An American (State) in Paris: The Constitutionality of U.S. States' Commitments to the Paris Agreement

by Kristin McCarthy

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In June 2017, President Donald Trump confirmed that the United States will withdraw from the Paris Agreement.[1] Almost immediately, individual states began to pledge their commitments to the Paris Agreement despite the lack of federal support.[2] Just a month after this announcement of federal withdrawal, California Gov. Jerry Brown announced that the state would play host to the Climate Action Summit in September 2018, and stated that President Trump "doesn't speak for the rest of America" in backing out of the Paris Agreement commitments.[3] The Climate Action Summit brought together leaders of states, cities, and businesses that have pledged their support for the Paris Agreement, and represented the first time a U.S. state hosted an international climate change conference directly supporting the Paris Agreement.[4] California also entered into a memorandum of understanding with China in June 2017, pledging to cooperate to share information on climate-related topics with the goal of advancing clean energy technologies.[5]

In the midst of these actions by California, at least 20 states, 110 cities, and more than 1,000 businesses and universities in the United States have publicly pledged their support for the Paris Agreement.[6] Sixteen states representing more than 40% of the American population have joined together to form the U.S. Climate Alliance, dedicated to upholding the United States' original commitments to the Paris Agreement.[7] These states are taking aggressive action to curb their greenhouse gas emissions. New York, for example, has set greenhouse gas emission reduction targets at 40% below 1990 levels by 2030, and 80% below 1990 levels by 2050.[8] The state aims to be coal-free by 2020, and to source one-half of its electricity from renewable energy sources by 2030.[9] Additionally, 18 states have pledged commitments to the Paris Agreement through the United Nations Non-State Actor Zone for Climate Action (NAZCA) portal.[10]

This combination of federal withdrawal and state involvement triggers a series of questions surrounding the constitutionality of individual state action in the Paris Agreement. Some scholars have noted that states' involve-

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1. Allison H. Ross & Meghan V. Brown, *Environmental Federalism: Individual States, Cities, and Businesses Vow to Combat Climate Change*, Orange County Law., Aug. 2017, at 36.
2. *See infra* Sections II.B.-C.
3. Lisa Friedman, *Jerry Brown Announces a Climate Summit Meeting in California*, N.Y. Times, July 6, 2017, https://www.nytimes.com/2017/07/06/climate/jerry-brown-california-climate-summit.html.
4. *Id.*
5. Memorandum of Understanding on California-Jiangsu Clean Technology Partnership, June 5, 2017, Cal.-China, https://www.gov.ca.gov/wp-content/uploads/2017/09/6.5.17_Jiangsu_MOU.pdf.
6. Michael D. Regan, *U.S. Cities, States Pledge Support for Climate Accord*, PBS, Nov. 11, 2017, https://www.pbs.org/newshour/nation/u-s-cities-states-pledge-support-for-climate-accord.
7. United States Climate Alliance, *Home Page*, https://www.usclimatealliance.org/ (last visited Sept. 8, 2018).
8. U.S. Climate Alliance, 2017 Annual Report: Alliance States Take the Lead 6 (2017), https://static1.squarespace.com/static/5936b0bde4fcb5371d7ebe4c/t/59bc4959bebafb2c44067922/1505511771219/USCA_Climate_Report-V2A-Online-RGB.pdf.
9. *Id.*
10. *See* Global Climate Action NAZCA, *Home Page*, http://climateaction.unfccc.int (last visited Sept. 8, 2018).

ment with the Paris Agreement may be unconstitutional because it could violate some combination of the Supremacy Clause, the Treaty Clause, and the Compact Clause.[11] This Comment takes a different view, outlining each of these three constitutional hurdles—the Supremacy Clause, the Treaty Clause, and the Compact Clause—and arguing that individual states' involvement with the Paris Agreement is not violative of the U.S. Constitution.

The Comment contends that state involvement in the Paris Agreement does not violate the Supremacy Clause because there is no express or implied statutory preemption, and because the Dormant Foreign Affairs Power doctrine does not apply to this scenario.[12] It then argues that states' voluntary commitments to the Paris Agreement do not violate the Treaty Clause, as individual states are not considered real Parties to the Agreement.[13] Lastly, it reasons that individual states' commitments to the Paris Agreement do not infringe on the requirements of the Compact Clause, as they do not interfere with the supremacy of the United States or form any legally enforceable compact.[14]

Part I provides background information on the Paris Agreement and its legal enforceability. Part II describes in greater detail the United States' history of involvement in the Agreement, including the pledges by non-nations. Part III then tackles each of the constitutional hurdles in turn, arguing that the Supremacy Clause, the Treaty Clause, and the Compact Clause all fail to preempt or prohibit voluntary state action in support of the Paris Agreement. Part IV points out the limitations of these arguments for future climate change agreements. Part V concludes.

I. The Paris Agreement: What Is It?

A. *Formation of the Paris Agreement*

First adopted in December 2015 at the 21st Conference of the Parties (COP21), the Paris Agreement is a voluntary global agreement within the United Nations Framework Convention on Climate Change (UNFCCC)[15] focused on combating climate change by mitigating greenhouse gas emissions and adapting to its effects.[16] The Agreement emphasizes the links between climate change, food production systems, hunger, and poverty, and "aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty."[17] As of September 2018, 195 UNFCCC Members have signed the Agreement, while 180 have ratified it.[18] The current goal of the Paris Agreement is to prevent the global temperature from rising more than two degrees Celsius above pre-industrial levels.[19] The signatories also agreed to attempt to pursue an even more aggressive path that would limit the increase to just 1.5 degrees Celsius.[20]

The Paris Agreement encourages "[d]eveloped countries [to] take the lead by undertaking absolute economy-wide [greenhouse gas] reduction targets, while developing countries should continue enhancing their mitigation efforts, and are encouraged to move toward economy-wide targets over time."[21] In the Agreement, each country determines and implements its own contribution to the global mitigation of climate change through the establishment of intended nationally determined contributions (NDCs).[22] In this way, the Agreement seeks a bottom-up approach that "reflects rather than drives national policy."[23]

Each country must revise its NDCs every five years starting in 2020 and must use an international accounting system to disclose its greenhouse gas reduction progress beginning in 2023.[24] The goal of the Agreement is that each subsequent series of NDCs will effectuate more progress in reducing greenhouse gas emissions than the prior one.[25] The Paris Agreement is voluntary and self-enforced, and the UNFCCC has no enforcement or punitive authority over any participating country that fails to meet its NDC goals or chooses to submit new weaker NDC goals.[26]

The Paris Agreement differs from its predecessors in international climate change agreements—the Kyoto Protocol, the Copenhagen Accord, and the Cancun Agree-

