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The International Commitments of the Fifty States

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ABSTRACT

U.S. law allocates power to conduct foreign relations primarily to the federal government, but it is well known that states routinely maintain foreign relations of their own. Much of this activity appears to result in legal and political commitments, whether in the form of "sister state" agreements or binding pledges to cooperate on discrete issues such as investment, environmental protection, and transportation. These commitments are at least loosely comparable to international treaties and may either advance or disserve state and national interests.

Yet very little is known about the commitments that are in force. For the most part, neither federal nor state law requires states to publish them or even report them to Congress or the executive branch. Few state agencies voluntarily post pertinent information online. Legal database companies have not included the commitments in their catalogs. And academic research has not served as an adequate, alternative source of transparency. The resulting uncertainty about modern practice inhibits the accountability of state governments to their voters, complicates any effort on the part of state officials to learn best practices, and impedes enforcement of the Article I Treaty Clause and the Compact Clause of the U.S. Constitution, both of which circumscribe state power in this area.

This Article resolves the present uncertainty by providing fresh transparency on state commitments with the national, regional, and local governments of foreign sovereigns. Through freedom-of-information requests to every major executive department and agency in each of the fifty states, I obtained a trove of hundreds of previously unpublished commitments, including many that appear to advance state and national interests in underappreciated ways, along with some that operate in significant tension—if not outright conflict—with federal law or foreign policy. The Article analyzes this collection to reveal new trends, promote accountability, identify lessons for negotiators, and facilitate norm consolidation in domestic law. The Article concludes by proposing measures to strengthen the legality and transparency of future commitments.

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INTRODUCTION

The U.S. Constitution assigns the federal government extensive power to enter cooperative arrangements with foreign governments, but that power is in some respects nonexclusive. U.S. states cannot adopt "Treat[ies],"[1] but the Compact Clause permits them to enter "Agreement[s]" and "Compact[s]" with "foreign Power[s]" if Congress consents.[2] In addition, a modern view suggests that it is possible for states independently to enter international commitments that neither qualify as "Treat[ies]" nor implicate the Compact Clause.[3] State and foreign officials have reportedly seized these openings by concluding instruments under various designations, such as "memorandum of understanding" and "letter of intent."[4]

Yet much of this practice is opaque. Federal law requires the U.S. Secretary of State to publish online and transmit to Congress many international agreements to which the United States is a party,[5] but federal law does not directly require the publication of any state agreements with foreign governments.[6] Nor does it

1. U.S. CONST. art. I, § 10, cl. 1.
2. *Id.* cl. 3.
3. *See* Letter from William H. Taft, Legal Adviser of the Department of State to Senator Byron L. Dorgan of North Dakota regarding a Memorandum of Understanding (MOU) signed by the State of Missouri and the Province of Manitoba (Nov. 20, 2001), *in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 179, 181–85 (Sally J. Cummins & David P. Stewart eds., 2001) [hereinafter Taft Letter] (articulating this view).
4. *See, e.g.*, Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1072 n.5, 1080 n.39 (2008) (citing examples); *see also* MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 60–62 (2016) (suggesting that state arrangements with foreign governments are common).
5. 1 U.S.C. §§ 112a(d), 112b(a). For a critique of the implementation of these requirements, *see* Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020). For recent reforms that resulted from this critique, *see* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, § 5947 (2022).
6. The only publication requirement is indirect and incomplete: When Congress consents to a state agreement or compact with one or more foreign powers, it often does so in an act or joint resolution that incorporates the full text. *See, e.g.*, Joint Resolution Granting the Consent of Congress to the Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105-381, 112 Stat. 3402 (1998). This practice ensures that the text will be published, as federal law generally requires the publication of congressional acts and joint resolutions in the U.S. Statutes at Large. 1 U.S.C. § 112. But Congress rarely consents in the first place. Hollis, *supra* note 4, at 1075–79. Moreover, even when Congress consents, that consent does not necessarily appear in a law that incorporates and thereby reveals the full text of the underlying agreement. *See, e.g.*, Act of July 27, 1957, ch. 758, 70 Stat. 701 (1956) (consenting in advance to compact

require states to report these agreements to Congress or the executive branch. Legislation introduced in the House of Representatives in 2019 and the Senate in 2020 proposed to instruct the State Department to "[m]aintain[] a public database of subnational engagements" with foreign governments, but Congress failed to enact this reform.[7] A version of the National Defense Authorization Act for Fiscal Year 2022 (NDAA) that passed the House of Representatives in September 2021 would have tasked the Department with "tracking subnational engagements,"[8] but this language was missing from the final bill.[9] And although the recently enacted NDAA for 2023 contains a section on subnational diplomacy, no provision calls for federal or state efforts to gather or disseminate information on pertinent state activity.[10]

Meanwhile, state-led transparency initiatives are ad hoc and incomplete. Certain state agencies in California, Michigan, and North Carolina have posted online compilations of recent commitments on selected topics.[11] Similarly, the Council of State Governments has created an online repository of compacts between U.S. states, a small number of which include foreign governments as additional parties.[12] But it has long been true that most states do not publish their

negotiations between the State of New York and the Government of Canada on the establishment of the Niagara Frontier Port Authority). As a result, the Statutes at Large is a poor source of information on modern practice.

7. City and State Diplomacy Act, H.R. 3571, 116th Cong. § 4 (2019); City and State Diplomacy Act, S. 4426, 116th Cong. § 4 (2020).
8. National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. § 1341 (2021).
9. *See generally* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (omitting the provision on tracking subnational engagements).
10. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 9108 (2022) (expressing the sense of Congress that the growth of U.S. state and local involvement in foreign relations is generally a positive development, and requiring the State Department to submit to Congress a strategic plan for inter alia "countering subnational diplomacy efforts from adversarial nations" and "supporting subnational engagements involving policymakers from urban and rural areas to improve United States foreign policy effectiveness.").
11. *Climate Change Partnerships*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/about/campaigns/international-cooperation/climate-change-partnerships [https://perma.cc/R6HV-SVM8]; *MOUs*, MICH. ECON. DEV. CORP., https://www.michiganbusiness.org/about-medc/mous [https://perma.cc/33FN-D8YG]; *International Agreements*, N.C. SEC'Y STATE, https://www.sosnc.gov/divisions/international/international_agreements [https://perma.cc/W2V5-4CFB].
12. *See National Center for Interstate Compacts (NCIC)*, COUNCIL STATE GOV'TS, https://compacts.csg.org/ [https://perma.cc/Q7PW-U3G7] (publishing the text of five interstate compacts to which one or more Canadian provinces are also parties).

international commitments as a matter of course.[13] Moreover, states typically enter these commitments without consulting or even notifying federal authorities.[14]

A few scholars have worked to improve transparency in this context. In 1970, political scientists Richard Leach, Donald Walker, and Thomas Levy surveyed all administrative agencies in each of the Canadian provinces to gather information about provincial agreements with U.S. states.[15] In 1973, the State Department commissioned Roger Swanson to collect the same information, this time through correspondence with U.S. state officials.[16] And in 2009, Duncan Hollis conducted an extensive review of online materials to compile data on state agreements with any foreign government.[17] Each of these studies generated valuable insights on the volume and subject matter of the agreements, the identities of the state and foreign parties, and geographic and temporal patterns.

It seems fair to say, however, that the empirical record remains deficient. The studies from the 1970s are dated and provide zero information about U.S. state commitments involving countries other than Canada. Hollis's study is much more recent and geographically inclusive, but the fact that neither federal nor (most) state law specifically mandates disclosure raises questions about the

13. LUIGI DI MARZO, COMPONENT UNITS OF FEDERAL STATES AND INTERNATIONAL AGREEMENTS 59 (1980). To be sure, states "usually" adopt "compacts" via enabling statutes that incorporate the full text. MICHAEL L. BUENGER, JEFFREY B. LITWAK, RICHARD (RICK) L. MASTERS & MICHAEL H. MCCABE, THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS 272 (2d ed. 2016). But while those statutes may be subject to publication requirements under state law, few state commitments with foreign governments take the form of a legislatively enabled compact. *Id.* at 33–35. As a result, most commitments are not subject to publication requirements under state law.

14. Interview with Reta Jo Lewis, Former Special Representative for Global Intergovernmental Affairs, U.S. Department of State (June 15, 2021); *see also* Hollis, *supra* note 4, at 1098 (suggesting that there was no federal consultation or oversight in the "vast majority of cases" circa 2010); Raymond Spencer Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1025 n.14 (1967) (reporting that in 1924 the State Department indicated "it had no information on the conclusion of any treaty or agreement between a State of the United States and a foreign government," and explaining that the "policy of not noticing such agreements seems to continue to this date" and that "the present author is unable to document agreements known to exist").

15. *See* Richard H. Leach, Donald E. Walker & Thomas Allen Levy, *Province-State Trans-Border Relations: A Preliminary Assessment*, 16 CAN. PUB. ADMIN. 468 (1973).

16. *See* ROGER FRANK SWANSON, STATE/PROVINCIAL INTERACTION: A STUDY OF RELATIONS BETWEEN U.S. STATES AND CANADIAN PROVINCES PREPARED FOR THE U.S. DEPARTMENT OF STATE iii, 1 (1974).

17. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 750–59 (2010).

accuracy of any findings from online sources.[18] Finally, the existing studies provide only limited insight on the contents of the commitments from recent decades.[19]

The result is substantial uncertainty about modern practice: How numerous are state commitments with foreign governments today? What issues do the commitments address and how do they address them? Which states are involved? Who are the foreign counterparts? Are any of the arrangements void as "Treat[ies]"?[20] To what extent do they qualify as "Agreement[s] or Compact[s]" that require congressional consent?[21] And regardless of their legality, do they reflect sound policy choices on the part of state leaders? Although impressionistic accounts of the volume and diversity of subnational commitments are common in the academic literature on foreign affairs federalism,[22] no one has answered these questions with any degree of precision. In fact, it appears that even many state officials have lacked complete information about the commitments that are in force.[23]

Such conditions impede enforcement of the U.S. Constitution. Without information about an agreement or compact, Congress cannot deliberate on whether to consent. And without information about the broader corpus of commitments, U.S. courts cannot make informed decisions about whether any given arrangement materially deviates from traditional practice.

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18. *See id.* at 750 (acknowledging this difficulty).
19. Swanson published the complete text of forty-four commitments in an appendix, but all of them predated 1974. SWANSON, *supra* note 16, at 292–509. Hollis summarized tendencies with respect to the topics and objectives of the agreements that he found, in addition to discussing several specific agreements in detail. Hollis, *supra* note 17, at 754–59. He also reported that state commitments with foreign governments generally "lack one or more of the classic indicia required for an interstate compact or agreement to exist." *Id.* at 768. His conclusions, however, were based on the text of a minority of the commitments that existed at the time. *See id.* at 750, 768 (reporting findings based on not only the text of 102 commitments but also "[m]edia and other reports suggest[ing] the existence of an additional 238").
20. U.S. CONST. art. I, § 10, cl. 1.
21. *Id.* cl. 3.
22. *See, e.g.*, EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 5 (1998) (asserting that "over the past quarter of a century, state and local governments have entered into thousands of accords, compacts, and agreements (but not 'treaties') with national and subnational governments around the world").
23. *See* DI MARZO, *supra* note 13, at 59 (explaining that "most [state and provincial] governments do not keep careful records of the[ir] agreements" and "have not properly appraised their own practice"). For example, one official explained to me on background that the governor's office in her state was unaware of certain operative commitments on which I had obtained information from other agencies in that state.

The absence of transparency is problematic for other reasons as well. It interferes with the ability of drafters and negotiators to learn best practices. It hinders state compliance with the commitments themselves by obscuring their details from many state lawmakers and policymakers. And it inhibits democratic accountability: Some commitments may lawfully advance state and national interests, such as by facilitating commerce or cultural exchange with allies, mitigating environmental risks, or fostering cooperation in cross-border law enforcement. Others, however, may undermine those interests by intentionally or unwittingly harming third-party states, working at cross-purposes with federal law, or creating foreign confusion about U.S. policy. Still others may simply fail to achieve their objectives. Without transparency, the public cannot vote for or against state officials in light of their performance.

As an illustration of the current difficulty, consider a recent agreement between California and Québec to work "toward the harmonization and integration of [their] greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions."[24] In 2019, the Trump administration challenged this agreement in federal court on multiple grounds.[25] On one theory, the agreement violated the Article I Treaty Clause because it qualified as a "Treaty" that no state may enter.[26] On another theory, it violated the Compact Clause because it constituted an "Agreement or Compact" for which congressional consent was required but never obtained.[27] Arguments about the constitutional law of foreign relations often invoke the historical practice of government institutions as a determinant of legal meaning,[28] but the parties and amici in this case could, through no fault of their own, do little more than cite a few examples of prior agreements in pressing their respective positions.[29] Unable to draw much insight from those examples, the district court

24. Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Que., Sept. 22, 2017, art. I, *available at* https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/2017_linkage_agreement_ca-qc-on.pdf [https://perma.cc/LN68-37GE].

25. Complaint, United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142).

26. *See id.* at 14.

27. *See id.*

28. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 420 (2012) ("Invocations of historical practice are particularly common in constitutional controversies implicating foreign relations.").

29. *See* Plaintiff United States of America's Notice of Motion, Motion for Summary Judgment, and Brief in Support Thereof at 22–23, United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142) (citing congressional responses to four prior agreements in arguing that the Compact Clause required California to obtain congressional consent); Brief

entered summary judgment for the State without discussing historical practice, choosing instead to rely exclusively on U.S. Supreme Court precedent and eighteenth- and nineteenth-century treatises.[30] Whatever the overall merits of that decision, it left a central question unresolved: Was California's agreement typical, such that upholding it merely reaffirmed customary practice, or was it aberrational, such that upholding it significantly altered the legal landscape? The evidence available at the time permitted only conjecture.[31]

This Article resolves the present uncertainty by providing fresh transparency on U.S. state commitments with the national, regional, and local governments of foreign sovereigns. In 2020, I filed more than 650 freedom-of-information requests—one with every major executive department and administrative agency in each of the fifty states—to obtain copies of all commitments in force at that time. In response, state officials produced copies of more than 600 commitments totaling roughly 3000 pages, most of which have never been published, even online.[32] By analyzing these records, I am able to spot new trends, advance transparency and accountability, identify lessons for drafters and negotiators, and promote norm consolidation in a "notoriously underdetermined area[] of constitutional law."[33]

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of Amici Curiae the States of Oregon et al. at 13–14, 20–25, United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142) (citing a handful of preexisting agreements to argue that California's agreement comports with the Compact Clause); Brief of Amici Curiae Professors of Foreign Relations Law at 11–13, United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142) (citing as examples six agreements for which congressional consent was never obtained).

30. United States v. California, 444 F. Supp. 3d 1181, 1190–98 (E.D. Cal. 2020). The Trump administration appealed this decision in September 2020. Plaintiff United States of America's Notice of Appeal, United States v. California, No. 19-CV_02142 (Sept. 14, 2020). The Biden administration, however, stipulated to the voluntary dismissal of the appeal in April 2021. Stipulation for Dismissal Under Federal Rule of Appellate Procedure 42(B), United States v. California, No. 20–16789 (9th Cir. Apr. 21, 2021).

31. *Cf.* Brief of Amici Curiae Professors of Foreign Relations Law, *supra* note 29, at 10 ("Although there has been no comprehensive update to Hollis's findings, it seems likely that many more such agreements have been made since 2010.").

32. Copies of all disclosed records are on file with the author. For a curated compilation, see U.S. STATE COMMITMENTS WITH FOREIGN GOVERNMENTS (Ryan Scoville & Mitchell Knief eds., forthcoming 2023). A larger, digital collection of all the records will be available under the same title with HeinOnline in late 2023. The digital collection will receive periodic updates and serve as a subnational analogue to *United States Treaties and Other International Agreements (UST)* and the *Treaties and Other International Acts Series (TIAS)*, which are official compilations of international agreements to which the United States is a party.

33. Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1625 (2008).

The Article proceeds as follows. Part I provides context for and clarifies the stakes of the empirical investigation by reviewing the law on state commitments with foreign governments. Part II explains the investigation's methodology and reports findings on the total number of commitments, their dates of signature, their parties, and their principal subject matter. Unlike prior studies, Part II also reveals extensive information about the contents of the commitments.

The findings are noteworthy in several respects. First, they show that although most commitments seem to be both lawful and beneficial to their parties, a substantial collection appear to bind states vis-à-vis foreign governments, despite the frequent absence of congressional approval or public disclosure. There is a reasonable argument that these arrangements violate the Compact Clause because of their "potential" impact on federal supremacy over foreign relations.[34] Some binding commitments might instead violate the Article I Treaty Clause, but firm conclusions on the matter are premature, as the meaning of that Clause is largely unsettled.

Second, the findings expose commitments that raise serious policy concerns. Most notably, states have entered into a collection of instruments with national, provincial, and municipal authorities from the People's Republic of China (PRC) for the express purpose of promoting technology transfer in a number of strategically sensitive fields of innovation, including information technology, nanotechnology, aerospace, biotechnology, and semiconductors. Most of these instruments appear to have been adopted not only without federal approval or public disclosure, but also at the initiative of the Chinese government. This suggests a coordinated, ongoing, and perhaps intensifying[35] PRC campaign to leverage relations with U.S. states to expand influence and acquire cutting-edge American technology, despite federal efforts to preserve U.S. technological

34. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978) (explaining that, in ascertaining whether congressional consent is necessary under the Compact Clause, "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy"); *see also, e.g.*, United States v. Belmont, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

35. *See, e.g.*, Flora Yan, *How Washington Soured on China-US Subnational Exchanges*, DIPLOMAT (Dec. 21, 2021), https://thediplomat.com/2021/12/how-washington-soured-on-china-us-subnational-exchanges/ [https://perma.cc/824P-GK54] (reporting that "under the Biden administration, China-U.S. subnational exchanges have largely continued, with signs indicating expansion").

leadership.[36] China's threat to this leadership is well known,[37] but the extent to which state governments have entered commitments that amplify the threat is a new revelation.

Finally, the findings support a somewhat contrarian view on California's CO2 agreement with Québec. Academic commentators have roundly supported the agreement for advancing the fight against climate change.[38] That reaction seems reasonable from an environmental policy perspective, but the findings in Part II clarify that the agreement lies at the leading edge of modern practice in terms of its formality and substantiality. The district court's decision to uphold the agreement in *United States v. California* thus suggests that few, if any, recent commitments are likely to be unconstitutional, and that there is generally ample room for states to shift toward more robust commitments going forward. To be sure, that decision is not binding precedent,[39] but in the absence of any clear appellate precedent to the contrary, and given centrifugal forces at work in American politics more generally, states may very well embrace the decision as an opening for broader and deeper international engagement. The question of how to encourage beneficial commitments while discouraging those that frustrate national interests carries greater significance in this context.

Part III therefore concludes by proposing reforms. These include the standardization of certain best practices for drafters and negotiators, the enactment of federal legislation to require states to report their commitments to Congress, and, as an alternative to federal legislation, the enactment of state legislation to require state executives to publish all commitments in force. Some of these reforms will create financial and administrative costs, but benefits in the form of improved compliance with the Constitution, greater legal certainty,

36. *See, e.g.*, Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115–232, 132 Stat. 2174 (2018) (revising the processes and authorities of the Committee on Foreign Investment in the United States (CFIUS) in recognition of new national security risks posed by certain types of foreign investment).

37. *See, e.g.*, MICHAEL BROWN & PAVNEET SINGH, DEFENSE INNOVATION UNIT EXPERIMENTAL, CHINA'S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGY ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION 14–15 (2018) (suggesting that China's acquisition of sensitive technology will undermine U.S. military superiority).

38. *See, e.g.*, Craig Holt Segall, *Networked Federalism: Subnational Governments in the Biden Era*, 48 ECOLOGY L. CURRENTS 1, 7 (2021) (calling on the Biden administration to withdraw the Trump administration's legal challenge to the agreement).

39. *See, e.g.*, NASD Dispute Res., Inc. v. Judicial Council of State of Cal., 488 F.3d 1065, 1069 (9th Cir. 2007) ("[A] district court opinion does not have binding precedential effect.").

enhanced democratic accountability, and stronger deterrence against state practices that disserve national interests are likely to outweigh those costs.

The reader should bear in mind three points before proceeding. First, although most of the records I collected are agreements in a colloquial sense, "agreement" would be confusing as an umbrella term in this context, as its technical meaning under Article I, Section 10 of the Constitution is arguably narrower than the meaning reflected in common usage.[40] I will thus refer to the records generically as "commitments," saving "treaty," "agreement," and "compact" for cases that warrant those designations under applicable constitutional law. By "commitment," I mean a written instrument that two or more parties have adopted to express their shared intent to engage in future conduct.

