states] would not be well calculated to preserve respect abroad or union at home.”²⁷¹

Moreover, the Vienna Convention on the Law of Treaties (VCLT)—officially recognized by the U.S. as constituting binding customary international law²⁷²—governs only treaties between nation-states, without mention of nonstate actors.²⁷³ Yet some international legal jurists have noted that the VCLT does not rule out the validity of other forms of international agreements.²⁷⁴ Article 6, which emphasizes nation states as treaty-making entities, “must be read as indicative of the type of entities covered by the Treaty rather than as indicative of the only entities capable of concluding treaties at international law.”²⁷⁵ More to the point, a draft proposal of the VCLT “considered the possibility of various other subjects entering into treaties alongside nation-states.”²⁷⁶ A comment by the drafting International Law Commission notes:

There is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States. Questions may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point

²⁷⁰ See Ku & Yoo, *supra* note 21, at 227-28

²⁷¹ *Holmes*, 39 U.S. at 578.

²⁷² *Vienna Convention on the Law of Treaties, Frequently Asked Questions, Treaty Affairs, Office of the Legal Advisor*, U.S. DEPARTMENT OF STATE, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 5, 2021).

²⁷³ Organization of American States, *Vienna Convention on the Law of Treaties* art. 6, May 23, 1969.

²⁷⁴ Hugo Cyr, *Treaty Powers of Federated States and International Law*, JUS POLITICUM, <http://juspoliticum.com/article/Treaty-Powers-of-Federated-States-and-International-Law-1117.html>.

²⁷⁵ *Id.*

²⁷⁶ Symposium, *Symposium on Climate Change Localism: Changing International Law for a Changing Climate*, AM. SOC’Y OF INT’L L. 279, 282 (2018).

also the solution must be sought in the provisions of the federal constitution.²⁷⁷

In fact, the foremost institutions and instruments of international law seem to at least tacitly concede this point. The Soviet republics of Ukraine and Belarus were parties to the United Nations Charter and full-fledged U.N. member states, despite being subnational entities of the federated Soviet Union, which was also a Charter party and U.N. member.²⁷⁸ The Paris Agreement, while only recognizing state parties, does provide that nonstate entities, including subnational units, can lodge their commitments with the Non-State Actor Zone for Climate Action (NAZCA).²⁷⁹ It also has language acknowledging the “multiscale dimensions” of addressing climate change and the need to build capacity “at all levels of government.”²⁸⁰

Notwithstanding the high-profile response by the U.S. Climate Alliance to the Trump Administration’s withdrawal from the Paris Agreement, it was not the first time that subnational entities continued American commitments to an international agreement in lieu of the national government. When the U.S. similarly failed to ratify another climate change treaty, the Kyoto Protocol, roughly 185 cities across the country issued unilateral declarations that implemented or expressed support for its provisions.²⁸¹ Nothing in the Kyoto Protocol precluded local and state governments from taking these actions, nor is there any indication that the U.N. or any other international body disputed their right to do so.²⁸² The previously mentioned unilateral declarations concerning other U.N. treaties the U.S. declined to ratify—such as the Comprehensive Nuclear Test Ban Treaty and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)—also garnered little opprobrium or pushback from the U.N.²⁸³

²⁷⁷ Cyr, *supra* note 274.

²⁷⁸ *Id.*

²⁷⁹ Symposium, *supra* note 276, at 280.

²⁸⁰ *Id.* at 280-81.

²⁸¹ Messing, *supra* note 38, at 193-94.

²⁸² *Id.*

²⁸³ *Id.* at 193.

Although largely symbolic compared to other instruments of international law, these declarations and nonbinding agreements nonetheless reflect a major shift in the international legal order.²⁸⁴ “The fact that there might be treaties between states and other international entities should only be surprising to those who still imagine treaties as being the highly formal agreements between monarchs otherwise living in a quasi-state of nature mainly controlled by customs and force.”²⁸⁵

Indeed, the very idea of a nation-state exercising what is sometimes called “Westphalian sovereignty” derives from, and is named after, a mid-seventeenth century agreement that predates the advent of federalism, constitutional republics, and rapid globalization.²⁸⁶ National sovereignty is no longer vested in monarchs and other absolute rulers, and international agreements are thus no longer established to maintain “the conditions for internal governance by protecting polities from external interventions.”²⁸⁷ Thus, “international law as a whole has evolved from a system mostly based on custom to a system embodied in treaties.”²⁸⁸ In the seventy-five years since the United Nations was established, its nearly 200 member states have concluded 200,000 treaties and agreements between them, governing an array of matters from water resource management and foreign investment, to space exploration and freedom of navigation on the high seas.²⁸⁹ (These are just the agreements officially registered with the U.N.).

B. *Subnational Foreign Relations for Twenty-First Century Challenges*

Factoring in the advent of globalization and the emergence of unprecedented global threats like climate change, Westphalian

²⁸⁴ See Cyr, *supra* note 274.