11. *See*, *e.g.*, Congressional Research Service, Legal Sidebar, Constitutional Limits on States' Efforts to "Uphold" Paris Agreement (2017); Zachary Basu, *States Fighting Trump on Climate Find New Foe: U.S. Constitution*, CNBC, July 13, 2017, https://www.cnbc.com/2017/07/13/anti-trump-climate-change-alliance-may-be-unconstitutional.html; Ellen M. Gilmer, *States Take Lead on Climate Amid Swirling Legal Questions*, E&E News, June 7, 2017, https://www.eenews.net/stories/1060055636; Tiana Lowe, *States, Cities, and Firms Threaten to Unconstitutionally Enter Paris Accords Independently*, Nat'l Rev., June 2, 2017, http://www.nationalreview.com/corner/448236/states-threaten-unconstitutional-paris-climate-accords-entry-entry.
12. *See infra* Section III.A.
13. *See infra* Section III.B.
14. *See infra* Section III.C.
15. The UNFCCC first entered into force on March 21, 1994, after ratification by 197 countries. Brandon Fernandez, *Throwing Shade on the Sunshine State: The Paris Agreement and How Florida Utility Companies Are Fighting to Control Solar Energy*, 41 Nova L. Rev. 105, 110 (2016). The United States was among the first nations to ratify the treaty on October 15, 1992, under then-President George H.W. Bush. *Id.* President Bush submitted the UNFCCC treaty to the U.S. Senate, which gave its consent less than five months later. *Id.* The parties to the UNFCCC committed to develop and publish national inventories of greenhouse gas emissions, prepare and administer national programs that mitigate and adapt to climate change, promote scientific and technological research and public awareness, and report any steps taken to further implement the convention. *Id. See also* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, 165, 170-74, 180-81, *available at* https://unfccc.int/resource/docs/convkp/conveng.pdf.
16. Ross & Brown, *supra* note 1, at 38.
17. United Nations Paris Agreement, Dec. 12, 2015, art. 2, §1, 55 I.L.M. 743, *available at* http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.
18. *See* United Nations Treaty Collection, *Paris Agreement*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited Sept. 8, 2018).
19. United Nations Paris Agreement, *supra* note 17, art. 2, §1(a). *See also* Ross & Brown, *supra* note 1, at 38.
20. United Nations Paris Agreement, *supra* note 17, art. 2, §1(a).
21. UNFCCC, *Summary of the Paris Agreement*, http://bigpicture.unfccc.int/#content-the-paris-agreemen (last visited Sept. 8, 2018).
22. *See* Ross & Brown, *supra* note 1, at 38.
23. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 Am. J. Int'l L. 288, 289 (2016).
24. United Nations Paris Agreement, *supra* note 17, art. 4.
25. Robert B. McKinstry Jr. et al., *Unlocking Willpower and Ambition to Meet the Goals of the Paris Climate Change Agreement (Part Two): The Potential for Legal Reform and Revision*, 47 ELR 10135, 10137 (Feb. 2017).
26. *See* Ross & Brown, *supra* note 1, at 38.

ments—in several ways.[27] While previous climate change agreements have largely focused on setting specific climate goals for countries to commit to at the Conference, the Agreement focuses on a more flexible approach.[28] It is centered on each nation's individually developed plans, taking into account each country's specific circumstances and capacities.[29] Additionally, the Agreement applies globally rather than only to developed countries,[30] and is legally binding on the Parties who sign it.[31] Further, it establishes a long-term architecture ready to adapt to changes, which must be updated every five years and which sets the expectation of growing progressively stronger over time.[32] Lastly, it institutes a framework of enhanced transparency and accountability that serves as a powerful incentive for nations to stick to their commitments.[33]

In these ways, the Paris Agreement may be viewed as more capable of effectuating change than its predecessors. However, the Paris Agreement still lacks legal enforceability of its key provisions, as discussed in the following section.[34]

B. Legal Enforceability of the Paris Agreement

Legal enforceability has long been a goal of international climate change regimes.[35] The original goal of UNFCCC negotiations was to create a treaty enforceable under international law.[36] Yet, while the Paris Agreement is legally enforceable to an extent, its key provision of setting emissions targets is merely an "aim," rather than a legal obligation.[37]

Earlier climate agreements have all failed to reach the level of a legally enforceable treaty.[38] The Copenhagen Accord of 2009, which many hoped would become a treaty, failed to do so because of disagreements over to whom the legal form would apply.[39] The United States was willing to accept only an agreement that applied to all Parties equally, while China, India, and other developing countries were willing to accept only an agreement that bound developed countries exclusively.[40] The solution was to make the Copenhagen Accord completely nonbinding on any Party.[41] Similar issues plagued the Cancun Agreements in 2010.[42]

In 2011, the UNFCCC convened in Durban, South Africa, and established the Durban Platform for Enhanced Action.[43] The Durban Platform called for the implementation of one of three things: "a protocol, another legal instrument, or an agreed outcome with legal force."[44] The first two of these three options would undoubtedly be considered a treaty, while the third is a novel term and thus ambiguous.[45] India therefore argued that an "outcome with legal force" under a country's domestic laws would satisfy this mandate.[46]

While no official form was ever decided upon, it became increasingly clear through negotiations that the Paris Agreement would form a legally enforceable international treaty.[47] However, the force of the Agreement's provisions varies greatly, and many key provisions are not legally binding.[48] Some provisions use the word "shall" and are legally binding, while many others use the words "should" or "encourage" and are therefore mere recommendations.[49] Still others are expressed with the word "will" and are viewed as nonbinding expectations.[50]

The legal enforceability of the Agreement was especially important to the United States, due to the difficult and extensive domestic process surrounding the passage of a treaty.[51] Because in the United States official treaties require approval of two-thirds of the U.S. Senate, most international agreements that the United States enters into are considered "executive agreements."[52] These "executive agreements" are usually entered into with the approval of

27. The Kyoto Protocol was an agreement written in 1997 and signed by 160 developed nations. David R. Wooley & Elizabeth M. Morss, Clean Air Act Handbook §10.3 (27th ed. 2017). The signatories of the Kyoto Protocol agreed to cut their collective greenhouse gas emissions to 5.2% below 1990 levels during the period from 2008 to 2012. *Id.* The Kyoto Protocol did not establish any emissions reduction targets for developing countries. *Id.* The Kyoto Protocol was not ratified until 2004 after years of delay, and the commitment period ended in 2012. *Id.* §§10.4-10.5. The Copenhagen Accord was an agreement written in 2009 in an attempt to prolong the agreements forged in the Kyoto Protocol. *See id.* §10.5. The Copenhagen Accord called for both developed and developing countries to commit to explicit emissions pledges, but did not contain any binding commitments. *Id.* The Cancun Agreements of 2010 set a collective goal of reducing emissions by 25% to 40% of 1990 levels by 2020, but did not set specific goals for each country. *Id.*
28. Bodansky, *supra* note 23, at 290.
29. *Id.*
30. *See* Wooley & Morss, *supra* note 27, §10.6.
31. Bodansky, *supra* note 23, at 290. That said, the Agreement does include several critical nonbinding elements. *See infra* Section I.B.
32. Bodansky, *supra* note 23, at 290.
33. *Id.* at 291.
34. *See infra* Section I.B.
35. Bodansky, *supra* note 23, at 294.
36. *Id.* at 295.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*; Wooley & Morss, *supra* note 27, §10.5.
43. *See* Wooley & Morss, *supra* note 27, §10.5.
44. Bodansky, *supra* note 23, at 295.
45. *Id.*
46. *Id.* at 295-96.
47. *Id.* at 296.
48. *Id.*
49. *Id.* at 297. For example, the Paris Agreement mandates that "[e]ach Party *shall* prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." United Nations Paris Agreement, *supra* note 17, art. 4, §2 (emphasis added). Contrarily, the Agreement merely suggests that "[d]eveloped country Parties s*hould* continue taking the lead by undertaking economy-wide absolute emission reduction targets." *Id.* art. 4, §4 (emphasis added).
50. Bodansky, *supra* note 23, at 297. For example, the Paris Agreement states that "[e]ach Party's successive nationally determined contribution *will* represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition." United Nations Paris Agreement, *supra* note 17, art. 4, §3 (emphasis added).
51. Bodansky, *supra* note 23, at 297.
52. *Id.* The vast majority (approximately 95%) of international agreements that the United States has entered into are "executive agreements," with more than 18,000 agreements falling into this category. Daniel Bodansky, Center for Climate and Energy Solutions, In Brief: Legal Options for U.S. Acceptance of a New Climate Agreement 5 (2015).