Second, it is possible to evaluate state commitments with foreign governments under the constitutional law of preemption. Specifically, some commitments might be preempted and invalid because they conflict with federal statutes,[41] treaties,[42] or foreign policy.[43] Others might encounter difficulty under the doctrine of dormant foreign affairs preemption, which holds that, even absent a conflict with federal law or foreign policy, a state action will be preempted if it generates more than an "incidental effect" on U.S. foreign relations.[44] Still other commitments might be unconstitutional under the doctrine of dormant foreign commerce preemption, which prohibits states from discriminating against or imposing excessive burdens on foreign commerce.[45] In part for reasons of space and in part because those doctrines are comparatively well-settled, I

40. *See infra* Part I.B (discussing the meaning of "Agreement" under the Compact Clause).

41. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (holding that a Massachusetts law restricting the authority of state agencies to purchase goods and services from companies doing business with Burma was unconstitutional because it stood as an obstacle to congressional objectives in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997).

42. *See* Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) (holding that a Seattle ordinance was unconstitutional because it conflicted with a 1911 treaty of commerce and navigation between the United States and Japan).

43. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420–25 (2003) (holding that California's Holocaust Victim Insurance Relief Act of 1999 was unconstitutional because it interfered with the foreign policy of the executive branch).

44. Zschernig v. Miller, 389 U.S. 429, 435–53 (1968). *But see Garamendi*, 539 U.S. at 439 (2003) (Ginsburg, J., dissenting) ("We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.").

45. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448–54 (1979) (relying on this doctrine to invalidate a state ad valorem property tax on foreign-owned cargo containers).

generally do not discuss them. They are not, however, any less important than the law that is the focus of this Article, so judges, practitioners, and academic commentators should not overlook them in assessing the legality of individual commitments.

Third, it is also possible to evaluate state commitments with foreign governments through the lens of international law. A substantial collection of academic commentary posits that subnational territorial units can, in some circumstances, enter commitments that qualify as treaties under customary international law.[46] This commentary raises the possibility that a state or even the United States might be responsible under international law in the event of a state's breach,[47] but the issue is unsettled and raises questions that would require their own article-length treatment. Once again for reasons of space, I bracket those questions here.

I. LEGAL CONTEXT

Two clauses in Article I, Section 10 of the Constitution form the starting point of the analysis. One is the Treaty Clause, which provides simply that "[n]o State shall enter into any Treaty."[48] The other is the Compact Clause, which establishes that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power."[49] The Supreme Court has never issued a majority opinion on the constitutionality of state commitments with foreign governments under either of these clauses, but other authority supports conclusions on several key issues, namely, (A) the relevance of the law on interstate commitments to the legality of state commitments with foreign governments, (B) the number of legally cognizable categories of commitment, (C) the contours of those categories, and (D) the significance of categorization. This Part explains each of these issues to clarify the law that governs the constitutionality and enforceability of the commitments that will be revealed in Part II.

46. *See, e.g.*, IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 82 (1973); 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 74, 114 (Olivier Corten & Pierre Klein eds., 2011).

47. *See* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN JURIDICAL COMMITTEE, GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS 128–30 (2020) (discussing this issue).

48. U.S. CONST., art. I, § 10, cl. 1.

49. *Id.* cl. 3.

A. A Single Compact Clause

The first issue concerns the relevance of a substantial collection of Supreme Court cases on interstate agreements and compacts.[50] Some commentators have argued that this precedent has little if any bearing on the constitutionality of state engagement with foreign powers.[51] In their view, the Compact Clause should be construed as establishing two different standards—one regulating agreements and compacts between U.S. states, and another requiring heightened scrutiny of commitments that include a foreign government as a party. The principal effect would be that states must obtain congressional consent for all commitments that are not independently barred as treaties for the purposes of Article I, Section 10, regardless of whether the commitments are binding, and regardless of whether consent would be necessary under the doctrine that applies to interstate agreements and compacts.[52]

The two-standards argument is not unreasonable. It is consistent with some authority from the early twentieth century.[53] It aligns with an opinion by Chief Justice Roger Taney from the 1840 case of *Holmes v. Jennison*,[54] which applied an exceptionally broad interpretation of the Compact Clause to conclude that even an implied, one-off agreement between Vermont and Canada was unconstitutional for lack of congressional consent. And supporters of the argument are undoubtedly correct that state engagement with foreign governments poses unique types of risks, including foreign subversion, mixed messages about U.S. foreign policy, and national diplomatic repercussions in the event of state noncompliance.[55]

50. *See generally* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW (2022) (discussing several key cases).

51. FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 74 (1951); Hollis, *supra* note 17, at 769–804; *see also* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1222–31 (2000) (arguing that the Constitution requires congressional consent prior to any state negotiations with a foreign government over the terms of an agreement or compact).

52. *See* Hollis, *supra* note 17, at 796 (suggesting that the federal government should play "a comprehensive role in supervising all [commitments]—legal and nonlegal—with foreign governments").

53. *See, e.g.*, Restrictions on States, 1943 DIGEST OF INTERNATIONAL LAW, ch. 16, § 464, at 24–25 (reporting that in 1938 the State Department insisted on the need for congressional consent to a proposed agreement for the reciprocal exemption of motor vehicle registration and fees between California and Baja California).

54. 39 U.S. 540, 572 (1840) (Story, McLean & Wayne, J.J., concurring) (concluding that the Foreign Compact Clause applies to "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties").

55. *See, e.g.*, Hollis, *supra* note 17, at 786–88 (emphasizing these risks).

The two-standards argument, however, has not prevailed in practice. Instead, the more influential view in recent decades has been that the Compact Clause imposes a single standard that operates in the same fashion regardless of whether one of the parties is a foreign power. This view has garnered support from the State Department,[56] two state appellate courts,[57] one federal district

56. *See* Taft Letter, *supra* note 3, at 181–82 (stating that Justice Taney's approach in *Jennison* "has not been widely supported" and explaining that the State Department ordinarily looks to the Supreme Court's decision in *Virginia v. Tennessee*, which reviewed an interstate compact, to determine the constitutionality of state commitments with foreign powers).

57. *See* McHenry County v. Brady, 163 N.W. 540, 544–45 (N.D. 1917) (applying *Virginia* to hold that a contract between municipal authorities in North Dakota and Canada did not require congressional consent under the Compact Clause); *In re* Manuel P., 215 Cal. App. 3d 48, 69 (1989) (applying Supreme Court precedent on interstate agreements and compacts to conclude that an arrangement between a California local government and Mexico did not implicate the Compact Clause).

court,[58] almost all of the state attorneys general that have considered the issue,[59] and leading academic commentary.[60]

58. *See* United States v. California, 444 F. Supp. 3d 1181, 1194–95 (E.D. Cal. 2020) (applying *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 162 (1985), which concerned an alleged interstate compact, to evaluate the constitutionality of a commitment between California and Québec).

59. *See* Treaties – State May Enter Agreement with World Health Organization to Provide Certain Advisory Services, 80 Md. Op. Att'y Gen. 48, 1995 WL 652898 (Nov. 3, 1995) (applying Supreme Court precedent on interstate agreements and compacts to conclude that an agreement between Maryland and the World Health Organization comports with the Compact Clause); Sister State Relationship with Foreign Country, Office of the Attorney General, State of Alaska, File No. 366–085–85, 1984 WL 61151 (Oct. 3, 1984) (citing *Virginia* in concluding that congressional consent is unnecessary for Alaska to enter into sister-state relationships with foreign countries); Re: Formalizing of Relationships with Foreign Countries, State of Utah, Informal Op. No. 81–26, 1981 WL 141928 (July 23, 1981) (citing *Virginia* in concluding that congressional consent is not required for Utah to enter into sister-state agreements with foreign countries); Reciprocity Agreements with Foreign Government – Legislative Authorization Required, 1980 Fla. Op. Atty. Gen. 149, 1980 WL 100601 (June 18, 1980) (relying on *Virginia* in concluding that congressional consent was not necessarily required for Florida to enter into agreements with foreign governments on the exchange of information and documents relating to the regulation of the banking industry); Tenn. Op. Atty. Gen. No. 79–328, 1979 WL 33937 (July 27, 1979) (relying on Supreme Court precedent on interstate compacts to conclude that Tennessee did not need congressional consent to enter an agreement with a Canadian province on the operation of commercial motor vehicles); United States Constitution, Article I, § 10, Vehicle and Traffic Law, §§ 516 and 517, 1978 N.Y. Op. Atty. Gen. 65, 1978 WL 27517 (Apr. 7, 1978) (relying on *Virginia* to conclude that New York did not need congressional consent to enter into the Non-Resident Violator's Compact with a Canadian province); Re: Whether Article 1011m, Section 8, V.T.C.S., Violates Article I, Section 10 of the United States Constitution, Tex. Atty. Gen. Op. H-964, 1977 WL 26303 (Mar. 29, 1977) (citing *Virginia* in concluding that a Texas planning commission did not need congressional consent to cooperate with Mexican states or local governments); 1955 N.Y. Op. Atty. Gen. No. 243, 1955 WL 72042 (June 6, 1955) (citing *Virginia* to conclude that New York must obtain congressional consent to modify a congressionally approved compact between New York and Canada); Battle Monuments in France, 1 Pa. D. & C. 639 (Pa. A.G.), 1922 WL 53340 (Jan. 13, 1922) (applying *Virginia* to conclude that the Compact Clause did not require Pennsylvania to obtain congressional consent to enter into agreements with France and Belgium to erect monuments in those countries for Pennsylvania soldiers who died in World War I). *But see* Offices and Officers – State – Board of Pilotage Commission – Licensing of Pilots, Wash. AGO 1961–62 No. 181, 1962 WL 70455 (Dec. 12, 1962) (citing Chief Justice Taney's opinion in *Holmes v. Jennison* to conclude that the State of Washington must obtain congressional consent to enter a ship piloting agreement with British Columbia); Constitution – State Acquiring Foreign Facilities., Wash. AGO 1949–51 No. 441, 1951 WL 43491 (Feb. 1, 1951) (relying primarily on Chief Justice Taney's opinion in *Holmes v. Jennison* to conclude that the Compact Clause prohibits the State of Washington from acquiring docking facilities owned by a foreign country without congressional consent).

60. *See* Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. f (Am. L. Inst. 1987) (endorsing the idea of a single standard).

Moreover, the notion of a single standard seems persuasive in two respects. First, it is consistent with the text of the Compact Clause, which appears to disfavor differential treatment by subjecting all agreements and compacts to a uniform requirement of congressional consent.[61] That uniformity is particularly noteworthy in light of the use of alternative consent procedures in other constitutional provisions,[62] which demonstrates that the Framers could have imposed stricter limits on agreements and compacts with foreign powers if they had deemed it appropriate to do so. Second, a single standard is sensible in practical terms. State agreements with foreign governments can subvert national interests, but interstate arrangements can cause serious problems of their own.[63] Even if the types of risks that arise in each context are unique, it is doubtful that the gravity of those risks is so different as to warrant two separate tests of constitutionality.

The effect of rejecting the two-standards argument is that the Supreme Court's various precedents on interstate agreements and compacts also inform the constitutionality of state agreements and compacts with foreign powers.[64] Part II will proceed accordingly in evaluating modern practice.

B. Four Categories of Commitment

The second issue concerns the number of legally cognizable categories of commitment. By its terms, Article I, Section 10 admits of only two: "Treat[ies]," which are off-limits, and "Agreement[s] or Compact[s]," which are permissible if Congress consents.[65] Nevertheless, Supreme Court precedent on interstate commitments clearly recognizes an extratextual third category consisting of binding agreements and compacts for which congressional consent is unnecessary.[66]

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61. *See* U.S. CONST., art. I, § 10, cl. 3; *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 155 (2d ed. 1997) (making this point).
62. *See, e.g.*, U.S. CONST., art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").
63. *See, e.g.*, Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 323–30 (2003) (identifying problems that can arise from interstate agreements and compacts).
64. *See generally* MULLIGAN, *supra* note 50 (discussing several key cases).
65. *See* U.S. CONST., art. I, § 10, cl. 1; *id.* cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power[.]").
66. Virginia v. Tennessee, 148 U.S. 503, 519 (1893). Detlev Vagts once referred to these as "subcompacts." Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143, 151 (1997).

Whether there is also a fourth category comprising nonbinding or advisory instruments is somewhat less clear. On the one hand, the State Department and Duncan Hollis have argued that there is no such category, on the view that the Compact Clause regulates binding and nonbinding commitments in the same manner.[67] One alleged justification for this position comes from the Supreme Court's decision in *U.S. Steel Corp. v. Multistate Tax Commission*,[68] which explained that the "mere form of [an] . . . agreement cannot be dispositive" of its status under the Compact Clause. Presuming that bindingness qualifies as an issue of "form," the State Department has cited *U.S. Steel* as establishing that commitments can implicate the Clause regardless of whether they are binding.[69] A second alleged justification is historical practice. In 2010, Hollis argued that this practice favors extending the Compact Clause to nonbinding commitments because Congress refused to consent to foreign participation in the 1968 Great Lakes Basin Compact, which he characterized as nonbinding.[70] The effect of the State Department/Hollis position would be that there are only three categories of commitment for purposes of federal law: (1) treaties, (2) binding and nonbinding agreements and compacts that require congressional consent, and (3) binding and nonbinding agreements and compacts that do not require consent,[71] with this last category reserved exclusively for the interstate context.

On the other hand, there are several reasons to conclude that nonbinding commitments fall outside the scope of the Compact Clause and thus warrant treatment as a separate and fourth category. First, the State Department's reliance on *U.S. Steel* seems misplaced. The cited language from that opinion would support the Department's position if bindingness were an issue of form, but few seem to think it is. Indeed, it is generally understood that bindingness, which concerns the legal effect of a commitment, is distinct from form, which concerns

67. *See* Taft Letter, *supra* note 3, at 187; Hollis, *supra* note 4, at 1073 n.12 & 1084. Although the State Department has not expressly repudiated the Taft Letter's position on nonbinding commitments, there is some evidence that the Department no longer endorses it. *See* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 207 (Sally J. Cummins & David P. Stewart eds., 2005) ("Both [the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Annex 2001 Implementing Agreement] appear to contain language of a legally binding nature. In the absence of Congressional approval, they may therefore raise questions under the Compact Clause of the Constitution.").

68. 434 U.S. 452, 470 (1978).

69. *See* Taft Letter, *supra* note 3, at 187.

70. *See* Hollis, *supra* note 4, at 1084 n.51.

71. *See* Hollis, *supra* note 17, at 759–60 (discussing these categories).

the manifestations of commitment.[72] It is settled, for example, that a contract can bind its parties regardless of whether it takes the form of a written agreement or an oral exchange.[73] Moreover, the language cited by the State Department stemmed from a discussion about whether an agreement or compact can take the form of reciprocal legislation rather than a jointly signed legal instrument.[74] Given that context, the best interpretation of *U.S. Steel* is simply that the process by which a state enters a commitment is not itself dispositive of the commitment's status as an agreement or compact. That point has little if any bearing on whether the Compact Clause applies to advisory instruments.

Second, the State Department/Hollis position does not account for Supreme Court precedent that appears to place only binding commitments within the scope of the Compact Clause. In *Texas v. New Mexico*, the Court stated succinctly that a "Compact is . . . a contract."[75] Because it is generally understood that contracts are binding by definition, this language suggests that compacts are as well.[76] Similarly, in *Northeast Bancorp, Inc. v. Board of Governors*, the Court explained that a state law can "constitute an agreement or compact" under the Compact Clause if, among other factors, it "requires" reciprocity.[77] Insofar as only a binding commitment can require anything of its parties, the Court seemed to indicate that agreements and compacts are binding by definition.[78] And in *Hinterlider v. La Plata & Cherry Creek Ditch Co.*, the Court explained that the Compact Clause "adapts to our Union of sovereign States, the age-old treaty-making power of independent sovereign nations."[79] Because treaties are binding by definition,[80] this language implies the same of compacts.

Finally, the State Department/Hollis view seems inconsistent with historical practice. While there are many congressionally approved agreements and compacts that are explicitly binding, I found no instances of Congress granting or purposely withholding consent to a nonbinding commitment. The only putative

72. *See, e.g.*, Restatement (Second) of Contracts, § 17 cmt. b (Am. L. Inst. 1981) ("The typical contract is a bargain, and is binding without regard to form.").
73. *See id.*, § 21 cmt. a.
74. *See* United States Steel Corp v. Multistate Tax Commission, 434 U.S. 452, 470 (1978).
75. 482 U.S. 124, 128 (1987).
76. *See, e.g.*, Restatement (Second) of Contracts, § 1 cmt. g (Am. L. Inst. 1981) ("A promise which is a contract is said to be 'binding.'").
77. 472 U.S. 162, 175 (1985).
78. *Id.*
79. 304 U.S. 92, 104 (1938).
80. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Valid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.") (citation and internal quotation marks omitted).

example to the contrary—Congress's refusal to consent to foreign participation in the 1968 Great Lakes Basin Compact[81]—merely reinforces this finding, as the compact in question was explicitly binding.[82] I also found no examples of state governments seeking congressional consent for nonbinding commitments. Although only two state attorneys general have squarely addressed the issue in published opinions, both concluded that nonbinding commitments fall outside the scope of the Compact Clause,[83] and leading commentary agrees.[84] The rest of this Article thus operates on the premise that the State Department/Hollis position is at least arguably incorrect, that there are likely to be four categories of commitment, and that preemption operates in place of the Compact Clause as the only federalism-based limit on state power to enter advisory instruments.[85]

81. Hollis, *supra* note 4, at 1073 n.12 & 1084.

82. *See* Great Lakes Basin Compact, Pub. L. No. 90–419, art. II(A), 82 Stat. 414, 414 (1968) ("This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin . . . ."). Granted, this Compact established a commission with power to make only nonbinding recommendations to the parties. *Id.*, art. VI., 82 Stat. 417–18. But it does not follow that the Compact was *itself* nonbinding. In fact, its text is littered with the word "shall"—the quintessential signal of legal obligation. *See generally*, *id.*

83. *See* Tenn. Op. Atty Gen. No. 79–394, 1979 WL 34002, at *1 (Aug. 30, 1979) (concluding that agreements establishing sister-state relationships with foreign countries do not contravene the Compact Clause because they "impose no binding contractual obligations or duties"); Re: Whether Article 1011m, Section 8, V.T.C.S., Violates Article I, Section 10 of the United States Constitution, Tex. Atty. Gen. Op. H-964, 1977 WL 26303, at *2 (Mar. 29, 1977) (explaining that cooperation between a Texas planning commission and Mexican states or local governments did not "constitute[] an agreement or compact within the meaning of the Constitution," given that the cooperation did not take the form of a "binding agreement").

84. *See, e.g.*, HENKIN, *supra* note 61, at 152 ("Art. I, sec. 10 applied to treaties, compacts or agreements which are legally binding. States have freely concluded nonbinding arrangements with foreign countries."); ZIMMERMANN & WENDELL, *supra* note 51, at 42 (explaining that nonbinding commitments between states "never have been brought before Congress because consent to them never has been thought necessary"); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 189 n.235 (1998) ("[I]nterstate compacts, before and after the Constitution, have always been thought to be binding.").

85. One likely implication is that it is easier for advisory instruments to avoid constitutional infirmity. Without congressional consent, agreements and compacts are unconstitutional if they have even a "potential" impact on federal supremacy. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978). In contrast, a potential impact is insufficient for preemption. *See, e.g.*, Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict [with federal law] is insufficient to warrant the preemption of the state statute.").

C. Contours of the Categories

The third issue concerns the contours of the categories. Article I, Section 10 and Supreme Court precedent suggest that there are conceptual differences between (1) treaties, (2) agreements and compacts that require congressional consent, (3) agreements and compacts that do not require such consent, and (4) advisory instruments, but the precise scope of each category is substantially unsettled.

1. Treaties

Begin with treaties. The Supreme Court has not yet defined this category in the holding of a majority opinion, but three possible approaches have emerged in dicta, the opinions of individual Justices, and academic commentary. Part II will examine recent practice under each in order to illuminate the significance of the choice between them.

The first comes from the eighteenth-century jurist Emmerich de Vattel, who posited that treaties are agreements that (1) bind the parties, (2) exist "either for perpetuity, or for a considerable time," (3) are "made with a view to the public welfare" rather than the affairs that might arise "between a sovereign and a private person," (4) require "successive execution" rather than a single act or transaction, and (5) are made either by "superior powers, by sovereigns who contract in the name of the state" or by "princes or communities" that "have a right to contract them, either by concession of the sovereign, or by the fundamental laws of the state, by particular reservations, or by custom."[86] Some scholars have argued that the original meaning of Article I, Section 10 embraces these criteria,[87] and the Supreme Court has acknowledged this possibility.[88]

86. EMMERICH DE VATTEL, THE LAW OF NATIONS §§ 152–54, at 192 (Joseph Chitty ed., Cambridge Univ. Press 2011) (1758). The effect of Vattel's fifth criterion is that the United States can guarantee that U.S. states do not acquire the capacity for treatymaking only by ensuring that a custom of state treaties does not emerge. This requires U.S. legal actors to enforce the Article I Treaty Clause as a prohibition on arrangements that would amount to treaties but for the fact that a U.S. state is a party.