²⁸⁵ Cyr, *supra* note 274.

²⁸⁶ See Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT’L L. 20, 20–41 (Jan. 1948).

²⁸⁷ Cyr, *supra* note 274.

²⁸⁸ *Id.*

²⁸⁹ Overview, *United Nations Treaty Collection*. UN.ORG, https://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml (last visited Mar. 5, 2021).

sovereignty and “treaty formalism” may do more harm than good when it comes to accomplishing all sorts of objectives for the public good: cultural exchange and mutual understanding, trade and commerce, scientific and humanitarian cooperation, and so on.²⁹⁰ This has led to calls for a “new international law”²⁹¹—sometimes called “cosmopolitan law” or “world law”²⁹²—characterized by a “global civil society” that provides nonstate actors, including individuals, the opportunity to “participate in social and cultural activities that reach beyond the nation.”²⁹³ This is critical given that “[international] relations are now a necessary aspect of any state’s governance.”²⁹⁴ Parag Khanna, a prominent international relations scholar, argues that the increasingly fractured, complex, and chaotic nature of the global order warrants a “mega-diplomacy” characterized by coalitions of local, subnational, and national governments in partnership with private actors.²⁹⁵

Subnational Foreign Relations is exploding across the world for the same reason there exist over 200,000 international treaties and agreements:²⁹⁶ The world is changing rapidly and becoming ever more complex, and there is a myriad of issues on which communities at all levels must work together. Many of these problems are too large for one nation to handle—such as climate change, water scarcity, terrorism, and economic instability—and they subsequently impact subnational polities of all sizes, regardless of what the national government does (or does not) do.

Thus, although international law recognizes that state X has a legal personality, this in itself is not sufficient to demonstrate that it is the only entity to do so within

²⁹⁰ Cyr, *supra* note 274.

²⁹¹ Ku & Yoo, *supra* note 21, at 210. Parag Khanna, *How to Run the World: Charting a Course to The Next Renaissance*, FOREIGN AFF. (2011), <https://www.foreignaffairs.com/reviews/capsule-review/2011-03-01/how-run-world-charting-course-next-renaissance>.

²⁹² *Id.* at 213.

²⁹³ *Id.* at 212.

²⁹⁴ Cyr, *supra* note 274.

²⁹⁵ Parag Khanna, *How to Run the World: Charting a Course to The Next Renaissance*, FOREIGN AFF. (2011), <https://www.foreignaffairs.com/reviews/capsule-review/2011-03-01/how-run-world-charting-course-next-renaissance>.

²⁹⁶ See Cyr, *supra* note 274.

its territory. In other words, the international status of the whole of a Federation does not in itself preclude its federated states from also having a form of international legal personality. **Indeed, international law does not preclude federations from being composed of multiple overlapping legal personalities.** Therefore, even if a Federation's constitution was bound by internal rules to respect international law, in no way does international law force such Federation to possess only one single international personality for all possible purposes (emphasis added).²⁹⁷

In response to the rapidly changing paradigm of international law, some advocate for a “new sovereignty” to replace the antiquated Westphalian model.²⁹⁸ This can take many forms, from “transnational networks of government officials” to judges citing “precedents from other countries and international tribunals.”²⁹⁹ Echoing Justice Louis Brandeis' exaltation of states as laboratories of “novel social and economic experiments without risk to the rest of the country,” subnational entities of all shapes and sizes could serve a similar purpose with respect to international law and political issues.³⁰⁰

This Note argues that Subnational Foreign Relations is yet another rendition of this new twenty-first century sovereignty, one that recognizes the fact that globalization means “we live in a time when the walls of sovereignty are no protection against the movements of capital, labor, information, and ideas.”³⁰¹ Nor does sovereignty protect against threats and challenges too big, disparate, and complex for national governments to handle on their own—or

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 *GEO. WASH. INT'L L. REV.* 537, 548–49 (2005), <https://www.semanticscholar.org/paper/Brandeis's-Happy-Incident-Revisited%3A-U.S.-Cities-as-Singh/e9b0a41537660fd919c9d74cf51d3157a8521abe>.

³⁰¹ Ku & Yoo, *supra* note 21, at 210.

too important to leave at the whim of rancorous national electoral politics.³⁰²

SFR is not only consistent with international law, but also with the U.S. Constitution's conception of, and relationship with, international law.³⁰³ The American Revolution was in many respects a revolt against the Westphalian model of sovereignty vested in a singular monarch or government.³⁰⁴ The U.S. Declaration of Independence asserted that government power comes from "the Consent of the Governed," which the people could change, abolish, or replace altogether.³⁰⁵ This idea of "popular sovereignty," once ahead of its time, is now a foundational element for the vast majority of the world's nation-states (at least in principle, if not in practice). Concurrent with the expansion of democratic principles worldwide, it may be time to broaden this pillar of human governance to encompass our burgeoning global community: "Popular sovereignty assumes that sovereign powers can be shared, divided, and limited without giving up on the entire system" of international law.³⁰⁶ SFR allows the people—through their cities, states, and even civil society groups—to exercise their constitutional right to self-expression (adopting international human rights standards or declaring solidarity and amity with a foreign people) and to self-governance (managing local concerns such as water and electricity in concert with foreign neighbors), albeit within the reasonable confines of the Constitution previously articulated above.