the U.S. Congress, although some have been the result of a president acting alone.[53]

In the case of the Paris Agreement, Senate and congressional approval appeared impossible at the time.[54] The United States therefore felt it was imperative to reach an agreement that was not legally binding on any provisions that would require legislative approval.[55] In short, the United States needed the provisions about emissions targets and spending to be nonbinding, or it would not have been able to enter the Agreement.[56] The United States therefore pushed hard for the NDCs to be enforced by a strong transparency system to encourage countries to meet their goals, rather than by any legally enforceable mechanism.[57] The Agreement "was explicitly crafted to exclude emissions reduction targets and finance from the legally binding parts of the [Agreement]."[58] The end result was an international treaty that is legally enforceable in some ways, but merely voluntary in many of its key provisions.

In the spectrum of enforceability among agreements, with "purely aspirational" agreements on one end and "legally binding [agreements] with punitive consequences for noncompliance" on the other, the Paris Agreement falls somewhere in the middle, but probably closer to the aspirational end.[59] The Paris Agreement is premised on "political pledges and political accountability,"[60] with peer pressure from other countries in the form of "international criticism [a]nd the need to explain oneself" as the only mechanism for compliance.[61] This mechanism of compliance is completely non-punitive and non-adversarial.[62] The fact that the Agreement lacks punitive legal enforceability will prove critical to the arguments I make, especially under the Treaty Clause and Compact Clause analysis sections.[63]

II. The United States' Involvement in the Paris Agreement

The United States emits the second-highest total amount of greenhouse gases in the world.[64] As such, the United States is viewed as a critical component of any effort to address climate change on an international scale.[65] The United States' involvement in the Paris Agreement has evolved with its change in presidential administrations.

A. *The United States' Entrance Into the Paris Agreement*

The United States joined the Paris Agreement on April 22, 2016,[66] under the Barack Obama Administration, and ratification was accepted on September 3, 2016.[67] Former President Obama entered the Paris Agreement by Executive Order under the umbrella of the UNFCCC treaty to which the United States was already a Party, rather than submitting the Paris Agreement itself as a treaty to the Senate for approval.[68] Therefore, the Paris Agreement is not considered an actual "treaty" to which the United States is a Party, under U.S. domestic law.[69]

Upon joining the Paris Agreement, the United States set an initial NDC objective to reduce greenhouse gas emissions by 26% to 28% of 2005 levels by 2025.[70] The United States' NDC cited the Clean Air Act (CAA) of 1970, Energy Policy Act of 2005, Energy Independence Security Act of 2007, and the Clean Power Plan of 2015 as the relevant statutory and regulatory provisions that would be used to meet this goal.[71] The CAA was the source of most of the specific future regulatory measures identified by the United States, including the existing and proposed mobile source emissions limits for methane and hydrofluorocarbons.[72]

In November 2016, the United States issued a strategy report titled *United States Mid-Century Strategy for Deep Decarbonization*.[73] This document, released at the November 2016 United Nations Climate Change Conference in Marrakech, laid out the United States' plans for reducing emissions by mid-century and built upon the United

53. The most common type of international agreement the United States enters into is the congressional-executive agreement. Bodansky, *supra* note 52, at 5. Examples of such agreements include the League of Nations Covenant, World Trade Organization Uruguay Round agreements, International Dolphin Conservation Program Act, Bretton Woods agreements, and the North American Free Trade Agreement. *Id.* at 6. Far fewer international agreements are executed by the president acting on his own authority. *Id.* at 7. Examples of these include the 1973 Vietnam Peace Agreement and the Iranian Hostage Agreement of 1981. *Id.*
54. Bodansky, *supra* note 23, at 297.
55. *Id.*
56. *Id.*
57. *Id.*
58. Fernandez, *supra* note 15, at 112 (internal citations omitted).
59. Scott McAnsh, *The Paris Climate Agreement: What Does It Really Mean for Climate Change?,* Ecojustice, Mar. 29, 2017, http://www.ecojustice.ca/the-paris-climate-agreement-what-does-it-really-mean-for-climate-change/.
60. *Id.*
61. Fernandez, *supra* note 15, at 120.
62. *Id.*
63. *See infra* Sections III.B.-C.
64. Thomas Damassa et al., *6 Graphs Explain the World's Top 10 Emitters*, World Resources Inst., Nov. 25, 2014, https://www.wri.org/blog/2014/11/6-graphs-explain-world's-top-10-emitters.
65. *See* Jenny Nelson, *Make Our Planet Great Again*, 94 Denv. L. Rev. Online 414, 414-15 (2017).
66. *See* United Nations Treaty Collection, *supra* note 18.
67. Nelson, *supra* note 65, at 414.
68. Fernandez, *supra* note 15, at 112. For a discussion of why this course of action was chosen by the United States at the time, see *supra* Section I.B. Because the Paris Agreement is largely aspirational, its ratification without Congress can be "justified as further implementing the existing objective under the *umbrella* of the previously ratified UNFCCC Treaty." Fernandez, *supra* note 15, at 126. However, some argue that the Paris Agreement should have required advice and consent of two-thirds of the Senate to be ratified as a separate treaty. *See id.*
69. *See* Fernandez, *supra* note 15, at 126.
70. Ross & Brown, *supra* note 1, at 38.
71. *Id. See also* Clean Air Act of 1970, 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618; Energy Policy Act of 2005, 42 U.S.C. §§15801-16538; Energy Independence Security Act of 2007, 42 U.S.C. §§17001-17386, ELR Stat. EISA §§101-1601. The Clean Power Plan of 2015 is currently in the process of being reviewed and repealed as ordered by the Trump Administration. *See infra* note 117 and accompanying text.
72. McKinstry Jr. et al., *supra* note 25, at 10137. *See also* 42 U.S.C. §§7521-7590.
73. Bob Lambrechts, *Navigating the Change in Climate Change Regulation in Kansas and Beyond*, J. Kan. B. Ass'n, Apr. 2017, at 42, 44. *See also* The White House, United States Mid-Century Strategy for Deep Decarbonization (2016), https://unfccc.int/files/focus/long-term_strategies/application/pdf/us_mid_century_strategy.pdf.