87. *See* David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 75–81 (1965); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 461 (1936); Ramsey, *supra* note 84, at 164–71.

88. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978).

The second approach comes from Justice Joseph Story's *Commentaries on the Constitution of the United States*, which proposed that "Treaty" in Article I refers only to:

> treaties of a political character; such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political [cooperation], and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.[89]

Story raised this definition as a mere possibility,[90] but the Court has quoted it in dicta in several cases,[91] and a federal district court recently relied upon it to conclude that a state's agreement on CO2 emissions was not a treaty.[92] Some evidence indicates that Story used the phrase "general commercial privileges" to refer to treaties of amity and commerce, which typically featured most-favored-nation provisions on issues such as tariffs and navigation rights.[93]

The third approach—call it the Congruence Thesis—draws implicit support from dicta in a long line of Supreme Court opinions and holds that the meaning of "Treaty" matches, and evolves in lockstep with, the meaning of that term in customary international law. In *Holmes v. Jennison*, for example, Chief Justice Roger Taney suggested that "Treaty" should be interpreted in accordance with its "usual and fair import."[94] In *United States v. Arjona*, the Court cited Article I, Section 10 as evidence that "all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States."[95] And in *Bank of Augusta v. Earle*, the Court posited that the adoption of Article I, Section 10 deprived the states "of all national power, and of all the means of international communication."[96] These kinds of statements cannot be true if

89. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1403, at 264 (3d ed., 1858).
90. *See* STORY, *supra* note 89, § 1403, at 264 ("*Perhaps* the language of the [Treaty Clause] may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground, that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character . . . .") (emphasis added).
91. *See U.S. Steel Corp.*, 434 U.S. at 462–64 (1978); Kansas v. Colorado, 185 U.S. 125, 140 (1902); Stearns v. Minnesota, 179 U.S. 223, 247 (1900); Louisiana v. Texas, 176 U.S. 1, 17 (1900); Virginia v. Tennessee, 148 U.S. 503, 519 (1893).
92. *See* United States v. California, 444 F. Supp. 3d 1181, 1190–93 (E.D. Cal. 2020).
93. *See* Brief of Amici Curiae Professors of Foreign Relations Law, *supra* note 29, at 15 n.4; *see also* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2218 (2015) (citing examples of these treaties).
94. 39 U.S. 540, 571 (1840) (Taney, C.J.).
95. 120 U.S. 479, 483 (1887).
96. 38 U.S. (13 Pet.) 519, 599 (1939).

the Article I Treaty Clause embraces an antiquated definition that applies to only a portion of the commitments that now qualify as treaties under international law, for in that case "Treaty" would not carry its usual meaning by modern standards, and Article I, Section 10 would not bar all forms of treatymaking for purposes of international law, much less ban all state intercourse and communication with foreign powers. The statements thus suggest a living constitutionalist orientation, whereby any expansion of the treaty concept's boundaries in international law automatically triggers a corresponding shift in the scope of the Article I Treaty Clause.

The effect would be a broad prohibition. In international law today, "treaty" is commonly understood to refer to any commitment that is binding, exists between sovereign states or other actors with treatymaking capacity, entails reciprocal promises of future conduct, is written or otherwise recorded, and is governed by international law according to the shared intent of the parties.[97] The Congruence Thesis would thus prohibit any U.S. state commitment that exhibits these features, even if the commitment does not operate for a considerable time or call for successive execution, as Vattel's definition would require,[98] and even if it does not have a political character, as Story proposed.[99]

Efforts to implement such a prohibition, however, would likely encounter difficulty in the case of any commitment that fails to claim or disclaim treatymaking intent in express terms but otherwise displays the elements of a treaty under international law. There are two conceivable solutions, but neither is problem-free. The first would be to infer treatymaking intent, and thus unconstitutionality, if formalities that are common in treatymaking among sovereign states are present to a sufficient degree. Such formalities include production of the text in the official language of each side, a provision for "entry into force," signatures by authorized representatives, references to the sides as "parties," and the use of "articles" and a preamble.[100] Customary international law, however, does not require any formalities per se,[101] much less establish a

97. *See generally* Duncan B. Hollis, *Defining Treaties*, *in* THE OXFORD GUIDE TO TREATIES 19–28 (Duncan B. Hollis ed., 2012) (discussing the defining characteristics of treaties).

98. *See* VATTEL, *supra* note 86, §§ 152–53.

99. STORY, *supra* note 89, § 1403, at 264.

100. *See* ORGANIZATION OF AMERICAN STATES, *supra* note 47, at 26–29 (discussing formalities that tend to distinguish treaties from other types of international commitments); *see also* Holmes v. Jennison, 39 U.S. 540, 571 (1840) (Taney, C.J.) (suggesting that "Treaty" refers to "an instrument written and executed with the formalities customary among nations").

101. *See* Philippe Gautier, *1969 Vienna Convention: Article 2 – Use of Terms*, *in* 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 35–40 (Olivier Corten & Pierre Klein eds., 2011)

bright-line rule that mandates formalities of particular types or in particular numbers, so courts and other U.S. legal actors would have to exercise considerable judgment in relying upon these kinds of features to decide the constitutionality of specific commitments.[102]

The other conceivable solution would be to use a rebuttable presumption. Absent evidence to the contrary, it is generally assumed that an agreement between sovereign states is governed by international law,[103] but it is unclear whether the same approach should apply here. On the one hand, subnational territorial units can possess treatymaking capacity under customary international law,[104] sovereign states frequently enter into treaties, and foreign official knowledge of the Article I Treaty Clause may be limited.[105] In this context, a presumption in favor of treatymaking intent might best reflect the actual intent of foreign sovereigns. On the other hand, U.S. state governments are undoubtedly aware of both the federal government's broad power over treatymaking and the existence of the Article I Treaty Clause, so a presumption against treatymaking intent seems most likely to reflect the actual intent of the states. The effect of the first presumption would be that most binding commitments with foreign sovereigns are unconstitutional, whereas the effect of the second would be that most are constitutional and governed either by the law of the U.S. state party or by the law of the foreign sovereign party, rather than by international law. There is indirect evidence that the Supreme Court would favor a presumption against treatymaking intent,[106] but commentators have divided on the merits of the two

(explaining that a treaty need not be a "highly formalized instrument" and that meeting minutes and even oral agreements can qualify under general international law).

102. *Cf.* ORGANIZATION OF AMERICAN STATES, *supra* note 47, at 26–29 (discussing formalities that tend to distinguish treaties from other types of international commitments).

103. Kirsten Schmalenbach, *Article 2: Use of Terms*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 40 (Oliver Dörr & Kirsten Schmalenbach eds., 2018).

104. *See, e.g.*, BERNIER, *supra* note 46, at 82 (1973) (explaining that the constituent territories of sovereign states are subjects of international law insofar as applicable national constitutional law grants them the power to interface separately with foreign states and such states agree to deal with them).

105. A number of foreign scholars have suggested without qualification that U.S. states possess power to enter into treaties. *See, e.g.*, Bertus de Villiers, *Foreign Relations and the Provinces – International Experiences*, 11 S. AFR. PUB. L. 204, 207 (1996); Jacques Hartmann, *The Faroe Islands: Possible Lessons for Scotland in a Post-Brexit Devolution Settlement*, 44 EUR. L. REV. 110 (2019). This literature suggests that foreign official knowledge of the Article I Treaty Clause should not be taken for granted.

106. *See, e.g.*, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) ("We do not assume unconstitutional legislative intent even when statutes produce harmful results . . . much less do we assume it when the results are harmless.") (internal citation omitted).

options,[107] and the Court has never addressed the issue. Given the unsettled state of the law, Part II will account for both presumptions, along with the formalities-based approach to ascertaining intent, in attempting to categorize recent practice.

2. Agreements and Compacts for Which Congressional Consent is Required

Judicial pronouncements on the second category are more abundant and suggest a two-step process of identification. This process asks (1) whether the commitment in question exhibits the classic indicia of binding agreements and compacts and, if so, (2) whether the commitment is the type of agreement or compact that "tend[s] to the increase of political power in the states, which may encroach on or interfere with the just supremacy of the United States."[108] A state must obtain congressional consent only when both steps yield an affirmative answer.

Several precedents elaborate on the first step. The Court explained in *Virginia v. Tennessee* that there is no difference in meaning between "Agreement" and "Compact," except that the latter "is generally used with reference to more formal and serious engagements than is usually implied" by the former.[109] Moreover, unlike treaties, agreements and compacts address "'what might be deemed mere private rights of sovereignty; questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.'"[110] Formalities such as name or title, in contrast, are generally immaterial: In *U.S. Steel v. Multistate Tax Comm'n*,[111] the Court observed that a commitment can qualify as a binding agreement or compact even if it is informal, and even if it is reflected in reciprocal legislation rather than a single written instrument. As the Court explained in *Northeast Bancorp*,[112] such legislation can implicate the Compact Clause as long as it exhibits the "classic indicia" of a binding agreement

107. *Compare, e.g.*, Frank L.M. Van de Craen, *The Federated State and its Treaty-Making Power*, REVUE BELGE DE DROIT INT'L 377, 398 (1983) (arguing for a presumption in favor of treatymaking intent, on the ground that it would violate international law to subject a sovereign state, without its consent, to the internal law of the other party) *with* DI MARZO, *supra* note 13, at 153 (suggesting that a presumption against treatymaking intent is warranted for U.S. state commitments that have not been approved by the federal government).
108. 148 U.S. 503, 519 (1893).
109. *Id.* at 520.
110. *Id.* at 519 (quoting 2 STORY, *supra* note 89, § 1403, at 264).
111. 434 U.S. 452, 470–71 (1978).
112. 472 U.S. 159, 175 (1985).

or compact, which include (1) the creation of a "joint organization or body," (2) a restriction on each party's ability "to modify . . . unilaterally," (3) a restriction on their ability to "repeal . . . unilaterally," and (4) a requirement of reciprocity.

The Court has intimated that these indicia are non-exclusive,[113] and it has never applied them to categorize an arrangement other than reciprocal legislation, but they have nevertheless become the focal point of step-one analysis across modern practice. In 2001, for example, the State Department suggested that the indicia are "useful" in categorizing not only reciprocal legislation, but also jointly signed legal instruments, such as memoranda of understanding (MOUs).[114] The State Department then applied them to evaluate the constitutionality of an MOU between the State of Missouri and the Province of Manitoba.[115] One federal district court,[116] multiple state supreme courts,[117] and several commentators[118] have also applied the indicia in this manner. For better or worse, this practice approaches the first step as a highly formalistic exercise in box-checking.

The Supreme Court has elaborated on the second step as well. As explained above, a state must obtain congressional consent only when seeking to enter an agreement or compact that "tend[s] to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[119] Significantly, this standard calls for an analysis of "potential, rather than actual, impact upon federal supremacy."[120] Such an impact will exist if the agreement or compact "enhance[s] the political power" of one or more states at the expense of others[121] or interferes with federal interests, such as the effective implementation of federal law.[122] A potential impact on federal supremacy will

113. *See id.* (describing the four as "several of the classic indicia").
114. *See* Taft Letter, *supra* note 3, at 188.
115. *See id.* at 187–88.
116. *See* United States v. California, 444 F. Supp. 3d 1183, 1194–95 (2020).
117. *See, e.g.*, Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 99–103 (Cal. 2015) (holding that the Multistate Tax Compact is advisory because it "does not satisfy any of the indicia of binding interstate compacts noted in *Northeast Bancorp*"); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89, 99–106 (Tex. 2017) (same).
118. *See, e.g.*, Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1973–76 (2007) (applying the classic indicia to argue that the Regional Greenhouse Gas Initiative falls outside the scope of the Compact Clause).
119. Virginia v. Tennessee, 148 U.S. 503, 519 (1893); *see also* Texas v. New Mexico, 138 S. Ct. 954, 958 (2018) (explaining that "Congress's approval serves to prevent any compact or agreement between any two States, which might affect injuriously the interests of others," and "ensures that the Legislature can check any infringement of the rights of the national government") (internal quotation marks and citation omitted).
120. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978).
121. Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 176 (1985).
122. *See* Taft Letter, *supra* note 3, at 189.

also exist if the arrangement "purport[s] to authorize the member States to exercise any powers they could not exercise in its absence,"[123] "delegat[es] . . . sovereign power" to an organization created by the arrangement,[124] restricts member states' ability to reject regulations created by that organization,[125] limits the ability to withdraw,[126] or addresses matters that are not solely "local" in nature.[127]

Yet despite this guidance, the two-step framework remains difficult to apply, the principal problem being that the significance of the classic indicia remains unclear. After expressing "doubt" that the commitment at issue in *Northeast Bancorp* amounted to an agreement or compact, the Court noted that the four indicia were all absent.[128] The Court did not, however, explain the logic behind its position. On the one hand, the Court's doubt may have rested on the idea that each of the absent indicia is integral to the status of agreement or compact. Under this possibility, the absence of even just one of the indicia would have rendered the Compact Clause inapplicable, so the absence of all four created an easy case. On the other hand, the Court may have doubted that the commitment was an agreement or compact on the view that each indicium was relevant to but individually nondispositive of categorization. Under this possibility, the classic indicia are merely suggestive of the presence of something that is truly integral (reciprocal obligations of performance), and it was only the simultaneous absence of several indicia that rendered the Compact Clause inapposite.

The latter interpretation seems more persuasive. The Court has made clear on multiple occasions that the words "Agreement" and "Compact" are capacious. *Virginia*, for instance, explained that these terms are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."[129] Similarly, *Texas v. New Mexico* explained that a "Compact is . . . a contract."[130] It is hard to see why a commitment should have to create a "joint organization or body" or restrict unilateral termination to qualify under these precedents. Moreover, *Northeast Bancorp* did not cite any authority to justify its characterization of these indicia as "classic."[131] None of them appeared

123. *U.S. Steel Corp.*, 434 U.S. at 473.
124. *Id.*
125. *Id.*
126. *Id.*
127. *See* Taft Letter, *supra* note 3, at 189.
128. Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 175 (1985).
129. 148 U.S. 503, 517–18 (1893).
130. 482 U.S. 124, 128 (1987) (quoting Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).
131. 472 U.S. at 175.

in *Virginia*'s various illustrations of agreements and compacts.[132] And they are largely nonessential even for the formation of treaties among nations,[133] which have traditionally addressed matters of greater gravity.[134] Nevertheless, Part II reports on the status of modern practice under both views of the classic indicia, in recognition of the unsettled state of the law.

3. The Other Two Categories

The two remaining categories are defined in negative terms. Agreements and compacts that do not require congressional consent are those that do not have a potential impact on federal supremacy.[135] Advisory instruments are commitments that lack the binding character of treaties, agreements, and compacts.[136]

D. Significance of the Categories

The final issue concerns significance: Why do the categories matter? The primary answer is that each carries its own implications under domestic law. A "Treaty" is unconstitutional even if Congress consents.[137] An agreement or compact that requires but does not receive congressional consent is equally unconstitutional.[138] An agreement or compact that requires and receives consent will generally operate as federal law,[139] as state law that takes precedence over

132. *Virginia*, 148 U.S. at 518.
133. *See* Duncan B. Hollis, *Defining Treaties*, *in* THE OXFORD GUIDE TO TREATIES 11, 19–28 (Duncan B. Hollis ed., 2012) (discussing the characteristics of treaties under international law).
134. *See Virginia*, 148 U.S. at 519 (explaining that while commitments covered by the Treaty Clause include "treaties of alliance for purposes of peace and war, and treaties of confederation," those covered by the Compact Clause concern "mere private rights of sovereignty; such as questions of boundary, interests in land situate [sic] in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other").
135. *See Ne. Bancorp*, 472 U.S. at 176.
136. *See, e.g.*, Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 99–103 (Cal. 2015) (holding that the Multistate Tax Compact is advisory because it "does not satisfy any of the indicia of binding interstate compacts noted in *Northeast Bancorp*"); Graphic Packaging Corp. v. Hegar, 538 S.W.3d 89, 99–106 (Tex. 2017) (same).
137. U.S. CONST., art. I, § 10, cl. 1; *see also* Holmes v. Jennison, 39 U.S. 540, 571 (1840) (explaining that "even the consent of Congress could not authorize" a state to enter a "Treaty").
138. U.S. CONST., art. I, § 10, cl. 3.
139. *See* Cuyler v. Adams, 449 U.S. 433, 438–42 (1981) ("[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, Congress's consent transforms the States' agreement into federal law under the Compact Clause . . . .").

state statutes,[140] and as a "contract" that the Constitution's Contracts Clause prohibits the state from "impairing."[141] A binding agreement or compact that does not require congressional consent might not qualify as federal law regardless of whether consent is given,[142] but it is state law that binds the state itself and likely amounts to a contract for purposes of the Contracts Clause.[143] Finally, an advisory instrument is neither federal law nor a contract but at most a form of state law that does not bind the state.[144]

To be sure, the categories do not carry much significance for purposes of domestic judicial enforcement. Simply put, such enforcement is likely to be unavailable in most cases regardless of the domestic legal status of a state's international commitment. Like treaties, agreements and compacts that require but do not receive congressional consent are unenforceable because they are unconstitutional.[145] In addition, while federal courts can exercise jurisdiction over state lawsuits against other states,[146] the principle of sovereign immunity generally precludes federal courts[147]—and likely state courts[148]—from exercising

140. *See, e.g.*, McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991); Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council, 786 F.2d 1359, 1371 (9th Cir. 1986).

141. *See* U.S. CONST., art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); Green v. Biddle, 21 U.S. 1, 92–93 (1823) (holding that a binding interstate agreement or compact qualifies as a "contract" for purposes of the Contracts Clause); *see also* New York v. New Jersey, 143 S. Ct. 918, 924 (2023) (citing *Green* in support of the proposition that compacts are "construed as contracts under the principles of contract law").

142. The law on this point is unsettled. *Compare, e.g.*, *Cuyler*, 449 U.S. at 452 (Rehnquist, J., dissenting) ("[T]he construction of a compact not requiring consent, even if Congress has consented, will not present a federal question.") (citation omitted), Ghana v. Pearce, 159 F.3d 1206, 1208 (9th Cir. 1998) (same), *and McComb*, 934 F.2d at 479 (same), *with* Applicability of Section 410 of the Amtrak Reform and Accountability Act of 1997 to the Gateway Development Commission, Op. O.L.C., 2020 WL 1182299, at *3 (Feb. 13, 2020) (interpreting *Cuyler* as establishing that "Congress's decision to authorize an interstate agreement on a subject matter that is within the scope of federal legislative authority would itself suffice" to transform the agreement into federal law), *and* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 514 (2003) (same).

143. *See* BUENGER ET AL., *supra* note 13, at 101–05 (discussing case law supporting these propositions).

144. *See, e.g.*, Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 99–103 (Cal. 2015); Graphic Packaging Corp. v. Hegar, 538 S.W.3d 89, 99–106 (Tex. 2017).

145. *See* U.S. CONST., art. I, § 10, cl. 1, 3.

146. *See, e.g.*, Welch v. Tex. Dep't Highways & Pub. Transp. Dept., 483 U.S. 468, 487 (1987) ("States may sue other States, because a federal forum for suits between States is 'essential to the peace of the Union.'") (citation omitted).

147. Principality of Monaco v. Mississippi, 292 U.S. 313, 330–32 (1934).

148. The Court has not squarely addressed whether its holding in *Monaco* extends to foreign governmental lawsuits against states in state court, but it has suggested in broad terms that

jurisdiction in suits brought against states by foreign governments. States can waive this immunity, but the Court indicated in *Principality of Monaco v. Mississippi* that they cannot do so without congressional consent if the underlying controversy "involves a matter of national concern and . . . is said to affect injuriously the interests of a foreign State" or "aris[es] from conflicting claims of a State of the Union and a foreign State as to territorial boundaries."[149] This suggests that a foreign government typically cannot use U.S. courts to hold a state accountable for breach, even in a case where the agreement or compact is binding on its terms and constitutional.