As Henkin observes, states inevitably "touch foreign affairs even in minding their proper business," since federalism gives states co-jurisdiction over the lives and activities of foreign nationals.³⁰⁷ This unavoidably influences U.S. foreign relations, as first tested by Virginia's inadvertent venture into foreign affairs in *Ware v. Hylton*.³⁰⁸ But even the routine laws, policies, and regulations of a state impact foreign nationals and entities, who must engage with state offices and courts to reside, do business, or seek legal remedies

³⁰² See generally *id.*

³⁰³ See generally *id.* at 233.

³⁰⁴ See Cyr, *supra* note 274.

³⁰⁵ Ku & Yoo, *supra* note 21, at 233.

³⁰⁶ *Id.* at 234.

³⁰⁷ Henkin, *supra* note 40, at 150.

³⁰⁸ See *Ware v. Hylton*, 3 U.S. 199 (1796).

within the state. Hence, despite the Constitution's ambivalent and ambiguous demarcation of state-federal domains in foreign affairs, it is practically impossible to separate subnational influence from the national government's foreign relations—especially in an era characterized by increasing movement of capital, people, and goods between the U.S. and the world.

In short, international law offers no restrictions on Subnational Foreign Relations, which is consistent with the foundational American principle of popular sovereignty, and which “nudge the nation back to federalism's early days . . . in which the states played a much larger role internationally.”³⁰⁹ Ostensibly, even skeptics and critics of international law could find merit in this originalist approach to state and local power abroad.

VII. CONCLUSION

Justice Michael Kirby of the High Court of Australia once observed that while “[o]nce we saw issues and problems through the prism of a village or nation-state . . . [n]ow we see the challenges of our time through the world's eye.”³¹⁰ Though he was referring to lawyers and judges, his statement could just as well apply to humanity as a whole. Even in the most authoritarian, nationalistic, or isolationist countries, the common person living in provinces, counties, cities, and even rural villages is more interconnected than ever.³¹¹ The world is on the cusp of developing into a truly global civilization, with a shared human identity that transcends the traditional confines of culture, religion, ethnicity, and political identity.

Far from idealistic or Utopian, this development reflects the sober reality that, whatever our multitude of differences, our species shares common existential problems and concerns that well exceed

³⁰⁹ Glennon & Sloane, *supra* note 23.

³¹⁰ Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 555 (2002).

³¹¹ See Faizal Karmali, *A World Better Connected Than Ever Before... But Is It Actually Better?*, THE ROCKEFELLER FOUNDATION (Oct. 1, 2015) <https://www.rockefellerfoundation.org/blog/a-world-better-connected-than-ever-before-but-is-it-actually-better/>.

the structural or legal frameworks of whatever country they happen to be born in. Aside from the more familiar and emblematic example of climate change, these concerns include the basics of human well-being and survival: Access to food, water, healthcare, economic resources, and more. All these issues and more are subject to an ever-growing array of nonbinding, informal, or otherwise extra-constitutional agreements, concluded not only by nation states, but by international organizations, nongovernment organizations, civil society groups, and subnational units of varying shapes, sizes, and labels.

The U.S. Constitution, which has endured longer than the written constitution of any other nation, has long benefited from its versatility and ability to “respond to developing circumstances.”³¹² As this Note has hopefully demonstrated, the Constitution is adaptable to the challenges and realities of this rapidly globalizing century, namely the burgeoning relationships between Americans and their foreign counterparts, which are no longer constrained by the barriers of old—not even the federal government. After two centuries of courts never striking down SFR—and not for lack of opportunity—and an equally long period of both congressional and executive acquiescence, federal administrations should conform to constitutional language, state practice, and consistent judicial rulings allowing states broad discretion to engage in the international realm.

Not only would such conformity be legally and politically sound, but it also would reap a range of practical and moral benefits: The United States could reclaim its standing as a responsible and engaged member of the international community; the people would have an outlet to express views and values otherwise unattainable through the comparatively more distant mechanisms of the federal government; and some of the most pressing problems facing the nation and the world can be addressed through hundreds of thousands more flexible, responsive, and bolder “laboratories” that make up the U.S. and almost 200 other nations.

³¹² Sean Gorman, *Goodlatte Says U.S. has the Oldest Working National Constitution*, POLITIFACT (Sept. 22, 2014), <https://www.politifact.com/factchecks/2014/sep/22/bob-goodlatte/goodlatte-says-us-has-oldest-working-national-cons/>.