States' pledge to reduce emissions by 28% from 2005 levels by 2025.[74]

B. Federal Withdrawal From the Paris Agreement

Early on in his 2016 presidential campaign, President Trump vowed to withdraw the United States from the Paris Agreement as quickly as possible if elected.[75] After his election, and amid the global discussions about climate change that followed the G7 summit in 2017, on June 1, 2017, President Trump announced that the United States would withdraw from the Agreement.[76] Additionally, President Trump has called for a repeal of the Clean Power Plan,[77] and has announced the cancellation of additional U.S. contributions to the Green Climate Fund, a mechanism of the UNFCCC through which 37 industrialized countries contribute money to help finance climate-aware technologies in developing countries.[78]

President Trump's withdrawal from the Paris Agreement may actually turn out to be meaningless, however. Even though the executive branch holds the power to unilaterally withdraw from the Agreement,[79] Article 28 of the Paris Agreement specifies that Parties may only withdraw from the Agreement "after three years from the date on which [the] Agreement has entered into force," and that "[a]ny such withdrawal shall take effect upon expiry of one year from the date of receipt . . . of the notification of withdrawal."[80] Therefore, the United States' withdrawal seemingly cannot take effect until 2020 at the earliest.[81] However, if the withdrawal is successful, the United States as a whole will no longer be a Party to the Paris Agreement, and will thereby become the only nonparticipating country in the world.[82]

C. "We Are Still In": State Involvement With the Paris Agreement

The president's decision to withdraw from the Paris Agreement has brought state and local action to the forefront of the climate battle. In the absence of any federal commitment to the Paris Agreement, many states are taking action into their own hands by vowing to individually uphold the goals of the Paris Agreement.[83] As of November 2017, a total of 20 states, Washington, D.C., and Puerto Rico have publicly pledged to uphold the Paris Agreement, representing 54% of the nation's gross domestic product.[84]

Hawaii became the first state to pledge its continued commitment to the Paris Agreement with the signing of Senate Bill 559—which formally committed the state to the Paris Agreement's goal of reducing greenhouse gas emissions—and House Bill 1578—which created a task force to keep Hawaii's air and water clean.[85] Since then, several other states have started pursuing climate goals that are equally if not more aggressive than the original NDC of the United States.[86] The governors of California, New York, and Washington formed the U.S. Climate Alliance, a bipartisan coalition of states committed to greenhouse gas emission reductions consistent with the goals of the Paris Agreement.[87] As of September 2018, 16 states and Puerto Rico have joined the Alliance, totaling more than 40% of the nation's population.[88] These states are working to uphold the United States' commitment to reducing greenhouse gas emissions by 26% to 28% below 2005 levels by 2025, and plan to do so by attracting new investment in clean energy and transportation.[89] The Alliance states have reported a 15% reduction in their greenhouse gas emissions from 2005 to 2015, and are on track for a reduction of 24% to 29% by 2025.[90]

In addition to states, many cities and companies are committing to uphold the Paris Agreement.[91] For example, a group of mayors led by Los Angeles Mayor Eric Garcetti formed the Mayors National Climate Action Agenda or "Climate Mayors" group, which has ballooned to include mayors representing 412 cities and nearly 20% of the country's population.[92] In the group, mayors share their best management practices and target reductions of greenhouse gas emissions.[93] The group even advertises a "Paris Agreement Adoption Toolkit," providing resources to cities and mayors who want to commit to the spirit and goals of the Paris Agreement.[94] Additionally, large companies, ranging from retailers to car manufacturers and even some oil companies, have announced their support for the Paris

74. *Id.*
75. Lambrechts, *supra* note 73, at 44.
76. Ross & Brown, *supra* note 1, at 36.
77. U.S. Environmental Protection Agency, *Complying With President Trump's Executive Order on Energy Independence*, https://www.epa.gov/energy-independence (last updated June 18, 2018). *See infra* note 117 and accompanying text.
78. Ross & Brown, *supra* note 1, at 38.
79. *See* Alexander Dunn, *J'Adore No More: President Trump and the Paris Agreement*, 11/28/2016 Geo. Envtl. L. Rev. Online 1 (2016).
80. United Nations Paris Agreement, *supra* note 17, art. 28. *See also* Dunn, *supra* note 79.
81. *See* Ross & Brown, *supra* note 1, at 38; McKinstry Jr. et al., *supra* note 25, at 10138.
82. With Syria's signing of the Paris Agreement in November 2017, the United States is now the only country opposed to the Paris Agreement. Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. Times, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html.
83. *Id.*
84. Alister Doyle, *Anti-Trump Group Says Most of US Economy Backs Paris Climate Pact*, Reuters, Nov. 11, 2017, https://www.reuters.com/article/us-climatechange-accord-usa/anti-trump-group-says-most-of-us-economy-backs-paris-climate-pact-idUSKBN1DB0AO. Sixteen of these 20 states and Puerto Rico are part of the Climate Alliance. *See infra* notes 87-88 and accompanying text.
85. Dom Galeon & Christianna Reedy, *Blazing a Trail: Hawaii Becomes the First U.S. State to Commit to the Paris Climate Accords*, Futurism, June 8, 2017, https://futurism.com/blazing-a-trail-hawaii-becomes-the-first-u-s-state-to-commit-to-the-paris-climate-accords.
86. Ross & Brown, *supra* note 1, at 39.
87. *Id.*
88. United States Climate Alliance, *supra* note 7.
89. U.S. Climate Alliance, *supra* note 8, at 4-8.
90. *Id.*
91. *See* Regan, *supra* note 6.
92. Climate Mayors, *Home Page*, http://climatemayors.org (last visited Sept. 8, 2018).
93. *See* Ross & Brown, *supra* note 1, at 39.
94. Climate Mayors, *City Officials—Paris Agreement Adoption Toolkit*, http://climatemayors.org/get-involved/city-officials/ (last visited Sept. 8, 2018).

Agreement.[95] Among those companies are ExxonMobil, Occidental Petroleum, and PPL Corporation.[96] Further, more than 3,500 leaders from states, cities, counties, businesses, and universities have signed on to the "We Are Still In" campaign, pledging individual commitments to uphold the Paris Agreement and tackle climate change issues in the United States.[97]

In addition to these national and subnational commitments, 18 U.S. states have pledged their support for the Paris Agreement directly to the United Nations.[98] The Agreement has a built-in mechanism for handling climate change commitments from non-nations.[99] Subnational groups can enter their own parallel pledges to reduce greenhouse gas emissions using the NAZCA portal.[100] Although this portal does not make the subnational groups official Parties to the Paris Agreement in any legal sense, it does allow them to take the same actions as the Parties of the Agreement: they can submit emissions targets and report their progress.[101] In this sense, the Paris Agreement can be viewed as a "quasi-treaty" between subnational groups; the agreements they make are voluntary and are not legally enforceable at all.