Nor is state immunity the only barrier to judicial enforcement. Foreign governments enjoy their own immunity from suit in federal and state courts under the Foreign Sovereign Immunities Act (FSIA).[150] The Act creates various exceptions to this immunity,[151] but the contours of those exceptions make it unlikely that states will be able to sue foreign governments in U.S. courts to enforce their commitments in many cases. Similar immunities will often protect U.S. states from suit in foreign jurisdictions.[152]

It does not follow, however, that state commitments with foreign governments are inconsequential. As a general matter, one can only imagine that parties make the effort to enter these commitments because they anticipate material benefits from compliance and intend to comply.[153] Parties might also enter them to express their views on, and thus help to build or undermine,

states cannot be sued in their own courts without their consent. *See* Alden v. Maine, 527 U.S. 706, 745–46 (1999) (quoting a collection of earlier cases in support of this proposition).

149. *Principality of Monaco*, 292 U.S. at 331.

150. *See* 28 U.S.C. § 1604 (providing that a "foreign state" shall generally be "immune from the jurisdiction of the courts of the United States and of the States"). Lower courts have applied the Act in cases against not only sovereign states but also their subnational territorial units. *See, e.g.*, Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183, 1189 (10th Cir. 2008) (holding that Sichuan Province is a "political subdivision" of the People's Republic of China and thus a "foreign state" for purposes of the Act). The effect is to bar jurisdiction in federal and state court over a state suit to enforce a binding agreement or compact against a foreign government regardless of whether that government is national or subnational in character.

151. 28 U.S.C. §§ 1605, 1605A & 1605B.

152. *See* Lori Fisler Damrosch, *The Sources of Immunity Law – Between International and Domestic Law*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 40, 46–49 (Tom Ruys & Nicolas Angelet eds., 2019) (discussing foreign law on foreign sovereign immunity).

153. *See* FRY, *supra* note 22, at 56–67 (discussing some of the anticipated benefits); CZESLAW TUBILEWICZ & NATALIE OMOND, THE UNITED STATES' SUBNATIONAL RELATIONS WITH DIVIDED CHINA: A CONSTRUCTIVIST APPROACH TO PARADIPLOMACY 115–17 (2021) (providing anecdotal evidence that sister-state agreements yield economic benefits for the parties).

international norms on topics of interest.[154] Depending on the processes utilized in their adoption, commitments might affect the balance of power between state governors and legislatures.[155] Moreover, breach may carry significant risks: Flagrant or persistent breach might generate reputational consequences that inhibit a party's ability to secure future partners.[156] Breach might displease constituents who support a disclosed commitment or come to expect state action in accordance with its terms.[157] And although beyond the scope of this Article, it is conceivable that breach will entitle the injured party to obtain reparations and pursue countermeasures under international law.[158] These possibilities underscore the need for a full accounting of modern practice.

In sum, the weight of authority suggests that there are likely four categories of state commitments with foreign governments: (1) treaties, (2) agreements and compacts that require congressional consent, (3) agreements and compacts that do not require congressional consent, and (4) advisory instruments that neither bind the parties nor implicate Article I, Section 10. The distinctions between these categories are unlikely to matter for purposes of domestic judicial enforcement, as immunity rules will bar most lawsuits against a state or foreign government for breach regardless of the type of commitment that has been breached. At the same time, categorization remains important: It dictates constitutionality, and it determines whether a commitment is federal law, a form of state law that binds the state itself, or neither. Table 1 summarizes these conclusions.

154. *See* Sharmila L. Murthy, *The Constitutionality of State and Local "Norm Sustaining" Actions on Global Climate Change: The Foreign Affairs Federalism Grey Zone*, 5 U. PA. J.L. & PUB. AFFS. 447, 464–446 (2020) (discussing the expressive function of U.S. state action in foreign affairs); Benjamin A. Barsky, *Dual Federalism, Constitutional Openings, and the Convention on the Rights of Persons with Disabilities*, 24 U. PA. J. CONST. L. 345, 365–81 (2022) (same).

155. *Cf.* Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 545–46 (2009) (arguing that nonbinding instruments between the United States and foreign sovereigns tend to amplify executive power at the expense of Congress).

156. *Cf., e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–85 (2008) (arguing that a sovereign state's compliance with or breach of international law generates reputational consequences in international society).

157. *Cf., e.g.*, MARK PURDON, DAVID HOULE & ERICK LACHAPELLE, SUSTAINABLE PROSPERITY RESEARCH REPORT, THE POLITICAL ECONOMY OF CALIFORNIA AND QUÉBEC'S CAP-AND-TRADE SYSTEMS, 39 (2014), *available at* https://institute.smartprosperity.ca/sites/default/files/publications/files/QuebecCalifornia%20FINAL.pdf [https://perma.cc/8HAD-APGW] (discussing public support in California and Québec for action to address climate change).

158. *Cf., e.g.*, 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 46, at 107–12 (citing authority for the proposition that subnational territorial units can, in some circumstances, enter commitments that are enforceable as treaties under customary international law).

Table 1: The Indicia, Status, and Enforcement of State Commitments with Foreign Governments

Category ***(* = tentative)***	***Indicia*** ***(* = tentative)***	***Domestic Legal Status***	***Domestic Judicial Enforcement***
I. Treaty	Binding Vattelian indicia* Same as indicia of treaties under international law* Political character*	Unconstitutional	Enforcement unavailable
II. Agreement or Compact Requiring Congressional Consent	Binding* Exhibits classic indicia set forth in *Northeast Bancorp** Addresses mere private rights of sovereignty Potentially encroaches on or interferes with federal supremacy	Without congressional consent: unconstitutional	Without congressional consent: enforcement unavailable
		With congressional consent: - federal law - state law that binds the state - a contract that Art. I, § 10 prohibits the state from "impairing"	With congressional consent: enforcement unavailable in federal court and most likely in state court as well, unless (1) a U.S. state defendant lawfully waives immunity or (2) a foreign defendant lacks immunity under the FSIA
III. Agreement or Compact Not Requiring Congressional Consent	Same as Category II but will *not* encroach upon or interfere with federal supremacy	State law that binds the state Might not qualify as federal law, even if Congress consents A contract that Art. I, § 10 prohibits the state from "impairing"	Enforcement unavailable in federal court and most likely in state court as well, unless (1) a U.S. state defendant lawfully waives immunity or (2) a foreign defendant lacks immunity under the FSIA
IV. Advisory Instrument*	Nonbinding Does not exhibit classic indicia from *Northeast Bancorp*	At most, state law that does not bind the state Not federal law and not a contract	Enforcement unavailable

II. NEW EVIDENCE OF MODERN PRACTICE

With the legal context in view, we can now identify—and appreciate the stakes of—a series of empirical questions: How common are state commitments with foreign governments today? Who are the parties and what are they agreeing to do? To what extent do recent commitments exhibit the notional indicia of a "Treaty" for purposes of Article I, Section 10? To what extent do they exhibit the indicia of binding agreements and compacts? Do any that qualify as a binding agreement or compact have a potential impact on federal supremacy? And what does the evidence suggest about the merits of influential perspectives on the meaning of the Article I Treaty Clause and the Compact Clause?

This Part answers these questions by describing the empirical project and reporting the results. In brief, those results suggest that while most commitments appear to be both lawful and beneficial, nearly one-quarter—well over one hundred—appear to impose reciprocal obligations on the parties. There is a reasonable argument that such binding arrangements have a potential impact on federal supremacy over foreign relations. And because Congress has not consented to most of them, there is reason to question their constitutionality. Separately, the results also reveal some commitments that raise serious policy concerns—not to mention potential preemption issues—in areas ranging from technology transfer to U.S. sanctions on Cuba. Finally, the results clarify that California's 2017 agreement to cap and trade CO2 emissions with Québec was more formal and substantive than a clear majority of recent commitments. The district court's decision to uphold that agreement in *United States v. California* thus signals that states have ample room to shift toward more robust commitments going forward. These findings suggest a greater need for federal oversight.

A. Methodology

From February to December of 2020, my research assistant and I used state freedom-of-information laws to request records from every major executive department and administrative agency in each of the fifty states. Each request asked for "copies of all legal agreements (including memoranda of understanding, compacts, and accords) that are currently in force between the State . . . and any foreign government (including national governments; prefectural, state, or

provincial governments; and cities)." Organizational names varied across states, but the recipients included every governor's office, attorney general's office, secretary of state, and state police headquarters, along with every department of administration, agriculture, commerce, economic development, education, energy, environment, natural resources, transportation, and treasury.

Some states required additional steps. In the cases of Alabama, Arkansas, Delaware, Tennessee, and Virginia, the law grants only state citizens the right to inspect and copy public records,[159] so I had to arrange for in-state agents to file the requests on my behalf. In the cases of New Jersey and New York, departments and agencies initially denied the requests as overbroad. This required me to conduct extensive online searches for references to any commitments involving either state and then utilize those references to file revised requests containing detailed information about specific commitments. And in a variety of other cases, officials simply did not respond, thereby necessitating follow-up requests. In the end, my research assistant and I contacted 657 different departments and agencies across the fifty states and managed to obtain responsive records from 119 of them, for a positive response rate of 18 percent. No recipient denied a request on the grounds of secrecy or privilege,[160] but fifty-six departments and agencies—roughly 9 percent of the total—did not respond in any way.

Although extensive, the collection effort was not unlimited in scope. I chose not to send requests to state governmental institutions such as legislatures, judiciaries, prisons, or public universities, on the assumption that executive departments and agencies would be responsible for virtually all significant commitments in any given state.[161] In addition, by asking for "copies," I implicitly excluded all oral commitments. During telephone conversations with some state officials, I came across anecdotal evidence that these exist, but they are

159. *See, e.g.*, ARK. CODE ANN. § 25-19-105(a)(1)(A) (providing that "all public records shall be open to inspection and copying . . . by any *citizen* of the State of Arkansas during the regular business hours of the custodian of the records") (emphasis added).

160. *Cf.* Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1775–98 (2021) (describing how federal doctrines that shield national security secrets from public disclosure have migrated to state governments in recent years).

161. Although far less common, state institutions outside the executive branch sometimes enter into commitments of their own. *See, e.g.*, Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (2015), *available at* https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.aspx [https://perma.cc/BWQ8-U9KZ].

likely to be less consequential in legal and policy terms[162] and are, in any event, uncollectable via public records laws.[163]

Upon obtaining the records, I read and coded each one along several dimensions. These include the identities of the state and foreign parties; the date of signature; the foreign party's status as a national, provincial, or local government; and the principal subject matter. Using *Jennison*, *Virginia*, *U.S. Steel*, and *Northeast Bancorp* as guides, I also coded for indicia of the commitment's status as a "Treaty," "Agreement or Compact," or advisory instrument under domestic law.

Like earlier studies, this one is not without challenges. Most importantly, it is unlikely that state officials collectively turned over all responsive records. The reason is simple: state law did not require them to do so. In California, for example, an agency's search "need only be reasonably calculated to locate responsive documents."[164] Whether a reasonably calculated search yields a complete set of responsive records is a separate question of no legal significance.[165] Similarly, in New York, "agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records."[166] Given these kinds of doctrines, it seems likely that state officials in at least some cases terminated their searches before finding all the relevant and accessible records in their custody. Unfortunately, it is impossible to know how often that was the case or how many responsive records were never delivered.

Another challenge is that the robustness and efficacy of freedom-of-information laws appeared to vary by state. For instance, the fact that recipients in New Jersey and New York initially refused the requests as overbroad made it much more difficult to obtain records from those two states, so both may be underrepresented in the findings. Similarly, the attorney who served as my agent

162. Chief Justice Taney's opinion in *Jennison* posited that even unwritten arrangements can qualify as agreements and compacts that require congressional consent. *See* Holmes v. Jennison, 39 U.S. 540, 572 (1840) (positing that the Compact Clause applies to "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties"). Taney's view of the Compact Clause, however, "has not been widely supported." Taft Letter, *supra* note 3, at 181–82.

163. *See, e.g.*, CAL. GOV'T CODE §§ 6252(e), 6253(a) (West 2016) (providing that public records are generally open to inspection but defining "public records" as "any *writing* containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics") (emphasis added).

164. City of San Jose v. Superior Ct., 2 Cal.5th 608, 627 (2017).

165. *Id.*

166. N.Y. Dept. of State, Comm. on Open Gov't, Opinion Letter (Aug. 20, 2012), *as reprinted in* https://docsopengovernment.dos.ny.gov/coog/ftext/2013/18949.html [https://perma.cc/C4UF-6H9A] at FOIL-AO-18949.

for Alabama informed me that it is common for that state's departments and agencies never to respond to a request, given that Alabama's public records law "contains no timelines, no penalties for non-response, and no enforcement mechanism short of going to court."[167] These kinds of conditions caution against definitive pronouncements on cross-state differences in practice.

That said, the merits of the present approach are apparent. Public records laws offer the only means of access to the many commitments that states have chosen not to publish. State officials are uniquely knowledgeable about the commitments that are in force. The fact that state law generally requires these officials to undertake reasonable efforts to locate responsive records suggests that the findings reflect at least a preponderance of relevant commitments. And it seems likely that officials were aware of and had relatively easy access to the records that are especially important to their state. In that sense, the findings should reflect many of the most significant commitments in force in recent years.

B. Findings

The records both confirm and challenge preexisting perceptions of state commitments with foreign governments. This Subpart explains how by reporting findings[168] pertaining to (1) volume and timing, (2) parties, (3) principal subject matter, (4) status under the Article I Treaty Clause, (5) status under the Compact Clause, (6) commitments that raise policy concerns, and (7) the context for the district court's decision in *United States v. California*.

1. Volume and Timing

States disclosed 637 commitments to which they were party in 2020—an increase of 87 percent from the 340 commitments that Hollis found in 2010.[169] This is clear confirmation that states are actively and perhaps increasingly engaged in foreign relations. The earliest disclosed record was the Uniform Vehicle Registration Proration and Reciprocity Agreement, which was adopted by more than a dozen states in 1957 and subsequently internationalized through the addition of British Columbia as a party in 1961. Yet states signed only 99 (16 percent) of the 637 commitments before the year 2000. In contrast, they signed

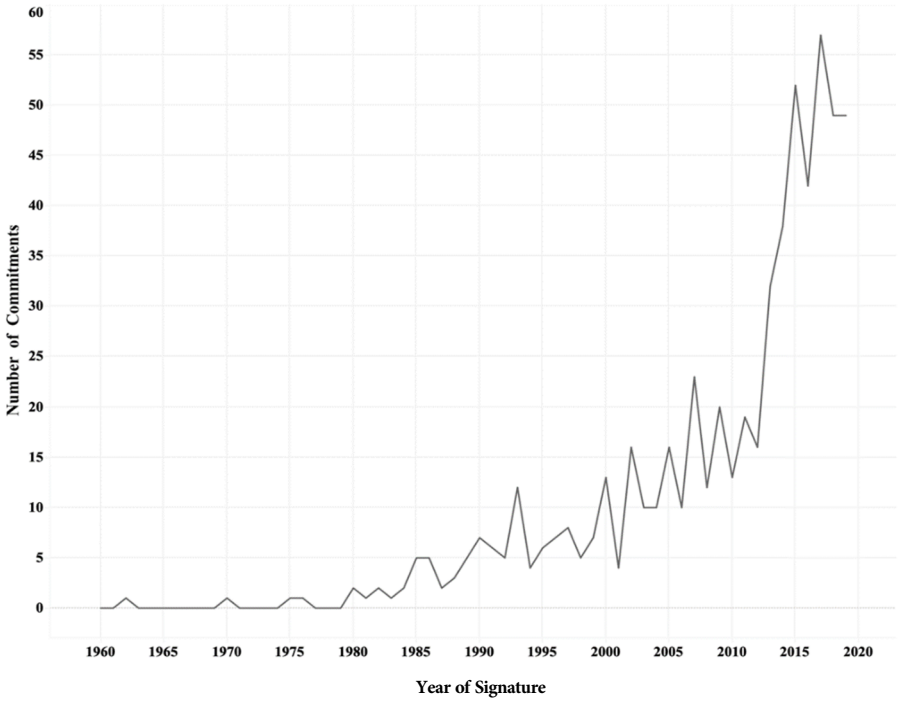
167. Email from Alabama Agent to Ryan Scoville (Sept. 16, 2020, 10:46 am) (on file with author).

168. The underlying data are available at Ryan Scoville, *State Commitments with Foreign Governments*, (2023) (unpublished empirical data), https://ryanscoville.files.wordpress.com/2023/01/state-commitments-with-foreign-governments.xlsx [https://perma.cc/LFM5-ACKU].

169. Hollis, *supra* note 17, at 750, 768.

356 (56 percent) within the eight-year period following 2012, as indicated in Figure 1. In other words, most of the disclosed commitments are of recent vintage.

Figure 1: Number of Disclosed Commitments in Force in 2020, by Year of Signature



The evidence exhibits other temporal patterns as well. The 1980s and 1990s featured the emergence of many sister-state agreements, but the disclosed commitments from more recent decades have displayed greater topical diversity and attention to discrete issues, with climate change being among the most common.[170] Commitments with Russia and former Soviet states appear to have emerged only in the early 1990s, once the Cold War had ended. And more than half of the operative commitments with China were adopted from 2010 to 2020.

170. For legal scholarship on the efforts of states and other subnational actors to combat climate change, *see*, *e.g.*, Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MD. J. INT'L L. 64 (2010); Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183 (2005).

To be clear, Figure 1 is consistent with reports that states have increased their engagement in foreign relations in recent decades,[171] but it does not depict the annual number of commitments adopted over time. I did not request copies of any that states terminated before 2020, or that expired by their own terms, so state officials did not deliver them. This is significant because, for earlier years in particular, the number adopted is likely to be substantially higher than the number still in force. Leach, Walker, and Levy, for example, reported that states had ninety-five written agreements with Canadian provinces alone in 1970–71,[172] but the data reported here show only two commitments with those provinces before 1974, presumably because the others are no longer active.

2. Parties

Forty-one U.S. states reportedly had at least one commitment with a foreign government in 2010,[173] but every state disclosed that it was a party to at least two in 2020. Figure 2 shows that the clear leader in terms of volume was California (93

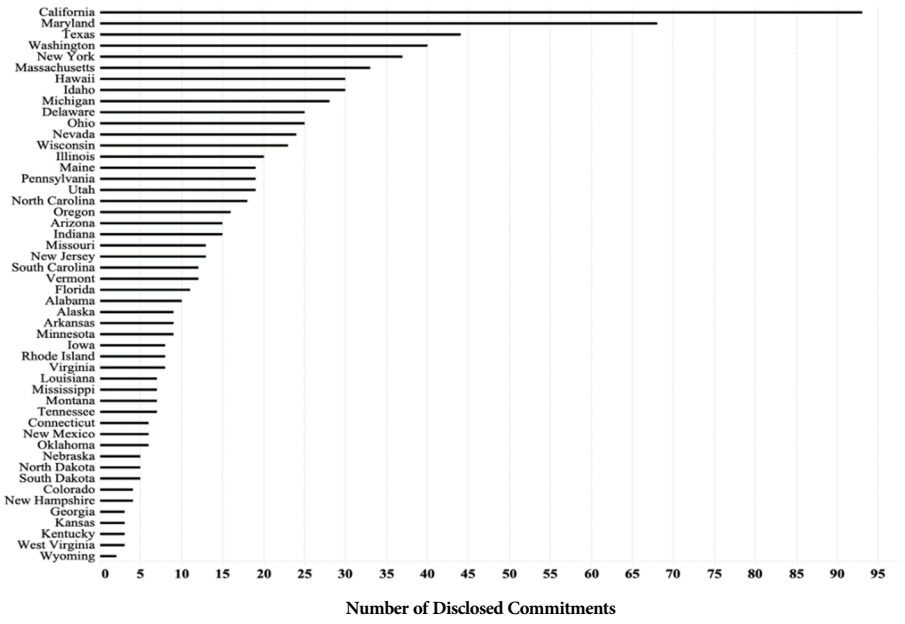
171. *See, e.g.*, Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1192–1200 (2008) (discussing evidence of greater engagement in foreign affairs by U.S. states); Noé Cornago, *On the Normalization of Sub-State Diplomacy*, 5 HAGUE J. DIPL. 11, 11 (2010) (observing that the "international activism of sub-state governments is rapidly growing across the world"). The historical record is spotty, but the available evidence suggests that the first written commitment was adopted by Maine and New Brunswick in 1839. *See* H. Doc. No. 169, 26th Cong., 1st Sess. (Apr. 7, 1840) (documenting General Winfield Scott's role as an intermediary in the adoption of this commitment, which was designed to resolve a territorial dispute between the parties). Other commitments emerged in the early twentieth century but were few in number. *Compare* Battle Monuments in France, 1 Pa. D. & C. 639 (Pa. A.G.), 1922 WL 53340 (Jan. 13, 1922) (discussing agreements that Pennsylvania entered into with France and Belgium to erect monuments in those countries for soldiers from the State who died in World War I), *with* Comment, *The Power of the States to Make Compacts*, 31 YALE L.J. 635, 638 (1922) (suggesting that "history furnishe[d] no example" of agreements or compacts between individual states and foreign powers as of 1922), *and* JOHN W. FOSTER, PRACTICE OF DIPLOMACY AS ILLUSTRATED IN THE FOREIGN RELATIONS OF THE UNITED STATES 322 (1906) (stating that the Compact Clause had "never been put in operation between a state and a foreign power" as of 1906). It appears that state commitments with foreign governments did not become common until after World War II. *See* Kal J. Holsti & Thomas Allen Levy, *Bilateral Institutions and Transgovernmental Relations Between Canada and the United States*, 28 INT'L ORG. 875, 888 (1974) (reporting that official contact between U.S. states and Canadian provinces was a "comparatively recent phenomenon" in the early 1970s); Herbert H. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, 36 MARQ. L. REV. 219, 234 (1953) (asserting in 1953 that there was a "trend toward the use of the compact to obtain cooperation" between states and foreign powers).

172. Leach et al., *supra* note 15, at 473, 476.

173. Hollis, *supra* note 17, at 751.

commitments), followed by Maryland (68), Texas (44), Washington (40), New York (37), Massachusetts (33), Hawaii (30), Idaho (30), Michigan (28), and Delaware (25) to round out the top ten. Notably, every one of these is a coastal state, shares an international border with Canada or Mexico, or exhibits both characteristics. In contrast, the ten states with the fewest disclosed commitments were Wyoming (2), West Virginia (3), Kansas (3), Kentucky (3), Georgia (3), New Hampshire (4), Colorado (4), Nebraska (5), South Dakota (5), and North Dakota (5), a majority of which have no coastline or international border. The evidence thus suggests significant variation in the extent of state engagement in foreign relations and aligns with prior evidence that geography may influence practice.[174]

Figure 2: Number of Disclosed Commitments in Force in 2020, by U.S. State Party



174. *See* SWANSON, *supra* note 16, at 36–39 (reporting that state commitments with Canadian provinces were "disproportionately concentrated in border states"); Hollis, *supra* note 17, at 752 (finding that California, New Jersey, Massachusetts, Washington, New York, and Texas had entered the largest number of commitments with foreign governments as of 2010).

States entered their commitments in various ways. One might imagine that governors consistently led the adoption process,[175] but the evidence displays considerable procedural variation. Indeed, although it was common for a governor to sign on behalf of his or her state, a majority (57 percent) of commitments were signed exclusively by lower-ranking officials who acted on behalf of an executive department or agency over which they presided, rather than on behalf of the governor or the state as a whole.[176] Much of the drafting also appears to have occurred outside of governors' offices. In Maryland, for example, the process "usually" begins when a staffer from either a foreign government or a state agency contacts his or her counterpart to propose an arrangement.[177] The Maryland Governor's Office must approve the text in advance if the Governor plans to sign, but in other cases officials send a draft to the Governor's Office merely as a "courtesy."[178]

Some of this variation appears to reflect state law. At least two states explicitly empower their governor to interface with foreign governments. A North Carolina statute grants the governor power to "oversee and approve all memoranda of understanding and agreements between the State and foreign governments" that are recognized and accredited by the U.S. Department of State, between the State and the "governmental subdivisions" of such foreign governments, and between the State and "international organizations."[179] Similarly, Virginia's constitution provides that the governor "shall conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states."[180] Michigan's constitution, in contrast, explicitly permits any "governmental authority" or "political subdivision" of the State to enter agreements with Canada and its provinces,[181] and the laws of many other states do not explicitly address the

175. *Cf.* TUBILEWICZ & OMOND, *supra* note 153, at 13 (noting that scholarship on the diplomatic activities of U.S. subnational actors "usually locates agency . . . in governors or mayors"); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2830 (2006) (discussing the role of state governors in foreign relations).

176. *See, e.g.*, Memorandum of Understanding on Economic Cooperation Between the Development Services Agency of the State of Ohio of the United States of America and the Ministry of Foreign Affairs and Trade of Hungary (2019) (signed by the Director of the Agency).

177. Email from Maryland Official #1 to Ryan Scoville (Mar. 4, 2021, 12:54 CST) (on file with author).

178. *Id.*

179. N.C. GEN. STAT. ANN. § 147-12(a)(13) (West 2017).

180. VA. CONST. OF 1971, art. V, § 7, cl. 3 (West 1971).

181. MICH. CONST. OF 1963, art. III, § 5 (West 1964).

issue. Some state constitutions even seem to imply an absence of gubernatorial authority to conduct foreign relations.[182]

The nature and extent of legislative involvement also varied. In some cases, signing authorities adopted a commitment with prior legislative consent.[183] For example, the Texas Department of Public Safety entered a 2014 agreement with Taiwan on the mutual recognition of drivers' licenses,[184] pursuant to a Texas statute that authorizes such an agreement with any "foreign country."[185] Similarly, in 1985, the Governor of Hawaii established a sister-state relationship with the Philippine province of Ilocos Sur to "carr[y] out the intent of the 1985 Legislature of Hawaii expressed in resolutions of the Senate and House of Representatives."[186] In other cases, especially those involving binding compacts, signing authorities obtained legislative approval ex post, whether in the form of ratification[187] or the appropriation of funds.[188] In still other cases, officials acted without any apparent legislative endorsement.[189] These variations mirror the

182. *See, e.g.*, TEX. CONST. art. IV, § 10 (as amended through Nov. 5, 2019) (providing that the governor "shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States").

183. There are many state statutes that explicitly authorize agreements with foreign governments. *See, e.g.*, IND. CODE ANN. § 9-28-5.1-1 (West 2012) ("To facilitate the exchange of driver's licenses, the [Bureau of Motor Vehicles] may negotiate and enter into a reciprocal agreement with a foreign country.").

184. *See* Mutual Agreement Between the Texas Department of Public Safety and the Republic of China (Taiwan) Through the Ministry of Transportation and Communications on the Reciprocal Issuance of Driver Licenses (2014). Congress arguably consented to this commitment and many others like it in the Taiwan Relations Act. *See infra* p. 368 (explaining this view).

185. TEX. TRANSP. CODE ANN. § 521.0305(a) (West 2005).

186. Declaration of Sister State / Province Affiliation (Hawaii / Ilocos Sur) (1985).

187. *See, e.g.*, R.I. GEN. L. ANN. § 2-13-1 (West 1950) (ratifying the Rhode Island governor's signing of the Northeastern Interstate Forest Fire Protection Compact, which includes as foreign parties the Canadian provinces of Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island).

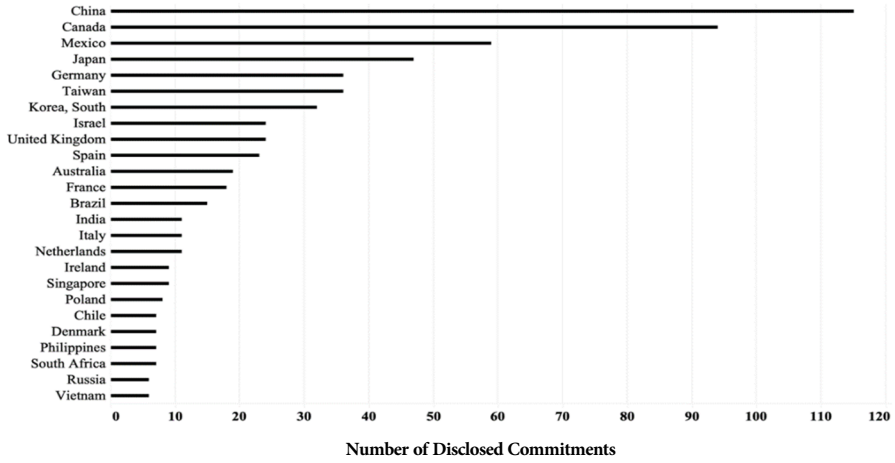
188. *Compare* Memorandum of Understanding Between the State of Maine of the United States and the Province of New Brunswick of Canada Regarding the St. Croix International Waterway (1986) (agreeing inter alia to create the St. Croix International Waterway Commission) *with* ME. REV. STAT. ANN., tit. 38, § 991 (1987) (authorizing and appropriating funds to support Maine's participation on the Commission).

189. *Cf.* Ku, *supra* note 175, at 2393–94 (suggesting that in many cases "state executives appear to be acting under their own constitutional authority" in entering agreements with foreign governments).

multiple pathways by which the president enters international agreements on behalf of the United States.[190]

The foreign parties were no less interesting. Hollis found in 2010 that the leading counterparts were Canada and its provinces (70 commitments), followed by mainland China and Taiwan (61), Israel (42), Mexico (32), and Japan (14).[191] In contrast, the new data suggest that the most common foreign parties in 2020 were mainland China and its provinces and cities (115), followed by the country and subnational jurisdictions of Canada (94), Mexico (59), Japan (47), Germany (36), Taiwan (36), South Korea (32), Israel (24), the United Kingdom (24), and Spain (23), as indicated in Figure 3. Moreover, the number of countries that have at least one national or subnational commitment with a U.S. state jumped from forty-four in 2010[192] to seventy-six in 2020. Figure 4 identifies the remaining 118 countries with which U.S. states disclosed zero operative commitments.

Figure 3: Number of Disclosed Commitments in Force in 2020, by Foreign Party (Top 25)



There are several obvious differences between the countries on the opposite ends of this divide. The countries associated with the most commitments with

190. *See* Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 892–93 (2016) (summarizing the domestic-law processes by which the United States enters international agreements).

191. Hollis, *supra* note 17, at 753.

192. *Id.*

U.S. states tend to enjoy relatively high levels of economic development;[193] are generally located in Northeast Asia, North America, or Western Europe; and for the most part maintain reasonably amicable relations with the United States. In contrast, the countries that were not associated with any disclosed commitments often exhibit lower levels of economic development;[194] are generally located in Africa, the Middle East, South America, and Southeast Asia; and typically lack strong political ties to the United States. This divide is consistent with evidence that economic interests drive states to pursue commitments in many cases.[195] It also suggests that, in practice, the degree of federal exclusivity in the conduct of U.S. foreign relations varies geographically.

Figure 4: No Disclosed Commitments with U.S. States in Force in 2020, by Foreign Party

Many factors appear to have influenced party pairings. In some cases, U.S. demographics seemingly played a role. Armenia, for example, was a party to only

193. *Cf. World Development Indicators: Economy*, WORLD BANK, https://datatopics.worldbank.org/world-development-indicators/themes/economy.html [https://perma.cc/AU8U-KFTH] (providing GDP data for each country).
194. *Cf. id.* (providing GDP data).
195. *See* Early H. Fry, *The United States of America*, *in* FEDERALISM AND INTERNATIONAL RELATIONS 276, 281 (Hans J. Michelmann & Panayotis Soldatos eds., 1990) (discussing state efforts to promote economic development through engagement with foreign governments).

one disclosed commitment with a U.S. state in 2020.[196] The U.S. counterpart was California, which has the largest population of ethnic Armenians in the United States.[197] In other cases, geographic proximity or similarity clearly played a role. Arizona, for instance, concluded several commitments with Mexican states on regional environmental and transportation issues,[198] and Hawaii entered a Green Island Partnership with Okinawa and Jeju to promote sustainable development.[199] In still other cases, the dominant influence appears to have been economic interest[200] or shared perspectives on contemporary challenges.[201] California thus entered dozens of arrangements on CO2 emissions with foreign governments that share the State's concerns about climate change. Notably, parties shared an international border only 16 percent of the time, suggesting that relatively little cooperation has addressed purely local issues.

The national or subnational status of the foreign parties is also noteworthy. As indicated in Table 2, 43 percent of all disclosed commitments were those of an "upward" variety, meaning that they were between a U.S. state and a foreign sovereign, such as France or South Africa. Another 53 percent were "lateral," meaning they were between a U.S. state and a subnational territorial unit that is comparable to a state, such as a Canadian province or a Japanese prefecture. Only 5 percent were "downward" commitments between a state and a foreign city or other local government. These numbers are comparable to Hollis's findings from 2010 but suggest a slight shift toward greater engagement with foreign sovereigns.[202]

196. Framework Agreement Between the Government of the State of California and the Government of the Republic of Armenia (2019).
197. *See id.* (stating as much).
198. *See, e.g.*, Declaration of Cooperation to be Entered into Between the Government of the State of Arizona, Through the Arizona Department of Transportation and the Government of the State of Sonora, Through the Secretariat of Infrastructure and Urban Development for Arizona-Sonora Border Master Plan Coordination and Implementation (2013).
199. *See* Agreement on the Establishment of Green Island Partnership (2016).
200. *See, e.g.*, Memorandum of Understanding on Establishing Joint Working Group for Trade and Investment Cooperation Between China Provinces and US State of Washington (2015).
201. *See, e.g.*, Joint Declaration Between the State of Washington, United States of America and the Department of Energy and Climate Change of the United Kingdom of Great Britain and Northern Ireland Concerning Strengthening Co-operation on Low Carbon Policies (2014).
202. *See* Hollis, *supra* note 17, at 751–52 (reporting that 61 percent of state commitments were with "sub-national governments" while 39 percent were with nation-states in 2010).

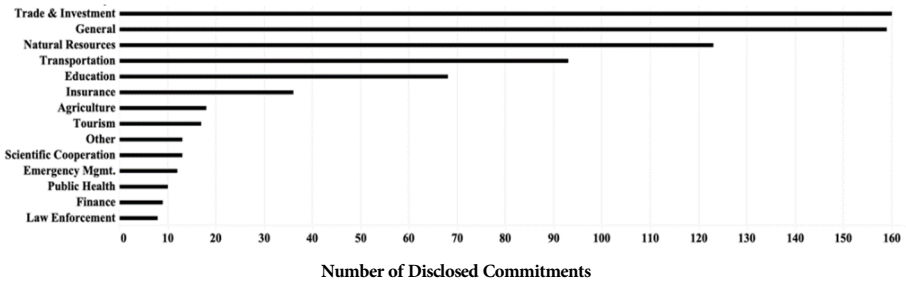
Table 2: Disclosed Commitments in Force in 2020, by Direction

Direction	*Number of Disclosed Commitments*	*% of Total*
Upward	275	43%
Lateral	340	53%
Downward	32	5%

3. Principal Topics

The commitments that were in force in 2020 addressed many topics. As shown below in Figure 5, the ten most common were trade and investment (160 commitments), cooperation in general terms (159), environment and natural resources (123), transportation (93), education (68), insurance (36), agriculture (18), tourism (17), scientific cooperation (13), and emergency management (12). Although less common, states also entered arrangements on public health, financial regulation, law enforcement, labor conditions, cybersecurity, human rights, and even defense industrial cooperation, among other issues.

Figure 5: Principal Topics of Commitment, by Volume



Commitments within each topical category shared certain tendencies. Those on trade and investment focused primarily on strengthening economic relations between the parties. States and foreign governments agreed to exchange information on business opportunities, conferences and trade shows, economic trends, and legal and policy developments.[203] They also agreed to assist each other's business enterprises, organize trade missions and delegations, match

203. *See e.g.*, Vietnam-Texas Joint Communique ¶ 2 (2003).

suppliers with customers and trade partners, and conduct joint research and development in mutually identified areas of opportunity.[204] These commitments implicated virtually every sector of economic activity, from mining to agriculture and biotechnology.

Commitments coded as "general" typically consisted of open-ended pledges to cooperate on multiple and diverse issues. In the most elaborate agreement of this type, Vermont and Québec agreed in 2013 to expand cooperation on economic development, energy, the environment, security, family matters, tourism, transportation, education, agriculture, cultural exchange, and health.[205] Many other arrangements established a sister-state relationship between the parties.

In the area of natural resources, commitments typically sought to advance environmental protection. Many declared shared goals of conservation.[206] Parties agreed on joint management of transboundary waters, air quality, and forests;[207] data sharing to improve knowledge of environmental conditions;[208] collaborative development of renewable energy technologies;[209] technical capacity-building through training and workshops;[210] harmonization of regulatory standards;[211] and mutual notification and assistance in the event of transboundary environmental emergencies.[212] Nearly fifty explicitly acknowledged and sought to address the problem of climate change, while

204. *See e.g.*, Memorandum of Understanding on Two-Way Investment Promotion Cooperation Between the Commonwealth of Massachusetts Office of International Trade and Investment, and Investment Promotion Agency of the Ministry of Commerce of the People's Republic of China § B (2008).

205. *See* Cooperation Agreement Between the Government of the State of Vermont and the Gouvernement du Québec (2013).

206. *See e.g.*, Memorandum of Understanding Between Department of Environment, Great Lakes, and Energy of the State of Michigan, USA and Department of Lake Biwa and the Environment of Shiga Prefectural Government, Japan ¶ 1 (2020).

207. *See e.g.*, Memorandum of Understanding Between the State of Maine of the United States and the Province of New Brunswick of Canada Regarding the St. Croix International Waterway § II (1986).

208. *See e.g.*, State of Washington – Province of British Columbia: Forest Memorandum of Understanding (2007).

209. *See e.g.*, Memorandum of Understanding Between the California Air Resources Board, of the State of California, and Environment and Climate Change Canada, of the Government of Canada, to Enhance Cooperation on Measures that Mitigate Greenhouse Gas Emissions ¶ 3(7) (2019).

210. *See id.* ¶ 3(8) (providing for the "[j]oint organization of symposia, seminars, workshops, exhibitions, training and virtual meetings" on measures to reduce greenhouse gas emissions).

211. *See e.g.*, Pacific Coast Action Plan on Climate and Energy § I.2 (2013).

212. *See e.g.*, Memorandum of Understanding on Control of Toxic Substances in the Great Lakes Environment ¶ 8 (1986).

still others were almost certainly motivated by it.[213] The Trump administration unsuccessfully challenged the constitutionality of one of these—California and Quebec's Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions—in federal court in 2019.[214]

An overwhelming majority of commitments on transportation concerned either of two issues. One was drivers' licenses. In a collection of bilateral instruments with France, Germany, South Korea, and Taiwan in particular, states pledged to issue a drivers' license to any resident who holds a valid license from the applicable foreign partner, without requiring the completion of skills testing or driver's education classes, in exchange for the same treatment of any individual who holds a valid state license while residing abroad.[215] The other issue was cross-border infrastructure. As a group, these commitments were the most elaborate and usually addressed the construction or maintenance of roadways, bridges, and ports of entry.[216]

Commitments within each of the remaining topical categories also exhibited noticeable commonalities. Those addressing education typically promoted foreign language studies in American public schools or international exchanges for students or teachers.[217] Those addressing insurance or finance generally sought to enhance government oversight of private firms operating across international borders,[218] while those focused on tourism uniformly provided for mutual promotion of tourism between the parties.[219] Commitments pertaining to agriculture included provisions on cooperation in agricultural research and development; the exchange of information on best practices, plant and animal health, and food safety; and the sharing of genetic material such

213. *See e.g.*, Cooperation Agreement Between the New York State Energy Research and Development Authority and the Danish Ministry of Energy, Utilities and Climate on the Development and Procurement of Offshore Wind Energy art. I.1 (2018).
214. *See* United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020).
215. *See, e.g.*, Reciprocal Agreement Between Idaho Transportation Department and Federal Ministry of Transport, Building and Urban Affairs of the Federal Republic of Germany for Driver License Reciprocity (2007).
216. *See, e.g.*, Crossing Agreement (Michigan-Canada) (2012).
217. *See, e.g.*, Memorandum of Understanding Between the Department of Public Instruction of North Carolina and the Ministry of Education and Culture of Spain art. 1 (1999).
218. *See, e.g.*, Memorandum of Understanding Between the New York State Banking Department and Dubai Financial Services Authority (2010).
219. *See, e.g.*, Memorandum of Understanding Between the Secretariat of Tourism of the United Mexican States and the Government of California of the United States of America on Cooperation in the Tourism Sector (2014).

as seeds and embryos, among other issues.[220] With respect to emergency management, commitments tended to provide for joint planning and mutual assistance to prevent and respond to natural disasters and civil emergencies.[221] Regarding public health, states often agreed to encourage joint research, training, and other mutual efforts to prevent and respond to outbreaks of infectious diseases.[222] In the area of scientific cooperation, states agreed to promote the exchange of specialists, collaborative research in areas such as robotics, and the organization of bilateral conferences and technical exhibitions on subjects of mutual interest.[223] Finally, commitments pertaining to law enforcement typically aimed to facilitate the investigation of transnational crime, in addition to enhancing training for prosecutors and investigators from participating jurisdictions.[224]

In terms of the number of commitments entered, certain states and foreign governments clearly exhibited more interest in some topics than others. A majority of California's commitments focused on environmental protection, while a majority of New York's addressed financial or insurance regulation. Most of Spain's concerned the promotion of Spanish-language education in American public schools, while over half of Israel's sought to foster collaboration in industrial research and development. Close to half of China's focused exclusively on promoting trade and investment. By contrast, the national and subnational governments of Canada and Mexico partnered with U.S. states on a comparatively wide variety of topics, none of which clearly dominated in terms of frequency.