As of September 2018, more than 12,500 of these non-state actor pledges have been received.[102] This mechanism likely was not built with the intention of state and local governments attempting to fill the void left by their national government, but rather as a means of encouraging broad involvement across different industries and locations.[103] Despite this, many states and local governments in the United States have taken advantage of the mechanism to recommit large proportions of U.S. citizens to the Paris Agreement.[104]

Although the non-state actor pledges signed by several states and localities have no legal enforceability and do not commit the non-state actors as signatories to the Agreement, critics have called these pledges and other state actions unconstitutional.[105] Opponents of individual state action on the Paris Agreement argue that states are prohibited from entering into international agreements because of the constitutional restrictions inherent in the Supremacy Clause, the Treaty Clause, and the Compact Clause.[106] These constitutional arguments will be examined in the following part.[107]

III. Legal Hurdles to State Involvement in the Paris Agreement

Commitments to the Paris Agreement by individual states as the federal government looks to withdraw raise several legal questions. There are three possible constitutional barriers to the international linking of subnational greenhouse gas markets.[108] The examination of these potential barriers is largely uncharted territory, and scholars have noted that "recent foreign affairs activities of state and local governments exist in a constitutional fog."[109]

Constitutional constraints on subnational involvement with international climate change agreements stem from the general premise that any foreign affairs-related activity is the federal government's exclusive domain.[110] Constitutional bases for this exclusive federal power are found in the Supremacy Clause, the Treaty Clause, and the Compact Clause.[111] This part discusses these three major constitutional questions that arise in the context of state involvement in the Paris Agreement. First, I consider and reject the idea that the Supremacy Clause preempts state action. Second, I discuss the Treaty Clause, and why it does not prohibit states from entering into the Paris Agreement. Lastly, I examine the Compact Clause, and determine that it also does not prevent state action.

A. *The Supremacy Clause*

The Supremacy Clause is the first relevant constitutional provision to consider when analyzing whether individual states may pledge commitments to the Paris Agreement amidst federal withdrawal. The Supremacy Clause states that the laws made by the U.S. federal government are the "supreme law of the land" and bind every state.[112] The clause has important implications for state involvement in foreign affairs, as foreign affairs are typically viewed as an area wholly controlled by the federal government.

95. Ross & Brown, *supra* note 1, at 39.
96. *Id.*
97. We Are Still In, *Home Page*, https://www.wearestillin.com (last visited Sept. 8, 2018).
98. *See* Global Climate Action NAZCA, *supra* note 10.
99. Zoë Schlanger, *The Paris Agreement Accidentally Created a Backdoor for US States and Companies to Defy Trump's Defection*, Quartz, June 6, 2017, https://qz.com/999980/how-us-states-and-companies-can-join-the-paris-agreement-despite-trumps-exit/.
100. *Id. See also* Global Climate Action NAZCA, *supra* note 10.
101. Schlanger, *supra* note 99.
102. Global Climate Action NAZCA, *supra* note 10.
103. Schlanger, *supra* note 99.
104. *See* Regan, *supra* note 6.
105. *See*, *e.g.*, Lowe, *supra* note 11 (arguing that state and local pledges to the Paris Agreement are unconstitutional based on the Treaty and Compact Clauses).
106. *See* Basu, *supra* note 11; Lowe, *supra* note 11.
107. *See infra* Part III.
108. David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 ELR 10478, 10478 (June 2016). *See also* Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. Rev. 1621, 1625 (2008) (noting that restrictions on state foreign affairs activities stemming from the Treaty Clause and Compact Clause are "notoriously undetermined areas of constitutional law").
109. Wright, *supra* note 108, at 10486 (quoting Kysar & Meyler, *supra* note 108, at 1625).
110. *See* Wright, *supra* note 108, at 10486.
111. *See* U.S. Const. art. VI, cl. 2; *id.* art. I, §X, cl. 1; *id.* cl. 3.
112. *Id.* art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

1. The Supremacy Clause: Express Preemption

Under the Supremacy Clause,[113] there are two relevant bases for claiming statutory preemption: express and implied.[114] Express preemption arises when a federal statute specifically declares that states are preempted and thus prohibited from making a law in a certain context.[115] To date, there is no express statutory preemption of climate change laws.[116] The major piece of federal legislation governing greenhouse gas emissions, the CAA, does not contain any explicit statutory preemption phrase.[117] In fact, under the Clean Power Plan that was enacted within the CAA,[118] states were not only encouraged, but required to initiate actions that would reduce their greenhouse gas emissions, and emissions trading across state borders was expressly permitted.[119] Therefore, it is relatively clear that there is no express preemption on state action in this context.

2. The Supremacy Clause: Implied Preemption

Without an express preemption of state involvement in this arena, there is still the possibility of implied preemption. Implied preemption encompasses two sub-doctrines: field preemption and conflict preemption.[120] Field preemption occurs when the federal government has regulated an area so comprehensively that it has not left room for state regulation on the matter.[121] The general premise behind field preemption is that Congress intended, by creating so many federal laws, to preempt the states from acting in a certain realm.[122]

In the case of climate change regulations, it is relatively clear that field preemption does not apply.[123] There is no comprehensive federal regulatory regime in place to monitor greenhouse gas emissions.[124] Further, the CAA, the statute most closely related to greenhouse gas emissions, contains no explicit preemption provision.[125] Nor does field preemption appear to apply if we look to international climate change treaties in which the United States is involved. While the United States is a Party to the UNFCCC, that treaty explicitly states that developed countries should pursue their climate goals "in a flexible manner."[126] Therefore, field preemption of state action on climate change regulations is unlikely.

Conflict preemption, on the other hand, arises when a state's actions make compliance with both the federal regulation and the state regulation impossible, or when a state's actions present an obstacle to accomplishing the goal of a federal statute.[127] In such cases, courts will strike down the state law causing such issues.[128] However, courts have not acted with absolute clarity in these cases.[129]

In *Crosby v. National Foreign Trade Council*,[130] for example, the U.S. Supreme Court considered a Massachusetts state law that barred state organizations from buying goods and services from companies that did business with Burma (Myanmar), citing human rights concerns.[131] At the same time the state law was enacted, there was a federal act imposing sanctions on Burma as well, which gave the president exclusive control over what economic sanctions should be imposed.[132] The Court held that federal law preempted the state law because the state law conflicted with the federal law's execution, and the state law was therefore unconstitutional under the Supremacy Clause.[133] In its analysis, the Court emphasized that the federal statute must be examined as a whole when performing a conflict preemption analysis.[134]

In *American Insurance Ass'n v. Garamendi*, the Supreme Court further expanded the basis on which a state law may be deemed unconstitutional.[135] The case involved a California law that required insurers to disclose information on Holocaust-era insurance policies.[136] In particular, a provision of that law required any insurer doing business in California and selling insurance policies in Europe to inform the state of those policies or risk losing its license.[137]

The Court struck down the California law as unconstitutional after finding that it imposed a stricter requirement on insurers than those negotiated by the president, and that it therefore impermissibly interfered with the president's foreign affairs conduct.[138] The result of this case was an expansion of the conflict preemption doctrine to what is now known as the "*Garamendi* version of conflict preemption"[139]: the idea that a state law need not be in direct conflict with a federal law to be preempted.[140] Instead, a state law may also be preempted by a foreign policy within an executive agreement.[141]