220. *See, e.g.*, Brother Agriculture Departments Agreement Between the Yunnan Department of Agriculture and the North Carolina Department of Agriculture and Consumer Services ¶ 2 (2011).

221. *See, e.g.*, Oil Spill Memorandum of Cooperation Between the Pacific States of Alaska, California, Hawaii, Oregon, and Washington and the Province of British Columbia (2001).

222. *See, e.g.*, Agreement of Understanding to Improve and Uphold Public Health Conditions in the Binational Border Region of the States of Chihuahua, Mexico, and New Mexico, United States of America (2008).

223. *See, e.g.*, Memorandum of Understanding Between the State of Maryland and the Kanagawa Prefecture in the Field of Life Science art. 1 (2019).

224. *See, e.g.*, Understanding Between the Government of the Commonwealth of Massachusetts and the Gouvernement du Québec with Respect to the Exchange of Law Enforcement Information § 4 (2007).

Many commitments also included provisions on enforcement or implementation. A few provided for termination[225] or the expulsion[226] of a party in the event of breach. Others established arbitration[227] or consultation[228] between the parties as the means of dispute resolution. Still others created the possibility of judicial enforcement by conferring exclusive jurisdiction in specific state[229] or foreign courts[230] or waiving the parties' sovereign immunity from suit.[231] And roughly half included some form of mechanism to encourage compliance, such as a requirement for parties to meet annually and discuss progress.[232] These arrangements constitute strong evidence that the parties often intended to take their commitments seriously, at least at the time of signature.

4. Status Under the Article I Treaty Clause

Although lack of settlement on the constitutional meaning of "Treaty" permits only tentative conclusions on the status of most commitments under the Treaty Clause, the evidence indicates that each of the leading notional

225. *See, e.g.*, Collaboration Agreement Between the Indiana Department of Education of the United States of America and the Ministry of Education, Culture and Sport of the Kingdom of Spain to Regulate the Spanish Visiting Teachers Program art. V(c) (2017).
226. *See, e.g.*, IAIS Multilateral Memorandum of Understanding on Cooperation and Information Exchange art. 9.7 (2007).
227. *See* Maine Department of Transportation Cooperative Agreement for Planning and Preliminary Engineering Madawaska-Edmundston International Bridge (2018) (providing for UNCITRAL arbitration in the event of disagreement).
228. *See, e.g.*, Memorandum of Understanding Between the Government of Victoria, Australia and the Government of the Commonwealth of Virginia, United States of America Concerning Cyber Security (2016) (providing that disputes will be resolved "only by consultation between the participants, and will not be referred to any national or international court or tribunal, or to any other person or entity for settlement").
229. *See, e.g.*, Reciprocity Agreement Between the Republic of China (Taiwan), Ministry of Transportation and Communications and the State of Louisiana, Department of Public Safety and Corrections, Public Safety Services, Office of Motor Vehicles (2018) (stating that any action arising against Louisiana out of the Agreement "shall be brought in the 19th Judicial District Court for the Parish of East Baton Rouge").
230. *See* Joint-Use and Occupancy Agreement, Port of Entry Vehicle Inspection Site, Coutts, Alberta, Canada, Between the Province of Alberta and the State of Montana (2015) (stating that in the event of disagreement "each of the parties irrevocably submits and attorns to the exclusive jurisdiction of the courts of the Province of Alberta").
231. *See, e.g.*, Maine Department of Transportation Cooperative Agreement, *supra* note 227 (stating that the parties "agree not to raise any defense of sovereign immunity in respect to the jurisdictional issues and in respect to any decision issuing from any arbitration body or any court pursuant to the Model Law").
232. *See, e.g.*, Joint Declaration of Intent Between the Kansas State Department of Education and the German Central Agency for Schools Abroad, Bonn, Germany (n.d.) (requiring the parties to prepare an annual joint report to assess implementation).

definitions of that term would have different implications for modern practice if adopted by the Supreme Court. In this sense, the evidence helps to clarify the significance of those definitions and the stakes of the choice between them.

First, a sizable number of commitments would likely be unconstitutional if the Court were to interpret the Treaty Clause in accordance with Vattel's criteria. As explained in Part I, the original meaning of the Clause reportedly channels the work of Vattel and thus prohibits as a "Treaty" any arrangement that (1) purports to bind the parties, (2) claims to exist "either for perpetuity, or for a considerable time," (3) is "made with a view to the public welfare" rather than the affairs that might arise "between a sovereign and a private person," (4) seeks to require "successive execution" rather than a single act or transaction, and (5) includes a sovereign state or another entity with treatymaking capacity under international law as the U.S. state party's foreign counterpart.[233] These characteristics were common, as shown in Table 3. Although most commitments were plainly nonbinding,[234] nearly one-quarter contained binding language—that is, they used the word "shall" at least once in prescribing the actions of the parties—and did not disclaim a binding effect. Most were made either for perpetuity or a considerable time: a supermajority had an explicitly indefinite duration or lacked a fixed term, and even those that had a fixed term averaged a duration of approximately four years and typically provided for the possibility of extension or renewal. All were clearly made with a view to the public welfare rather than private interests.[235] Almost all called for successive execution. Nearly half featured an entity with treatymaking capacity under international law as the foreign counterpart. And most importantly, the number of commitments that satisfied every one of Vattel's criteria amounted to nearly 10 percent of the commitments collected. Depending on one's views on originalism and state participation in foreign affairs, the tension between modern practice and the dominant view of the original understanding calls into question either the legality of the practice or the practicality of an originalist approach.

233. VATTEL, *supra* note 86, § 152, at 192; *see also supra* note 87 (citing academic research indicating that the original meaning of the Treaty Clause reflects the Vattelian definition of "treaty").

234. Nonbinding arrangements are also common at the federal level. For an analysis of this practice, see Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. (forthcoming 2023).

235. *See also supra* Part II.B.3 (describing the principal subject matter of the commitments).

Table 3: The Commonality of Treaties Under Vattel's Criteria

Criterion	*Number of Qualifying Commitments*	*% of Disclosed Total*
Binding Language	147	23%
Duration ≥ 1 Year	619	97%
Public Welfare	637	100%
Successive Execution	621	97%
Counterpart with Treatymaking Capacity	290[236]	46%
All Criteria	**58**	**9%**

In contrast, no recent instruments appear to qualify as a treaty under Justice Story's definition. As discussed in Part I, Story raised the possibility that Article I, Section 10 refers only to:

> treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.[237]

236. Of these, 275 commitments were with foreign sovereigns or Taiwan. The other 15 were with German lander or Swiss cantons that possess at least a degree of treatymaking capacity under international law. *Compare* Oliver J. Lissitzyn, *Territorial Entities Other than Independent States in the Law of Treaties*, 125 RECUEIL DES COURS 1, 84 (1970) (explaining that the constituent territories of sovereign states can possess treatymaking capacity under international law as long as applicable national constitutional law recognizes that capacity), *with* Grundgesetz [GG] [Basic Law], art. 32(3), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#:~:text=(3)%20No%20person%20shall%20be,be%20disfavoured%20because%20of%20disability [https://perma.cc/2BF8-4GH2] ("Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government."), *and* BUNDESVERFASSUNG [BV] [CONSTITUTION], Apr. 18, 1999, SR 101, art. 56, para. 1 (Switz.) ("A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers."). On Taiwan's capacity for treatymaking in certain contexts, see Mao-wei Lo, Note, *An Unrecognized State as an International Investment Law Actor: The Innovation of Taiwan's New International Investment Treaties*, 31 MINN. J. INT'L L. 97, 106 (2022) (suggesting that the "'functional recognition' of Taiwan's capacity to conclude treaties has been widely implemented in the international trade law regime").

237. 2 STORY, *supra* note 89, § 1403, at 264 (quoted in Virginia v. Tennessee, 148 U.S. 503, 519 (1893)).

Few if any of the disclosed commitments fit this description. Although nearly a dozen purported to establish an "alliance,"[238] none required the parties to assist one another as allies for purposes of peace and war. None created a confederation. Nor did any cede sovereignty, confer jurisdiction, or create external political dependence. And while commitments promoting trade and investment were common, none of them included most-favored-nation provisions on issues such as tariffs and navigation rights, so they did not confer "general commercial privileges" in the sense that Justice Story appears to have intended.[239] Story's relatively narrow definition would thus cause little if any disruption to modern practice.

Finally, a portion of recent practice could be unconstitutional under the Congruence Thesis, but much would depend on how U.S. legal actors resolve questions about how to ascertain treatymaking intent. As explained above, the Congruence Thesis holds that the meaning of "Treaty" matches, and evolves in lockstep with, the meaning of that term in customary international law.[240] The modern effect would be that the Article I Treaty Clause prohibits U.S. states from entering into any commitment that (1) purports to be binding, (2) includes a sovereign state or another entity with treatymaking capacity as the foreign counterpart, (3) entails reciprocal promises of future conduct, (4) is written or otherwise recorded, and (5) is governed by international law according to the shared intent of the parties.[241]

As shown in Table 4, a significant number of commitments exhibited most of these elements. Nearly a quarter used binding language—namely, the word "shall"—to prescribe the actions of the parties and did not disclaim binding effect. Nearly half were with foreign sovereigns or subnational territorial units that possess the capacity to enter treaties under international law.[242] The vast majority entailed reciprocal promises of future conduct. All of the commitments were in writing. And 54 (8 percent) exhibited all of these characteristics.

238. *See, e.g.*, Partnership Agreement Between the State of Alabama and Abia State, Nigeria (2000) (stating the parties' intent to "subscribe to an Alliance").

239. 2 STORY, *supra* note 89, § 1403, at 264; *see also* Brief of Amici Curiae Professors of Foreign Relations Law, *supra* note 29, at 15 n.4 (citing evidence that the phrase "general commercial privileges" referred to treaties of amity and commerce, which typically included most-favored-nation provisions).

240. *Supra* pp. 330–31.

241. *Supra* p. 331.

242. *See supra* note 236 (elaborating on this finding).

But the extent to which the parties shared treatymaking intent is a harder question. Two of the 54 commitments that otherwise appeared to qualify as treaties were expressly governed by U.S. state law, rather than by international law, so they do not qualify.[243] Yet none of the others clearly claimed or disclaimed treaty status or otherwise specified the governing law, so it is not readily apparent whether the parties intended to create a treaty in most cases. As explained above, one way to address this uncertainty is to infer treatymaking intent whenever formalities that are common in treatymaking among sovereign states are present to a sufficient degree. Anywhere from 1 percent to 8 percent of recent commitments could qualify as treaties under this approach, depending on how many formalities are necessary in each case. As also explained above, another way to address the uncertainty is to rely on a rebuttable presumption. Depending on whether that presumption runs in favor of or against treatymaking intent, anywhere from 0 to 8 percent of recent commitments could qualify as treaties.

243. *See* Memorandum of Understanding Between the Department of Education, State of Michigan, United States of America and the Confucius Institute Headquarters (Hanban) of the People's Republic of China (2018) (providing that the resolution of any disputes arising under the MOU would be governed by Michigan state law); Memorandum of Agreement Between Utah State Board of Education and Senat von Berlin ¶ 13 (2018) ("This agreement shall be construed under the laws of the State of Utah (USA).").

Table 4: Treaty Commonality Under the Congruence Thesis
(Formalities as Indicia of Treatymaking Intent)

Criterion	*Number of Qualifying Commitments*	*% of Disclosed Total*
Binding Language	147	23%
Counterpart with Treatymaking Capacity	290	46%
Reciprocity	554	87%
In Writing	637	100%
Formalities		
• Signed	635	99%
• > 1 Language	399	63%
• "Parties"	336	53%
• Preamble	284	45%
• "Articles"	126	20%
• "Entry into Force"	101	16%
All Criteria (All Formalities)	**6**	**1%**
All Criteria (At Least One Formality)	**52**	**8%**

As an example of an instrument that could very well constitute a "Treaty" under Vattel's criteria and modern international law, consider a 2009 commitment between Wisconsin and Israel on bilateral cooperation in industrial research and development.[244] This one was in writing and signed by authorized representatives "in duplicate, each in the Hebrew and the English languages, both texts being equally authentic."[245] It referred to Wisconsin and Israel as "Parties,"[246] contained a preamble that identified shared objectives,[247] and laid out terms in separate "articles."[248] It was made for the public welfare,[249] called for successive

244. Agreement Between the Government of the State of Israel and the Government of the State of Wisconsin on Bilateral Cooperation in Private Sector Industrial Research and Development (2009).
245. *Id.* at 6.
246. *Id.* at 2.
247. *Id.* at 1.
248. *Id.* at 1–7.
249. *See, e.g.*, *id.* art. I(a) (expressing the parties' aim to "intensify bilateral industrial R&D cooperation").

execution,[250] had an indefinite duration,[251] and contained binding language. Article IV, for instance, provided that the "Parties . . . shall facilitate, support and encourage cooperation projects in the field of technological and industrial R&D undertaken by Entities from the State of Wisconsin and from the State of Israel."[252] It did not explicitly state that it is a treaty, but the agreement did provide that it shall not affect the present and future rights or obligations of the parties arising from "*other* international agreements and treaties,"[253] thereby implying that it shared the same categorization. And it required the parties to notify one another, "in writing, through diplomatic channels, of the completion of internal legal procedures required for bringing th[e] Agreement into force."[254] Several other commitments exhibited similar characteristics.[255]

5. Status Under the Compact Clause

The evidence also supports preliminary conclusions under the Compact Clause. As explained above in Part I, modern practice tends to apply a two-step analysis that asks (1) whether a commitment exhibits the classic indicia of agreements and compacts and, if so, (2) whether the commitment has a potential impact on federal supremacy, such that congressional consent is required.[256] Doctrinal indeterminacy complicates the analysis under each of these steps,[257] but there is a reasonable argument that nearly one-quarter of recent commitments—well over 100 in total—not only qualified as agreements or compacts, but also had a potential impact on federal supremacy. Because the vast majority of these did not receive congressional consent, there is reason to question the constitutionality of a nontrivial portion of modern practice.

250. *See, e.g.*, *id.* art. IV(1) (requiring each party to "facilitate, support and encourage cooperation projects in the field of technological and industrial R&D undertaken by Entities from the State of Wisconsin and from the State of Israel").
251. *See id.* art. VIII(2) ("This Agreement shall remain in force until either Party terminates it.").
252. *Id.* art. IV(1).
253. *Id.* art. VIII(5) (emphasis added).
254. *Id.* art. VIII(1).
255. *See generally, e.g.*, Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (2017) (containing a preamble, binding language, references to California and Québec as "parties," separate "articles," procedures governing "entry into force," signatures by authorized representatives, and a provision for adoption of the text in multiple languages).
256. *Supra* pp. 333–36.
257. *See supra* pp. 335–36 (discussing possible interpretations of the significance of the classic indicia).

Step-One Findings. First is the question of whether any of the disclosed commitments qualified as agreements or compacts. As discussed in Part I, the Supreme Court indicated in *Northeast Bancorp* that such arrangements have several "classic indicia": (1) the creation of a "joint organization or body," (2) a restriction on each party's ability "to modify . . . unilaterally," (3) a restriction on their ability to "repeal . . . unilaterally," and (4) a requirement of reciprocity.[258] Table 5 shows that one or more of these were almost always absent. Some commitments did not provide for reciprocal undertakings. More than half imposed no restriction on unilateral modification or unilateral termination. A clear majority avoided binding language. And an even larger majority did not create a joint organization or body of any kind, whether a formal commission or an informal working group for party representatives.

Table 5: The Commonality of the "Classic Indicia" of Agreements and Compacts

Criterion	*Number of Qualifying Commitments*	*% of Disclosed Total*
Reciprocity	554	87%
Restricts Termination	284	45%
Restricts Amendment	262	41%
Binding Language	147	23%
Joint Organization	97	15%
All Criteria	**7**	**1%**

The implications of this evidence depend on the unsettled question of whether the allegedly classic indicia are each necessary for or merely suggestive of the existence of an agreement or compact.[259] If they are each necessary, then agreements and compacts with foreign governments are exceedingly rare, as fewer than a dozen commitments even arguably exhibited all of the indicia. Those are:

- Pacific Northwest Emergency Management Arrangement (1996)
- Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement (2005)
- Crossing Agreement (Michigan – Canada) (2012)
- Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain Among the State of New

258. Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 175 (1985).
259. *See supra* pp. 335–36 (discussing plausible interpretations of the significance of the classic indicia).

York, the Gouvernement du Québec and the State of Vermont (2015)
- Memorandum of Understanding Between State of Nevada, United States of America and Jiangsu Province, People's Republic of China (2015)
- Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (2017)
- Agreement of Cooperation Between the State of Mississippi and SIBAT, Defence Export & International Cooperation / Ministry of Defence of the State of Israel (2019)

In contrast, if the classic indicia are merely suggestive and the real question is simply whether a commitment imposes reciprocal obligations of future performance, then the absence of one or more indicia is not necessarily dispositive, and every commitment that imposed reciprocal obligations—147 in all, or 23 percent of the disclosed total—is likely to qualify. As explained in Part I, this view seems to better align with Supreme Court precedent.[260]

Step-Two Findings. The second question concerns the extent to which the Compact Clause required states to obtain congressional consent. As explained above, the Supreme Court established in *Virginia* that consent is required whenever a commitment that qualifies as an agreement or compact has a potential impact on federal supremacy.[261] Firm conclusions on this issue would necessitate an analysis of each agreement or compact's interaction with corresponding federal law and policy, but at least preliminarily, there seems to be a strong argument that the Compact Clause required states to obtain congressional consent for all of these arrangements.

The basis for this conclusion is not that recent agreements and compacts have had a potential impact on any specific federal law or foreign policy. A majority of these commitments have dealt with traditional issues of state or local governance, such as teacher exchanges and drivers' licenses. None that addressed other issues explicitly sought to undermine federal law or foreign policy. A handful of others aimed to promote or operate in accordance with policies that are reflected in U.S. diplomatic statements or international agreements between the

260. *Supra* pp. 335–36.
261. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978) (explaining that, in ascertaining whether congressional consent is necessary under the Compact Clause, "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy").

United States and foreign sovereigns.[262] Some called for implementation in cooperation with federal agencies[263] or were executed with logistical assistance from U.S. diplomats.[264] Still others were adopted after legal or policy review by officials in the State Department.[265] Although far from standard, these forms of interaction suggest that some binding commitments not only promote federal interests but do so with the affirmative support of the executive branch, illustrating what Jean Galbraith has referred to as "cooperative foreign affairs federalism."[266]

Instead, the need for congressional consent arises from the fact that any commitment establishing reciprocal obligations between a state and a foreign government has a potential impact on federal supremacy over foreign relations,[267] particularly when the other party is a foreign sovereign.[268] This is true in several

262. *See, e.g.*, Joint Declaration of Intent for the Establishment of Relations of Friendship Between the State of Israel and the State of New Jersey of the United States of America (1988) (providing that the parties "shall encourage and promote trade between the State of Israel and the State of New Jersey, in the spirit of the US-Israel Free Trade Area Agreement").

263. *See, e.g.*, Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain Among the State of New York, the Gouvernement du Québec and the State of Vermont (2015) (establishing a committee with membership that "may include officials from other state, federal, and provincial agencies or departments having an interest in the cooperative programs" established under the MOU).

264. *See, e.g.*, Reciprocal Agreement Under 21 Del. C. 401(b) With German Federal and State Transport Ministries (Delaware – Germany) (1996) (showing the role of the U.S. embassy in Germany in transmitting correspondence that documents an agreement between the parties on the mutual recognition of drivers' licenses).

265. *See* Maryland Official #1, Maryland Department of Commerce, to Ryan Scoville (May 10, 2021, 10:47 CST) (explaining that Maryland state officials seek policy review of a proposed commitment from the relevant country office in the State Department "from time to time"); Hollis, *supra* note 4, at 1092 n.85 (explaining that the State Department's Office of the Legal Adviser has provided legal counsel on proposed commitments when asked to do so by a state or foreign government).

266. *See generally* Jean Galbraith, Book Note, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131 (2017) (reviewing MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY (2016)) (discussing various ways in which federal and state authorities interact on issues pertaining to foreign affairs).

267. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

268. *See supra* p. 353 (reporting that 43 percent of recent commitments were between a U.S. state and a foreign sovereign). Although agreements and compacts with foreign subnational jurisdictions are probably less likely to have an impact on federal supremacy, it is generally understood—or at least assumed—that any that do have such an impact are subject to the requirement of congressional consent in the same manner as are agreements and compacts with foreign sovereigns. *See* Complaint, United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142) (arguing that California's CO2

respects. First, the adoption of a binding text is more likely to create foreign expectations of compliance. Concerns about the consequences of upsetting those expectations could inhibit the federal government's freedom to adopt legal or policy measures that would impede a state's ability to fulfill its promises. Second, it is possible for a U.S. state to breach a binding commitment. Such a breach could generate not only reputational harm for the state, but also legal liabilities that may be difficult to resolve without federal diplomatic intervention. Third, it is possible for a foreign government to breach a binding commitment. A U.S. state's pursuit of accountability in response to such a breach could damage or at least complicate U.S. relations with the breaching party. Finally, foreign governments that enter binding commitments with U.S. states have less reason to work with the federal government in pursuit of opportunities and solutions, particularly when their state partners wield significant economic power and political influence. From this perspective, binding agreements and compacts that do not require congressional consent may be common in the interstate context but non-existent in the context of state commitments with foreign governments. The reason is not that a different test operates in each context to dictate whether congressional consent is required, but rather that foreign compacts are much more likely to require consent under the general test from *Virginia*.

To be sure, it does not follow that all of the commitments that likely qualified as agreements or compacts and required congressional consent are unconstitutional. Congress consented on occasion. In six cases, Congress explicitly consented before or after the completion of specific negotiations between the parties.[269] In other cases, Congress explicitly consented in advance

agreement with Québec violates the Compact Clause, and thus assuming that a Canadian province qualifies as a "foreign Power" within the meaning of the Clause); Letter From Duncan B. Hollis, Office of Treaty Affairs, to Nicolas Dimic, Embassy of Can. (Jan. 13, 2000), *in* DIGEST OF UNITED STATES PRACTICE OF INTERNATIONAL LAW 294 (Sally J. Cummins & David P. Stewart eds., 2000) (stating that "U.S. states generally need Congressional consent to enter into arrangements with other national or subnational foreign governments"); Timothy C. Blank, Note, *A Proposed Application of the Compact Clause*, 66 B.U. L. REV. 1067, 1076–77 (1986) (arguing that the reference to "foreign Power[s]" in the Compact Clause is not limited to foreign sovereigns).

269. *See* Pub. L. No. 82-340, 66 Stat. 71 (1952) (consenting to the participation of certain Canadian provinces in the Northeastern Interstate Forest Fire Protection Compact); Pub. L. No. 105-377, 112 Stat. 3391 (1998) (consenting to the Northwest Wildland Fire Protection Agreement); Pub. L. No. 105-381, 112 Stat. 3402 (1998) (consenting to the Pacific Northwest Emergency Management Arrangement); Pub. L. No. 110-79, 121 Stat. 730 (2007) (consenting to the Great Plains Wildland Fire Protection Agreement); Pub. L. No. 110-71, 121 Stat. 2467 (2007) (consenting to the International Emergency Management Assistance Memorandum of

to all agreements and compacts that might emerge on a designated topic.[270] In still others, Congress arguably consented by implication, via legislation that does not mention state agreements or compacts with foreign governments but may nevertheless authorize them in effect.[271] The Taiwan Relations Act, for example, establishes in part that "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan."[272] Because the Act defines "laws of the United States" to include state law,[273] this provision arguably transforms all of the many state laws that generically authorize agreements or compacts with "foreign countries" into laws that specifically authorize them with Taiwan.[274] Assuming that Congress would not have supported this transformation without also supporting state commitments with Taiwan, at least one state has interpreted the Act as evincing congressional consent to such arrangements.[275]

Yet it remains true that Congress did not consent to a clear majority of the 23 percent of disclosed commitments that appear to qualify as binding agreements or compacts and to have a potential impact on federal supremacy. This finding not

Understanding); Pub. L. No. 112-282, 126 Stat. 2486 (2013) (consenting to the State and Province Emergency Management Assistance Memorandum of Understanding).

270. *Compare, e.g.*, International Bridge Act of 1972, Pub. L. No. 92-434, § 3, 86 Stat. 731, 731 (1972) (codified at 33 U.S.C. § 535a) (consenting to state agreements with any level of Canadian or Mexican government for the "construction, operation, and maintenance" of bridges connecting the United States to either country, but also conditioning the effectiveness of any resulting agreement on approval by the U.S. Secretary of State) *with* State of Minnesota – Ontario Cooperative Agreement for Re-decking the International Bridge Over the Pigeon River on TH 61 (2020) (citing the International Bridge Act of 1972 as authorization).

271. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 3411, 108 Stat. 2663, 3105 (1994) (codified as amended at 42 U.S.C. § 5196a) ("The Director [of the Federal Emergency Management Agency (FEMA)] shall give all practicable assistance to States in arranging, through the Department of State, mutual emergency preparedness aid between the States and neighboring countries."); Pub. L. No. 110-342, 122 Stat. 3739, 3749 (2008) (consenting to an interstate compact that references, and presupposes the validity of, the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement).

272. 22 U.S.C. § 3303(b)(1).

273. *See* 22 U.S.C. § 3314(1) (defining "laws of the United States" to include "any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States *or any political subdivision thereof*") (emphasis added).

274. *See supra* note 183 (citing an example of these laws, of which there are many).

275. *See* Mutual Agreement Between Maryland Department of Transportation and the Republic of China (Taiwan) Through the Ministry of Transportation and Communications on the Reciprocal Issuance of Driver Licenses (2013) (stating that the Motor Vehicle Administration is authorized under Maryland Transportation Code Sections 12–401 and 12–403 "to enter into a reciprocity agreement with the Republic of China (Taiwan) under the Taiwan Relations Act, 22 U.S.C. § 3303(b)(1)").

only raises questions about the constitutionality of a significant portion of modern practice, but also suggests a need for greater vigilance on the part of congressional overseers and greater caution on the part of states themselves.

6. Policy Concerns

The evidence also includes a collection of nonbinding commitments that raise serious policy concerns. Perhaps the most noteworthy are states' numerous commitments with the national government, provinces, and municipalities of the United States' principal geopolitical rival—the People's Republic of China, which reportedly "us[es] subnational relations as a tool of influence" in its competition with the United States.[276] Roughly half of the disclosed arrangements with PRC governments have focused on promoting trade and investment, including in areas that implicate national security. Some have called for the parties to cooperate or collaborate in the sector of information technology,[277] and a collection of well over a dozen others have specifically encouraged cooperation or even "technology transfer"[278] in other strategically sensitive

276. Anthony F. Pipa & Max Bouchet, *Partnership Among Cities, States, and the Federal Government: Creating an Office of Subnational Diplomacy at the US Department of State*, BROOKINGS REP. (Feb. 17, 2001) https://www.brookings.edu/research/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state [https://perma.cc/F8FT-BB6U]. Consistent with this evidence, one state official explained to me on background that Chinese officials have reached out to his state to propose new commitments more often than the reverse.

277. *See* Memorandum of Understanding on Establishing Joint Working Group for Trade and Investment Cooperation Between China Provinces and the Commonwealth of Pennsylvania, United States of America art. VII (2018) (providing that the parties "will support companies to cooperate" in the sector of information technology); Memorandum of Understanding Between the State of Maryland, USA, and Anhui Province, China ¶ 3 (2004) ("[B]oth parties agree to develop new collaborations in . . . information technology sharing[.]"); Memorandum of Understanding on Science & Technology Cooperation Between Maryland (US) Department of Business & Economic Development, and Anhui (China) Provincial Department of Science & Technology ¶ 2 (n.d.) ("Both agree to collaborate in areas including . . . information technology[.]").

278. *See* Memorandum of Understanding: State of Alabama, the United States of America and Jiangsu Province, the People's Republic of China (2008) (stating that one goal of the agreement is to "expand technology transfers," including in the areas of information technology and biotechnology); Memorandum of Understanding on Strategic Cooperation Between Washington State Department of Commerce & Chinese Academy of Sciences Holdings Co., Ltd. art. III(2)(b) (2015) (providing that the parties "will encourage and support the organization of trade promotion events and commercial missions that allow the facilitation of technology transfer, joint ventures and trade between businesses and institutions of both sides").

fields such as nanotechnology,[279] aerospace,[280] biotechnology,[281] and semiconductors.[282] Still others call for technological cooperation in general terms.[283] Individually, but especially in aggregate, these arrangements could complicate federal efforts to protect U.S. technological leadership and innovation[284] by encouraging private conduct that creates opportunities for espionage, burdens and possibly even overwhelms federal oversight,[285] expands China's influence over American companies,[286] and challenges U.S. export

279. *See* Memorandum of Understanding on Establishing a Joint Working Group to Promote Trade and Investment Cooperation Between China Provinces and New York State of the United States art. VII (2016).

280. *See* Memorandum of Understanding on Establishing Joint Working Group for Trade and Investment Cooperation Between China Provinces and US State of Washington art. VII (2015).

281. *See* Memorandum of Understanding on Two-Way Investment Promotion Cooperation Between the Commonwealth of Massachusetts, Office of International Trade and Investment, and Investment Promotion Agency of the Ministry of Commerce of the People's Republic of China ¶ C (2008); Memorandum of Understanding on Investment Promotion Cooperation Between the Maryland Department of Business and Economic Development, USA and the Investment Promotion Agency of the Ministry of Commerce, China ¶ C(1) (2007).

282. *See* Memorandum of Understanding to Facilitate Closer Cooperation Between the China Council for the Promotion of International Trade and the Idaho Department of Commerce and Labor (2006).

283. *See, e.g.*, Memorandum of Understanding on Strengthening Cooperation on Trade and Investment Between the Maryland Department of Business and Economic Development and the Bureau of Commerce of Anhui Province ¶ 3 (2011) (stating that Maryland and Anhui Province "share a common desire to . . . [f]acilitate technology cooperation and technology trade between enterprises from both sides").

284. *See, e.g.*, Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1701, 132 Stat. 2174 (2018) (revising the processes and authorities of the Committee on Foreign Investment in the United States (CFIUS) in recognition of new national security risks posed by certain types of foreign investment).

285. CFIUS's inability to maintain adequate oversight in the face of a recent increase in pertinent transactions—many involving China in particular—prompted Congress to provide CFIUS with additional resources in 2018. *See id.*, 132 Stat. 2174–75, 2192, 2204 (observing "pressures on . . . CFIUS staff given the current workload," stating that CFIUS "may be limited in its ability to fulfill its objectives and address threats to the national security of the United States" as a result, providing hiring authority, and authorizing funding). It is plausible that affirmative state support for trade and investment with China in strategic sectors not only contributed materially to the problem that this legislation sought to address, but also will undermine the legislation's future efficacy by fostering an even larger volume of transactions that require CFIUS review.

286. *Cf.* Matt Pottinger, *Beijing's American Hustle: How Chinese Grand Strategy Exploits U.S. Power*, FOREIGN AFFS. (Aug. 23, 2021), https://www.foreignaffairs.com/articles/asia/2021-08-23/beijings-american-hustle [https://perma.cc/8LA8-YY68] (arguing that the Chinese government seeks to undermine U.S. and Western power in part by "systematically cultivat[ing] Western corporations and investors that, in turn, pay deference to Chinese policies and even lobby their home capitals in ways that align with the [Chinese Community

controls.[287] The U.S. Department of Commerce endorsed some of these commitments in a 2015 MOU with China's Ministry of Commerce,[288] but that surprising move took place at a time when U.S. sensitivity to the risk of technology transfer was less acute than it is today.[289] For that reason, the MOU seems unlikely to reflect the current position of the executive branch.

Other commitments raise different policy concerns. Some states paved the way for the domestic establishment of Confucius Institutes,[290] which allegedly spread propaganda and gather intelligence for China's government under the guise of language and cultural training.[291] A 2005 MOU that promotes joint programs of exchange in business and industry between Idaho and Xinjiang Province[292] now operates in tension with the federal government's effort to use economic measures to hold China accountable for the genocide of Uyghur

Party's] objectives," and calling for Washington "to do more to stymie Beijing's plans to dominate semiconductor manufacturing" in particular).

287. *See, e.g.*, Commerce Control List, Category 3A, Bureau of Industry and Security, U.S. Dept. of Commerce (Mar. 29, 2021) (imposing export controls on many types of semiconductors).

288. *See* Memorandum of Understanding Between the Department of Commerce of the United States of America and the Ministry of Commerce of the People's Republic of China to Establish a Framework to Promote Cooperation at the Subnational Level on Trade and Investment Between the United States and China (2015), *available at* https://ryanscoville.files.wordpress.com/2022/07/china-us-mou.pdf [https://perma.cc/PKV5-U4VP] (noting that the "presidents of the two countries were heartened by the work [carried out under the referenced commitments] and welcomed the establishment of additional similar mechanisms").

289. *See* Ellen Nakashima & Jeanne Whalen, *Biden Administration Concerned About U.S. Investments in Chinese Tech Companies with Military or Surveillance Ties*, WASH. POST (Dec. 16, 2021), https://www.washingtonpost.com/national-security/us-investments-china-biden/2021/12/15/835876a0-5772-11ec-a808-3197a22b19fa_story.html [https://perma.cc/75AX-NN4V] (discussing the Biden administration's concerns about technology transfer).

290. *See* Memorandum of Understanding Between the Confucius Institute Headquarters (Known as "Hanban"), the People's Republic of China, and the Utah State Board of Education (Known as "Board of Education"), State of Utah, United States of America (2018); Memorandum of Understanding Between the Department of Education, State of Michigan, United States of America and the Confucius Institute Headquarters (Hanban) of the People's Republic of China (2018).

291. *See* Pratik Jakhar, *Confucius Institutes: The Growth of China's Controversial Cultural Branch*, BBC (Sept. 7, 2019), https://www.bbc.com/news/world-asia-china-49511231 [https://perma.cc/J5P5-4BBM] (discussing the allegations). Reflecting these concerns, the National Defense Authorization Act (NDAA) for 2021 restricts Department of Defense funding to American universities that host a Confucius Institute. Pub. L. No. 116-283, § 1062 (2021).

292. Memorandum of Understanding Regarding the Promotion of Friendship, Cooperation and Commerce Between the State of Idaho, U.S.A. and Xinjiang Uygur Autonomous Region of China (2005).

Muslims.[293] A 2017 MOU between the Mississippi State Port Authority and the National Port Administration of Cuba expresses a mutual pledge to "improve business activities" between the United States and Cuba, including by engaging in "joint" public-relations efforts to generate new shipping business,[294] despite a longstanding embargo that prohibits most U.S. economic relations with that country.[295] A 2018 MOU between Indiana and Slovakia arguably challenges federal supremacy over arms exports[296] by expressing the parties' shared intent to cooperate in "seek[ing] commercial opportunities for military and defense-related investment and commercial expansion."[297] Similarly, the 2019 MOU between Mississippi and the Israeli Ministry of Defense—one of the few commitments that appears to exhibit all the classic indicia of a binding agreement or compact—obligates Mississippi to "[i]ntroduce relevant . . . American defense industries and technologies" to the Ministry in order to explore potential bilateral collaboration in defense industrial projects.[298] Roughly two dozen commitments—many with binding language and operating in the area of insurance regulation—seem to "enhance the political power"[299] of one or more states at the expense of others by stipulating that nonparty states cannot join without the consent of all parties.[300] And Kansas reportedly agreed in 2003 to encourage the repeal of federal sanctions against Cuba in exchange for Cuba's purchase of $10 million in Kansas agricultural

293. *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a), 135 Stat. 1529, 1529 (2021) (establishing a presumption against the legality of imports from the Xinjiang Uyghur Autonomous Region).

294. Memorandum of Understanding Between the National Port Administration of Cuba and Mississippi State Port Authority at Gulfport (2017); *see also* Memorandum of Understanding Between the National Port Administration of Cuba and the Jackson County Port Authority (2017) (expressing the parties' "desire to cooperate in sharing studies and market-related information that will allow them to improve business activities between the two countries").

295. *See generally* Cuban Assets Control Regulations 31 C.F.R. § 515 (2021) (prohibiting a wide variety of economic transactions with Cuba).

296. *See generally* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976) (establishing inter alia that the president has power to control arms exports and imports).

297. Memorandum of Understanding on Cooperation Between the State of Indiana in the United States of America and the Government of the Slovak Republic (2018).

298. Agreement of Cooperation Between the State of Mississippi and SIBAT, Defense Export & International Cooperation / Ministry of Defense of the State of Israel (2019).

299. Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 162, 176 (1985) (emphasis omitted); *see also* Texas v. New Mexico, 138 S. Ct. 954, 958 (2018) (suggesting that congressional consent is required when an agreement or compact "might affect injuriously the interests" of non-party states (quoting Florida v. Georgia, 58 U.S. 478, 494 (1854)).

300. *See, e.g.*, Agreement Between the Singapore National Science and Technology Board and the North Carolina Board of Science and Technology on Cooperation in Science and Technology (1994).

products.[301] Although several of these arrangements are nonbinding and thus unlikely to implicate the Compact Clause,[302] some may be preempted, and all underscore the risk of inadequate state transparency and federal monitoring.

7. Context for *United States v. California*

Finally, the evidence enables us to revisit the question that neither the court nor the parties could answer in *United States v. California*: Was California's commitment to cap and trade CO2 emissions with Québec typical, such that upholding it merely reaffirmed customary practice, or was it aberrational, such that upholding it significantly altered the legal landscape?

We can answer this question by first identifying the key features of the commitment itself. With a formal preamble and twenty-three "articles" spanning more than a dozen pages, the instrument identifies California and Québec as "parties" and frequently uses binding language in calling for them to harmonize and integrate their emissions regulations, recognize each other's emissions allowances and offsets, permit the trading of allowances and offsets across jurisdictions, jointly auction allowances, and establish an accounting mechanism to ensure transparency in the measurement of emissions reductions.[303] The promises are clearly reciprocal and envision successive execution over an indefinite period of time.[304] One provision requires the parties to create a consultation committee to monitor implementation.[305] Another specifies that any party seeking to withdraw "shall endeavor to give" notice twelve months in advance.[306] Still other provisions require the parties to mutually agree on any future amendments,[307] consult with one another to resolve any disagreements,[308] and notify one another as soon as possible after completing "any procedures required for the Agreement's entry into force."[309] No provisions, in contrast, explicitly address the binding or nonbinding nature of the commitment, its

301. *See* Hollis, *supra* note 17, at 741 (discussing this commitment).
302. The State Department/Hollis position maintains that even nonbinding commitments can implicate the Clause, but that position seems inconsistent with Supreme Court precedent and historical practice. *See supra* pp. 326–28 (making this argument).
303. Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions arts. 1–10 (2017).
304. *Id.*
305. *Id.* art. 13.
306. *Id.* art. 17.
307. *Id.* art. 18.
308. *Id.* art. 20.
309. *Id.* art. 22.

relation to preexisting federal law or foreign policy, or its status under international law. Official versions of the text exist in English and French,[310] and the signatories include the heads of relevant agencies in addition to the governor of California and the premier of Québec.[311]

Given these features, the evidence from Part II suggests that California's commitment was typical in some respects. Arrangements addressing environmental problems and climate change in particular have been common.[312] It is normal for states to work with foreign governments with which they do not share a border.[313] Moreover, all recent commitments have had a "political character" at least in the sense that they have avoided creating "proprietary or quasi-proprietary interests" for the state parties.[314] California's agreement was unexceptional in exhibiting these same characteristics,[315] and to that extent the district court's decision to uphold it aligned with customary practice.

But in other ways, the evidence reveals that the agreement was aberrational. It was part of the tiny fraction of recent commitments that utilized all of the measured treaty formalities.[316] It was one of an even smaller group that at least arguably exhibited all the classic indicia of binding agreements and compacts.[317] And unlike most commitments, which did not appear to pose any specific threat to federal supremacy,[318] this one operated in considerable tension with a contemporaneous foreign policy of the federal government—namely, the Trump administration's decision to withdraw from the Paris Agreement on Climate Change, and thereby inhibit international efforts to reduce CO2 emissions, due to

310. *Id.* art. 23.
311. *Id.* annex 1.
312. *See supra* Figure 5 (identifying natural resources as the third-most-common topic among recent commitments); *see supra* p. 354 (identifying climate change as a common topic).
313. *Compare* Plaintiff's Motion for Summary Judgment, *supra* note 29, at 18–20 (arguing that California's agreement was a "Compact" that required congressional consent, in part because the parties do not share a border), *with supra* p. 352 (reporting that parties have shared a border in only 16 percent of recent commitments).
314. *Compare* Plaintiff's Motion for Summary Judgment, *supra* note 29, at 14 (arguing that California's agreement had a "political character," and was therefore a "Treaty," because it did not give California a "proprietary or quasi-proprietary interest" in Québec's approach to regulating CO2 emissions (emphasis omitted)), *with supra* Table 3 (reporting that all recent commitments have sought to advance public welfare).
315. *Cf. generally* Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (2017).
316. *See supra* p. 362 (providing data on the presence of treaty formalities).
317. *See supra* p. 364–65 (elaborating on this point).
318. *See supra* p. 365 (explaining that most commitments have dealt with traditional issues of state and local governance).

concerns about economic impact.[319] It does not necessarily follow that the district court erred in upholding the agreement, but it does follow that virtually no recent commitments are likely to be unconstitutional under the district court's reasoning. For better or worse, states may very well respond by shifting toward more formal and substantial commitments going forward.