Under this *Garamendi* analysis, if a state's commitments to the Paris Agreement make compliance with federal regulations or executive agreements impossible, or present an obstacle to accomplishing an objective of a federal statute

113. *Id.*
114. Wright, *supra* note 108, at 10486.
115. *Id.*
116. *Id.*
117. *See* 42 U.S.C. §§7401-7671q.
118. The Clean Power Plan is currently in the process of being reviewed and repealed as ordered by the Trump Administration. *See* 40 C.F.R. §60 (2017); Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 198 (Oct. 16, 2017) (to be codified at 40 C.F.R. §60).
119. *See* 40 C.F.R. §§60.10, 60.26 (2017).
120. Wright, *supra* note 108, at 10486.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id. See also* 42 U.S.C. §§7401-7671q.
126. United Nations Framework Convention on Climate Change, *supra* note 15.
127. 530 U.S. 363, 372 (2000).
128. Wright, *supra* note 108, at 10487.
129. *Id.*
130. *Crosby*, 530 U.S. 363.
131. *Id.* at 366-67.
132. *Id.* at 368-70.
133. *Id.* at 366.
134. *Id.* at 373.
135. 539 U.S. 396 (2003).
136. *Id.* at 401.
137. *Id.* at 410.
138. *Id.* at 429.
139. Wright, *supra* note 108, at 10487.
140. *Id.*
141. *Id.*

or agreement, they will be held unconstitutional. This is not the case here, however. There are no federal regulations on climate change with which this action would interfere.[142] Further, state involvement in the Paris Agreement does not stand in the way of the purposes of any federal legislation.[143] The most relevant federal statute, the CAA, is not hindered by this state action as it does not speak to international climate change agreements.[144]

State involvement with the Paris Agreement also does not conflict with President Trump's executive decision to withdraw the United States from the Agreement. First, that decision is only an oral statement by the president at this time, and cannot take effect until 2020 at the earliest.[145] Second, the withdrawal applies only to the U.S. federal government's involvement as an official Party to the Agreement. Again, state and local governments and businesses that choose to join the Agreement do so in a non-official capacity that does not make them a Party to the Agreement and is not legally binding in any way.[146] Because of this, there is no conflict preemption and thus no implied preemption of any kind.

3. The Supremacy Clause: Dormant Foreign Affairs Power

The Supremacy Clause inquiry does not stop there. In cases in which there is no federal statutory preemption, the Dormant Foreign Affairs Power may still preempt state action.[147] The Dormant Foreign Affairs Power is set out in *Zschernig v. Miller*.[148] In that case, the Supreme Court invalidated an Oregon law prohibiting inheritance by non-resident aliens.[149] The Court held that even though inheritance was an area of traditional state concern and regulation, this law constituted an intrusion into the field of foreign affairs, which is entrusted solely to the federal government.[150]

Although *Zschernig* sets out a seemingly strong argument for preemption of state action relating to foreign affairs, it does not necessarily control in this scenario. The Court in *Zschernig* emphasized that the Oregon law at issue in that case threatened to "impair the effective exercise of the Nation's foreign policy."[151] Such impairment does not arise when states and localities join the Paris Agreement. *Zschernig* and subsequent cases that have followed its holding have dealt with states expressing their condemnation for a foreign country's activities through the implementation of regulations that equate to embargoes or boycotts.[152] Under the Paris Agreement, however, states pledge voluntary commitments to an international agreement, without attempting to speak for the nation in condemning a foreign power. *Zschernig* is therefore inapposite here, and it is unlikely that a court would find any violation of the Dormant Foreign Affairs Power.[153]

Moreover, scholars have long debated the strength of the *Zschernig* holding.[154] Courts have been reluctant to apply this principle, and have declined to extend its reach.[155] Notably, the more recent *Garamendi* decision did not rely on *Zschernig*.[156] In fact, the Supreme Court has not followed this holding at all since the decision,[157] and its holding has become distinguished as a remnant of the Cold War era, when states were eager to display their anti-Communist fervor.[158]

Despite this debate about the strength of the *Zschernig* holding, the U.S. Court of Appeals for the Ninth Circuit relied on it in a 2012 decision, *Movsesian v. Versicherung AG*.[159] In that case, the court held that a state law might be unconstitutional even absent a conflict with federal foreign policy, if the law "(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power."[160] The *Movsesian* case requires courts to inquire whether the "real purpose" of a state law is to address a foreign affairs event or to regulate an area of traditional state concern.[161]

Applying this holding to the case at hand yields two possible results. On the one hand, the Supreme Court has long recognized a state's interest in protecting "all the earth and air within its domain."[162] Courts therefore may find that states are merely protecting their own interests by entering into climate change agreements. On the other hand, the *Movsesian* holding may increase judicial scrutiny of state laws that focus heavily on emphasizing their disagreement with President Trump's withdrawal from the Paris Agree-

142. *See id.*; 42 U.S.C. §§7401-7671q.
143. *See* Wright, *supra* note 108, at 10487.
144. *See id.*; 42 U.S.C. §§7401-7671q.
145. *See supra* notes 80-81 and accompanying text.
146. *See* Schlanger, *supra* note 99.
147. Wright, *supra* note 108, at 10487.
148. 389 U.S. 429 (1968).
149. *Id.* at 431.
150. *Id.* at 440-41.
151. *Id.* at 440.
152. *See* Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300, 307 (Ill. 1986) (invalidating Illinois tax provision that discriminated against South African coins because "sole motivation was disapproval of [South Africa's] policies" and "encouraging a boycott" of South African products). *See also* Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1378 (D.N.M. 1980) (invalidating state university's policy of denying admission to Iranian students in retaliation for the Iranian hostage crisis).
153. *See* Cruz v. United States, 387 F. Supp. 2d 1057, 1075 (N.D. Cal. 2005).
154. *See* Wright, *supra* note 108, at 10487; Jeremy Lawrence, *The Western Climate Initiative: Cross-Border Collaboration and Constitutional Structure in the United States and Canada*, 82 S. Cal. L. Rev. 1225, 1226 (2008).
155. *See*, *e.g.*, *Cruz*, 387 F. Supp. 2d at 1075.
156. *See* Wright, *supra* note 108, at 10487. *See also* American Ins. Ass'n v. Garamendi, 539 U.S. 396, 417-20 (2003) (holding that Zschernig's doctrine of dormant preemption was not applicable because there was a federal foreign policy in "clear conflict" with the state law in this case).
157. *See Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting) ("We have not relied on Zschernig since it was decided, and I would not resurrect that decision here."). *But see* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 Emory L.J. 31, 40, 74-77 (2007) (discussing *Zschernig* and *Garamendi* as related examples of a troubling new "foreign affairs preemption" doctrine).
158. Lawrence, *supra* note 154, at 1257-58.
159. 670 F.3d 1067 (9th Cir. 2012).
160. *Id.* at 1074.
161. *Id.*
162. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 519, 37 ELR 20075 (2007) (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

ment. If a state law crosses the fine line between protecting its interests and expressing foreign policy, it may run afoul of the Dormant Foreign Affairs Power.

To date, few state laws relating to climate change have ever been challenged using this doctrine.[163] This is partly due to the fact that some state laws were enacted under express waiver authority of the CAA, which allows state regulation of motor vehicle emissions.[164] Further, two federal district courts have rejected arguments that state laws governing emissions standards on new vehicles are preempted by the federal government's foreign affairs power.[165]

Though the Dormant Foreign Affairs Power has not proven to be a major barrier to state legislation on climate change so far, it could become one in the future. However, it would likely withstand scrutiny as long as the state action reasonably related to the state's interests, and did not focus too heavily on condemning federal foreign policy or otherwise impairing the federal government's exercise of foreign policy powers.

4. The Supremacy Clause: Summary of Doctrines

In sum, the Supremacy Clause likely does not present an insurmountable hurdle for individual state involvement in the Paris Agreement. There is no express statutory preemption of climate change laws in the CAA or other federal legislation.[166] There also is no implied field preemption because there is no comprehensive federal regulation of greenhouse gases.[167] Further, there is likely no implied conflict preemption because state action here is not at odds with any federal decision.[168] Lastly, the Dormant Foreign Affairs Power is also not at issue, as the state actions here involve the legitimate protection of state interests, and are not merely an expression of disapproval of the country's policies.[169]

B. The Treaty Clause

Aside from the preemption restrictions stemming from the Supremacy Clause,[170] states are further constrained by the provisions of the Treaty Clause set out in Article I, §10.[171] The Treaty Clause states that "[n]o state shall enter into any treaty, alliance, or confederation," and thus becomes important in the debate of whether state involvement in the Paris Agreement constitutes a "treaty" within the meaning of this clause.[172]

Case law on the interpretation of the Treaty Clause is limited, perhaps due to its relative clarity.[173] The landmark decision on the Treaty Clause is *Holmes v. Jennison*, a case from 1840 that continues to represent the law today.[174] In that case, the Supreme Court held that an extradition arrangement between Vermont and Quebec was unconstitutional.[175] The Court reasoned that such an arrangement was akin to an international treaty.[176] Notably, however, the Court drew a distinction between "treaties," as contemplated and forbidden to states in the Treaty Clause, and "agreements."[177] The Court held that a "treaty" was "an instrument written and executed with the formalities customary among nations."[178] Further, a "treaty" aims to secure "public welfare" and applies "for a considerable time,"[179] while an "agreement" may differ in object and duration.[180]

Although the Court in *Holmes* did not explore the constitutionality of all possible forms of agreements between individual states and foreign nations, it implied that agreements were not "positively and unconditionally forbidden" for states to enter, as treaties are.[181] The general consensus now is that states may have some flexibility to enter into agreements with other governments so long as they are not formalized "treaties."[182]

More recently, dicta in *Massachusetts v. Environmental Protection Agency*,[183] a case primarily about the federal government's authority to regulate greenhouse gases under the CAA, touched on the Treaty Clause.[184] Justice John Paul Stevens stated, as part of the majority opinion, "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, *it cannot negotiate an emissions treaty with China or India*."[185]

Despite this, the Supreme Court is unlikely to ever find individual states' actions in the Paris Agreement to be unconstitutional based on the Treaty Clause alone. No agreement to date between an individual state and a foreign country has ever been successfully challenged as a violation of the Treaty Clause.[186] Further, when states enter the Paris Agreement, they are not considered signatories or

163. Congressional Research Service, *supra* note 11.
164. *Id*. *See also* 42 U.S.C. §7543.
165. *See* Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (granting summary judgment to California on a challenge to the state's law setting emissions standards for new vehicles); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 37 ELR 20232 (D. Vt. 2007) (upholding a similar law in Vermont).
166. *See supra* Section III.A.1.
167. *See supra* Section III.A.2.
168. *See id*.
169. *See supra* Section III.A.3.
170. *See supra* Section III.A.
171. U.S. Const. art. I, §X, cl. 1.
172. *Id*.
173. *See* Wright, *supra* note 108, at 10488.
174. 39 U.S. 540 (1840).
175. *Id*. at 569.
176. *See id*.
177. *See id*. at 571 ("[T]he words 'agreement' and 'compact,' cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word 'treaty.'").
178. *Id*. at 572.
179. *Id*.
180. *Id*.
181. *See id*.
182. *See* Wright, *supra* note 108, at 10488. For further analysis of states' power to enter into agreements or compacts, see *infra* Section III.C.
183. 549 U.S. 497. 37 ELR 20075 (2007).
184. *See id*. at 519.
185. *Id*. (emphasis added).
186. Louis Henkin, Foreign Affairs and the United States Constitution 152 (2d ed. 1996). *See also* Lawrence, *supra* note 154, at 1251-52.

Parties to the Agreement.[187] Instead, they are simply stating their own independent, voluntary commitments.[188] It would be difficult to consider these commitments "treaties," and therefore unlikely for the Treaty Clause to bring about much trouble for these states that choose to enter their commitments. Because states are not true Parties to the Paris Agreement, their actions are likely not at odds with the Treaty Clause.

C. The Compact Clause

The final and perhaps the most challenging constitutional hurdle for these states to overcome in entering commitments to the Paris Agreement is the Compact Clause, which states that "[n]o State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[189] Although at first glance the Compact Clause appears to prohibit any and all agreements or compacts, in practice, the interpretation of this text is more complex and varied than it seems.[190] Courts have interpreted the Compact Clause to mean that some but not all compacts or agreements require congressional approval.[191] The relevant question, then, becomes whether individual state involvement in the Paris Agreement constitutes an agreement or compact violative of this clause.

The *Holmes* case discussed in Section III.B. represented the Supreme Court's first real opportunity to clarify the scope of the Compact Clause, yet the Court's holding was inconclusive.[192] While the holding in *Holmes* tended to suggest that perhaps *all* agreements, however informal, between a state and a foreign government were unconstitutional, subsequent cases have not followed this view.[193] Generally, courts seemed reluctant to invalidate all instances of interstate cooperation and agreements that were developing over time.[194]

For example, in *Union Branch R.R. Co. v. East Tennessee & Georgia R.R. Co.*, the Georgia Supreme Court made no mention of the *Holmes* decision at all, and rejected a Compact Clause challenge to a railroad construction agreement between Georgia and Tennessee.[195] The court held that the Compact Clause restrained states' power only with respect to agreements "which might limit, or infringe upon a full or complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution."[196] The court reasoned that a broader reading of the Compact Clause could not have been intended, because no benefit would be gained by such a provision.[197]

Justice Stephen Field echoed this line of thinking 40 years later in *Virginia v. Tennessee*.[198] In dicta on the Compact Clause, Justice Field opined:

> The terms "agreement" or "compact" taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control.[199]

Justice Field proceeded to provide examples of interstate agreements that would in no respect restrain the federal government, and thus concluded that the Framers could not have intended the Compact Clause to reach every possible agreement between states.[200] He then concluded that the Compact Clause was meant to prohibit only the formation of agreements "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[201] A year later, Justice Field restated this functional interpretation of the Compact Clause in *Wharton v. Wise*.[202]

This view was reaffirmed decades later in *New Hampshire v. Maine*, when the Supreme Court held that the Compact Clause did not require congressional consent for an interstate agreement about an ancient boundary.[203] The Court again applied this functional analysis of the Compact Clause in *U.S. Steel Corp. v. Multistate Tax Commission*,[204] holding that the Multistate Tax Compact adopted by seven states without congressional approval was constitutional.[205] Congressional approval was not required under the Compact Clause because the agreement did not infringe upon the federal government's exclusive territory or supremacy.[206]

These precedent cases "quite clearly [hold] that not all agreements and compacts must be submitted to the Congress."[207] The test that has emerged for the application of the Compact Clause is whether or not the state's involvement with an agreement or compact with another state or foreign government interferes with the supremacy of the United States.[208] In this way, the Compact Clause mirrors the Supremacy Clause. Because the Supremacy Clause likely does not preempt these state actions,[209] the Compact Clause similarly should not.

187. *See* Schlanger, *supra* note 99.
188. *See id.*; Global Climate Action NAZCA, *supra* note 10.
189. U.S. Const. art. I, §X, cl. 1.
190. *See* Congressional Research Service, *supra* note 11.
191. Wright, *supra* note 108, at 10488.
192. *See supra* Section III.B. *See also* Holmes v. Jennison, 39 U.S. 540 (1840).
193. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 465 (1978).
194. *See id.*
195. 14 Ga. 327 (Ga. 1853).
196. *Id.* at 339.
197. *Id.* at 340.
198. 148 U.S. 503 (1893).
199. *Id.* at 517-18.
200. *Id.* at 518.
201. *Id.* at 519.
202. 153 U.S. 155, 168-70 (1894).
203. *See* 426 U.S. 363, 370 (1976).
204. 434 U.S. 452 (1978).
205. *Id.* at 479.
206. *Id.* at 472-78.
207. *Id.* at 489 (White, J., dissenting).
208. *See id.*
209. *See supra* Section III.A.

The Compact Clause does not forbid state action here for another reason as well. The U.S. Department of State, a branch of government that advises the states and foreign countries on the implications of the Constitution, has interpreted the Compact Clause to preclude only legally binding agreements.[210] Individual states that make voluntary pledges to the Paris Agreement are not entering into any kind of legally enforceable agreement or compact between countries. Indeed the Paris Agreement itself, for official signatories, has no mechanism for compliance or enforcement besides transparency and the vague threat of embarrassment should a country fail to meet its publicly announced emissions targets.[211]

But even further than that, individual states, localities, and businesses that commit themselves to the Agreement are not considered to be actual signatories or Parties to the Agreement.[212] Therefore, whatever binding or legal authority the Paris Agreement has over its Parties does not apply to these individual state commitments. Thus, if a state chooses to announce that they plan to take up certain policies to reduce their climate footprint, without any legal or compliance implications, they are allowed to do so without violating the Compact Clause.[213]

Because the Paris Agreement for non-state actors is completely nonbinding,[214] it would presumably survive any constitutional challenge under the Compact Clause.[215] Similarly, the memorandum of understanding between China and California contains language expressly stating that its provisions are not legally binding.[216] It is therefore unlikely that the Compact Clause could restrict this memorandum or other similar agreements.[217]

Because the commitment of a state to the Paris Agreement does not interfere with the supremacy of the United States, and because the commitment is wholly voluntary and not legally enforceable, this state action likely survives the scrutiny of the Compact Clause.

IV. Application Beyond the Paris Agreement

With the uncertainty inherent in the politics surrounding climate change regulation, it is difficult to predict the actions that the federal government and individual states will take in the future. It is therefore important to analyze possible future agreements that states may form, and the constitutional limits of the arguments made here. Although I have argued that state commitments to the Paris Agreement do not violate the Constitution, there are almost assuredly some agreements that a state could enter into that would violate the Supremacy Clause, Treaty Clause, or Compact Clause.

Looking first to the Supremacy Clause, a state could violate the express preemption doctrine if, for example, the CAA or another federal statute relating to greenhouse gases contained an explicit preemption clause.[218] A state could similarly violate the implied preemption doctrine if the federal government enacted climate change regulation that was so comprehensive that state action could only be viewed as being at odds with the federal legislation.[219] Additionally, if the federal government enacted legislation that set a definitive ceiling rather than just a floor on climate standards, any state action that exceeded that ceiling would be preempted.[220] Given the current political climate, however, preemption on this topic seems unlikely.

Further, a state could violate the Dormant Foreign Affairs Power if it crafted a law or agreement with the primary purpose of showing disapproval of the federal government's actions, rather than protecting the state's interests.[221] This may be a fine distinction for some agreements or state laws, and one that states should be particularly cognizant of before acting. States should ensure that their actions are prompted by the desire to advance their citizens' interests, rather than the desire to speak out against federal climate change policy.

State actions would likely not violate the Treaty Clause, as that clause applies primarily to actual treaties ratified by a two-thirds Senate vote.[222] However, if a state entered into a written and executed agreement with binding provisions resembling a treaty, it may risk running afoul of the Treaty Clause.[223]

Lastly, a state could easily violate the Compact Clause if it chose to enter into a binding agreement with a foreign government or international body.[224] If a state became an actual Party to a treaty or international agreement, or otherwise signed a binding compact with punitive consequences, it would almost certainly be in violation of the Compact Clause.[225] States therefore must ensure that any agreement they enter into is completely voluntary, nonbinding, and free of penalties.

V. Conclusion

Individual U.S. state commitments to the Paris Agreement in the midst of federal withdrawal fall within the realm of permissible state power and are not unconstitutional. These individual states' actions do not violate the

210. Congressional Research Service, *supra* note 11.
211. *See supra* notes 60-62 and accompanying text.
212. *See* Schlanger, *supra* note 99.
213. *See* Congressional Research Service, *supra* note 11.
214. *See* Fernandez, *supra* note 15, at 120; *see also* Global Climate Action NAZCA, *supra* note 10.
215. *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 Tex. L. Rev. 741, 744 (2010) (explaining that Kansas' trade agreement with Cuba would likely not be found unconstitutional under the Compact Clause because the agreement is "non-binding").
216. *See* Memorandum of Understanding on California-Jiangsu Clean Technology Partnership, *supra* note 5.
217. Congressional Research Service, *supra* note 11.
218. *See supra* Section III.A.1.
219. *See supra* Section III.A.2.
220. *See id.*
221. *See supra* Section III.A.3.
222. *See supra* Section III.B.
223. *See id.*
224. *See supra* Section III.C.
225. *See id.*

Supremacy Clause because there is no express or implied federal statutory preemption on the topic of greenhouse gas emissions regulations.[226] Further, these actions do not impede significantly on the Dormant Foreign Affairs Power.[227] These state actions also do not violate the Treaty Clause, as the Paris Agreement is not a "treaty" as it applies to non-signatories.[228] Lastly, they do not violate the Compact Clause because they do not fall within the intended reach of the Compact Clause, and are merely voluntary pledges to take action.[229] As such, states should be able to continue their support for the Paris Agreement regardless of whether the federal government chooses to be involved. States ought to be careful, however, not to overstep the limits of their powers in entering into future climate change agreements.

226. *See supra* Section III.A.
227. *See id.*
228. *See supra* Section III.B.
229. *See supra* Section III.C.