III. LEGAL REFORMS

Given the evidence presented above, some observers might conclude that the status quo is acceptable, even if less than ideal. States appear not only to reap benefits by entering into commitments with foreign governments, but also to comply with Article I, Section 10 in most cases despite the general absence of publicity or federal oversight. The transparency provided by academic research, such as this Article, reduces the need for new laws to ensure disclosure going forward. And even without academic research, some commitments will inevitably come to light through voluntary disclosure or journalism.

Complacency, however, seems unwarranted. Most negotiators have courted legal risk unnecessarily through suboptimal drafting. A significant number of commitments have a potential impact on federal supremacy over foreign relations or raise serious policy concerns vis-à-vis countries such as China and Cuba. Academic research is too sporadic and proceeds much too slowly to serve as a reliable alternative to an official transparency regime.[320] It seems plausible, moreover, that future commitments will pose even greater challenges. The district court's decision in *United States v. California*, combined with the absence of any binding appellate precedent to the contrary, may encourage states to toe constitutional lines with greater frequency. Persistent gridlock in the federal political branches may tempt states to pursue subnational solutions to national problems in ways that encroach on federal power. And the hyperpolarization of the American electorate may incentivize states to use commitments with foreign governments to undermine federal laws or policies that state voters disfavor. This Part therefore proposes reforms, including the standardization of a set of best

319. *See Full Transcript: Trump's Paris Climate Agreement Announcement*, CBS NEWS (June 1, 2017), https://www.cbsnews.com/news/trump-paris-climate-agreement-withdrawal-announcement-full-transcript [https://perma.cc/PGW3-ADJS] (explaining the administration's decision to withdraw).

320. This Article is itself an example. Part II.B.5 revealed that states adopted a collection of binding commitments of questionable constitutionality in recent decades. *Supra* pp. 363–69. Although it is helpful to know the contents now, the general lack of public and official knowledge impeded accountability and posed risks to federal supremacy and national interests in the interim.

practices for drafters and negotiators, the enactment of federal legislation to promote transparency and congressional monitoring, and, as an alternative to federal legislation, the enactment of state legislation to ensure the publication of all commitments in force.

A. Best Practices for Drafters and Negotiators

To begin, there is ample room for better draftsmanship. Some commitments attend to U.S. legal complexities with considerable sophistication. Many, however, seem to reflect little if any effort to address potential constitutional concerns. In fact, many show signs of drafting by foreign officials who might misunderstand or have no interest in U.S. law.[321] At a minimum, these commitments foster needless uncertainty about their own legality. Negotiators can improve on them by following two basic guidelines.

The first is to incorporate as a matter of course certain practices that reflect the requirements of the Article I Treaty Clause and Compact Clause. These include the following:

- A stipulation that all provisions will be interpreted in accordance with applicable federal law, including Article I, Section 10 of the Constitution.
- A citation in the preamble to any congressional consent, whether express or implied.
- A stipulation that all provisions will be interpreted in accordance with federal foreign policy.[322]
- A stipulation that no provisions aim to disadvantage third-party states.
- Where appropriate, and absent congressional consent to the waiver of sovereign immunity, a stipulation that nothing in the commitment amounts to a waiver of immunity with respect to any potential dispute that might "involve[] a matter of national concern

321. A number of commitments with the national government of China, for instance, involve different U.S. states as parties but use the same formatting, language, and structure. The same is true of many state commitments with Spain and with Israel. To the extent that these and other foreign governments are unaware of Article I, Section 10, they are more likely to propose arrangements that are unconstitutional. *Cf.* Ryan M. Scoville, *U.S. Foreign Relations Law From the Outside In*, 47 YALE J. INT'L L. 1 (2022) (discussing the importance of foreign knowledge of U.S. foreign relations law).

322. This stipulation would help a state to avoid problems under federal preemption in addition to Article I, Section 10. *Cf. supra* notes 41–45 (collecting cases on foreign affairs preemption).

> and . . . affect injuriously the interests of a foreign State" or "arise from conflicting claims . . . as to territorial boundaries."[323]

The second guideline is to consider additional measures that do not reflect the requirements of Article I, Section 10 but would nevertheless help to reduce uncertainty about the domestic legal status and legitimacy of a proposed commitment. These include the following:

- A citation in the preamble to any authorization or support from the federal executive branch.
- A citation in the preamble to any federal law or policy that the commitment will support.
- Where appropriate, a stipulation that the commitment is nonbinding.

Negotiators should be able to follow these guidelines with little difficulty. Both reflect practices that at least some states have already adopted to an extent in recent years.[324] Much of the proposed language reflects constitutional law that states must follow in any case. And as a general matter, foreign governments seem likely to be indifferent to provisions concerned exclusively with U.S. domestic law.

In addition, the guidelines should help states to avoid legal challenges of the sort that California faced in 2019, when the Trump administration sued the State for its CO2 agreement with Québec.[325] Whatever the policy merits of that agreement, it is hard to deny that its drafting could have been better. Negotiators did not disclaim the agreement's status as a treaty under the Article I Treaty Clause or address its status under the Compact Clause.[326] They did not insert any language to provide for interpretation in accordance with federal law or U.S. foreign policy.[327] And they did not cite any federal law or policy that the agreement

323. Principality of Monaco v. Mississippi, 292 U.S. 313, 331 (1934).

324. *See, e.g.*, Agreement Between the State of Maryland and the Government of Hungary and on Cooperation in the Field of Higher Education art. 5 (2017) ("This Agreement and activities arising from it shall be performed and interpreted by each party in accordance with . . . Article I, Section 10 of the Constitution of the United States."); Crossing Agreement (Canada – Michigan) art. VI, § 1 (2012) ("The International Authority is hereby established as a public body corporate and legal entity pursuant to this Agreement, in accordance with Applicable Law, including Section 10 of Article I of the US Constitution[.]"); Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement ch. 7, art. 700 (2005) ("This Agreement is not intended to infringe upon the treaty power of the United States of America . . . .").

325. Complaint, United States v. California, 444 F. Supp. 3d 1811 (E.D. Cal. 2020) (No. 19-CV-02142).

326. Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (2017).

327. *Id.*

supports.[328] These omissions likely helped to encourage the administration's challenge. Whether future commitments encounter similar challenges is substantially up to states themselves.

B. A Federal Reporting Requirement

Regardless of whether negotiators improve their drafting, Congress should enact legislation to facilitate federal monitoring. Since 1972, the Case-Zablocki Act ("Case Act") has required the Secretary of State to transmit to Congress the text of many international agreements to which the United States is a party.[329] Recent evidence shows that the Secretary has not always complied,[330] but the Case Act has nevertheless helped to ensure congressional notification and review of qualifying federal agreements in many cases.[331] Some commentators have thus proposed analogous legislation that would require states to transmit to Congress the text of subnational commitments with foreign governments.[332] Such legislation would operate as a necessary and proper means of carrying into effect Congress's power to grant or withhold consent under the Compact Clause.[333] In addition, the legislation would comport with the anticommandeering doctrine,[334] help to deter violations of the Treaty Clause, and enjoy precedent in not only

328. *Id.*
329. 1 U.S.C. § 112b(a).
330. *See* Hathaway et al., *supra* note 5, at 668–77.
331. *See id.* at 668–69 (reporting that the State Department transmitted more than 5500 agreements to Congress under the Case Act between January 20, 1989, and January 20, 2017).
332. *See* Hollis, *supra* note 17, at 800–01; Thomas Liefke Eaton, *Reanimating the Foreign Compacts Clause*, 45 WM. & MARY ENVTL. L. & POL'Y REV. 29, 36 (2020).
333. *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ."); United States v. Comstock, 560 U.S. 126, 134 (2010) ("We have . . . made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."). A reporting requirement would be "rationally related" to the implementation of Congress's power to choose whether to consent because Congress cannot exercise that power without notice of the existence of a commitment for which consent may be necessary. *Id.*
334. In *Printz v. United States*, the Supreme Court held that Congress cannot commandeer state officers to assist in the adoption or enforcement of a federal regulatory program. 521 U.S. 898, 935 (1997). But this doctrine does not apply where, as here, a federal statute would "regulate[] state activities" rather than "the manner in which States regulate private parties." Reno v. Condon, 528 U.S. 141, 150–51 (2000) (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

foreign law[335] but also reporting mandates that Congress has imposed on states in various other contexts.[336] Yet commentators have offered few details on what this legislation might look like. Further discussion is therefore warranted.

In designing a reporting statute, Congress will need to address a series of questions: (1) Who should receive copies of the commitments? (2) What kinds of commitments should be subject to the reporting requirement? (3) When should states be required to report? (4) What kind of enforcement mechanism, if any, should be available for cases of noncompliance? (5) What is the relationship between state reporting and congressional consent? And (6) should there also be a publication requirement? Resolving these questions will require Congress to balance competing concerns about transparency, the separation of powers, federalism, financial costs, administrative burdens, and efficacy.[337]

1. Recipient

First is the question of who should receive the commitment texts. To the extent that states have directly informed the federal government of their commitments in recent years, available evidence suggests that they have chosen to contact the State Department rather than Congress.[338] The Department has formidable access to information and expertise on foreign relations and international law, so that is not an unreasonable choice. Yet Article I, Section 10

335. *See, e.g.*, Australia's Foreign Relations (State and Territorial Arrangements) Act 2020, No. 116, Part 2, Div. 2, § 16 (2020) (providing that an Australian state or territory that proposes to negotiate an arrangement with a foreign government must provide written notice to the Australian Minister for Foreign Affairs); Código Federal de Procedimientos Civiles [CFPC], Diario Official de la Federación [DOF] 02-01-1992 (Mex.), 31 I.L.M. 390, 395 (1992) ("The centralized and decentralized agencies of the Federal, State or Municipal Public Administration shall keep the [Mexican] Department of Foreign Affairs informed about any inter-institutional agreement that they plan to enter into with other foreign governmental agencies or international organizations.").

336. *See, e.g.*, Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, § 2(a), 128 Stat. 2860 (2014) (requiring inter alia that states receiving certain federal funds report to the Attorney General information regarding the death of any person who was detained or under arrest at a state correctional facility at their time of death).

337. *Cf.* WILLIAM T. EGAR, CONG. RSCH. SERV., R46357, CONGRESSIONALLY MANDATED REPORTS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS (2020) (discussing drafting choices, costs, and benefits of legislation that mandates reporting to Congress).

338. Interview with Reta Jo Lewis, *supra* note 14; *see also, e.g.*, Memorandum of Understanding Between the National Police Agency of the Republic of Korea and the Wisconsin Department of Transportation on the Mutual Recognize and Exchange of Driver's Licenses ¶ 15 (2017) ("The Wisconsin DOT may provide the United States Department of State with a copy of this MOU.").

plainly confers on Congress—not the President—primary authority to grant or withhold federal consent to binding agreements and compacts.[339] Because Congress cannot exercise that power without knowledge of pertinent state activity, any reporting requirement should, at a minimum, seek to ensure easy access to all commitment texts for the Senate Foreign Relations Committee and the House Foreign Affairs Committee, whether in place of or alongside the State Department.[340]

2. Content

The second question is what kinds of commitments should be subject to the reporting requirement. One conceivable answer is to obligate states to transmit the texts only of those that are binding. Until recently, federal law embraced an analogous approach to the international agreements of the United States.[341]

339. The Compact Clause refers to the "Consent of Congress" as the only prerequisite for a state's entry into an agreement or compact. U.S. CONST., art. I, § 10, cl. 3. Nevertheless, the legislation that confers consent might be subject to the Presentment Clause, which provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." *Id.*, § 7, cl. 2. Certain modalities of constitutional interpretation point in opposite directions on this issue. *Compare* James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WILLIAM & MARY BILL RTS. J. 775, 778 (2019) (arguing that the text of the Constitution, early congressional practice, and case law favor the view that the power to consent to interstate compacts "belongs to Congress alone" and "is not shared with the President"), *with* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1026 (2016) (suggesting that "historical practice has glossed" the Compact Clause to require presentment to the president). If the Presentment Clause applies, states that seek to enter into agreements and compacts will typically have to obtain the approval of the president in addition to a simple majority of each house of Congress.

340. The Case Act establishes a similar rule for certain types of international agreements to which the United States is a party. *See* 1 U.S.C. § 112b(a) (requiring the Secretary of State to notify the U.S. Senate Foreign Relations Committee and the U.S. House Foreign Affairs Committee of a new international agreement of the United States if immediate public disclosure would, in the opinion of the President, be prejudicial to the national security of the United States, but otherwise requiring the Secretary to notify all of Congress).

341. *See* 22 C.F.R. § 181.2(a)(1) (2019) (explaining that an international agreement to which the United States is a party is not subject to reporting under 1 U.S.C. § 112b unless the parties "intend their undertaking to be legally binding, and not merely of political or personal effect"). *But see* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5947(a) (2022) (extending the reporting requirements of 1 U.S.C. § 112b to any nonbinding agreement that does not involve the U.S. military or intelligence community and that either (1) "could reasonably be expected to have a significant impact on the foreign policy of the United States" or (2) "is the subject of a written communication" to the Secretary of State from the Chair or Ranking Member of the Senate Foreign Relations Committee or House Foreign Affairs Committee).

Replicating that approach in the present context would limit compliance burdens for states by removing most commitments—namely, those that are nonbinding—from the scope of the reporting requirement. It would do so, moreover, while still promoting the disclosure of all commitments that are most likely to violate Article I, Section 10.[342]

Yet a broader requirement that extends to nonbinding commitments would likely generate practical benefits. It would better promote accountability by ensuring that state officials cannot evade disclosure merely by shifting from binding to nonbinding arrangements.[343] It would help to deter nonbinding commitments that violate federal preemption doctrines,[344] as well as binding commitments that violate Article I, Section 10. And it would encourage states to improve the administration of their commitments, as only state governments with adequate record keeping and interagency coordination would be able to guarantee timely transmission to the designated federal recipients. This improvement may in turn foster greater state compliance with the commitments themselves by ensuring that relevant state officials are aware of them.[345] Although a reporting requirement that applies to binding and nonbinding engagements would be more burdensome for federal officials to implement and for states to follow, Congress might reasonably conclude that the burden is justified in light of these benefits.

Assuming that a broad requirement is warranted, a related issue is how to define the category of nonbinding commitments. As Hathaway, Bradley, and Goldsmith have pointed out in their treatment of the federal transparency regime for the international agreements of the United States, there is no easy answer.[346] The basic difficulty is that nonbinding commitments could in principle include a wide range of trivial undertakings—such as verbal agreements to hold meetings or engage in official travel—that generally do not warrant congressional oversight, but statutory language that would exclude them risks a reporting requirement that is too narrow to protect federal and public interests.

342. *Cf.* Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Valid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.") (citation and internal quotation marks omitted); *supra* pp. 326–28 (arguing that only binding commitments implicate the Compact Clause).

343. *Cf.* Hathaway et al., *supra* note 5, at 708–09 (making an analogous point in favor of extending the Case Act to at least some nonbinding arrangements).

344. *See supra* notes 41–45 (citing cases on foreign affairs preemption).

345. *Cf. supra* note 23 (discussing evidence of a lack of coordination and even awareness of recent commitments within state governments).

346. Hathaway et al., *supra* note 5, at 709.

Congress might attempt to address this difficulty in any number of ways. One option would be to set forth a list of types of nonbinding commitments that fall within the scope of the reporting mandate.[347] For example, the statute might provide that a nonbinding commitment must be transmitted to Congress if it includes as a party any level of China's government or concerns sensitive technology.[348] Another option would be to replicate the reporting requirement that Congress recently adopted for the nonbinding agreements of the United States.[349] This approach would call on states to report any nonbinding commitment that "could reasonably be expected to have a significant impact on the foreign policy of the United States" or "is the subject of a written communication" from the Chair or Ranking Member of the Senate Foreign Relations Committee or House Foreign Affairs Committee.[350] Still another option would be to mandate that states report any nonbinding commitments that they have not disclosed to the public.

Congress will also need to specify the types of U.S. parties who will be subject to the reporting requirement. Although this Article has focused on commitments adopted by states and their executive departments and agencies, other state institutions, such as judiciaries and public universities, have at times entered international commitments of their own.[351] In addition, substantial evidence indicates a growing field of city engagement in foreign relations.[352] Insofar as these other types of subnational actors might also enter commitments that implicate Article I, Section 10,[353] a reporting requirement that encompasses

347. *Cf. id.* (arguing for an analogous reform to promote the disclosure of nonbinding commitments of the United States).

348. *Cf.* CHINA'S INFLUENCE & AMERICAN INTERESTS: PROMOTING CONSTRUCTIVE VIGILANCE 35 (Larry Diamond & Orville Schell eds., 2019) (arguing that "[a]ll Memoranda of Understanding and contracts [between U.S. subnational governments and Chinese entities] should be transparent and public").

349. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5947(a).

350. *Id.*

351. *See, e.g.*, Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law, *supra* note 161.

352. *See generally, e.g.*, Helmut Philipp Aust & Janne E. Nijman, *The Emerging Role of Cities in International Law – Introductory Remarks on Practice, Scholarship, and the* Handbook, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CITIES 1, 2–7 (Helmut Philipp Aust & Janne E. Nijman eds., 2021) (discussing city engagement in foreign relations, including through cooperative arrangements with one another).

353. The text of Article I, Section 10 focuses exclusively on the power of a "State" to enter into international commitments, but the commitments of local governments can raise similar risks to federal supremacy. *Compare, e.g.*, Memorandum of Understanding Between the

them warrants consideration. At the same time, it seems likely that, at least for the foreseeable future, the most significant commitments will count as parties either states proper or their executive departments or agencies, so Congress might reasonably limit the reporting requirement to those institutions as a means of mitigating compliance burdens.

3. Timing

A third question concerns timing: When and how often should states be required to report? Options include (1) retail reporting of each proposed commitment before signature, (2) retail reporting of each proposed commitment within a designated period following signature, and (3) wholesale reporting of all commitments signed by each state within a recurring period of time. With respect to international agreements of the United States, the Case Act opts for the third approach by requiring the Secretary of State each month to transmit to Congress all international agreements that were finalized during the prior month.[354] *Virginia v. Tennessee* established that Congress can consent to interstate compacts ex ante or ex post,[355] but the Court has called that view into question in recent decades,[356] and there may be particularly good reasons for doing so in the context of foreign compacts. My own sense is that different rules should apply depending on the nature of the commitment. With respect to nonbinding commitments, wholesale, ex post reporting on an annual basis would seem to facilitate adequate

National Port Administration of Cuba and the Jackson County Port Authority (2017) (expressing the parties' "desire to cooperate in sharing studies and market-related information that will allow them to improve business activities between" the United States and Cuba), *with* DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RSCH. SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS (2018) (summarizing U.S. sanctions on Cuba). In that sense, the case for applying Article I, Section 10 to the international commitments of local governments seems compelling. *See also* Memorandum by the Undersecretary of State (Webb) to the President, Sept. 27, 1951, *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1951: THE UNITED NATIONS; THE WESTERN HEMISPHERE 916–19 (1979) ("It seems clear that under [the Compact Clause] . . . what a State may not do, its political subdivisions may not do."); McHenry County v. Brady, 163 N.W. 540, 544 (N.D. 1917) (applying the test in *Virginia* to evaluate the need for congressional consent to a construction contract between county-level authorities in North Dakota and Canada).

354. 1 U.S.C. § 112b(a), *amended by* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5947(a) (2022).

355. 148 U.S. 503, 521–22 (1893).

356. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) (stating in dicta that "[u]nder the Compact Clause states *cannot* form an interstate compact without first obtaining the express consent of Congress") (emphasis in original).

levels of deterrence and federal monitoring while limiting the compliance burden for states. With respect to binding commitments, ex ante notification may be necessary to ensure that states do not establish legal relations before the federal government has had an opportunity to evaluate attendant risks.

4. Enforcement

Fourth is the question of whether mechanisms to foster compliance are necessary and, if they are, what they should be. As a point of comparison, the Case Act historically had none,[357] and this may have contributed to a degree of noncompliance on the part of the federal executive.[358] It does not necessarily follow that states would fail to comply with analogous legislation, and given the Supremacy Clause,[359] one can only imagine that they would generally follow a lawful federal directive, but it is conceivable that at least some states would fail to adhere to a federal reporting requirement some of the time. If concerned about this possibility, Congress could provide that no commitment shall carry any force or effect before transmittal.[360] Alternatively, and as it has done in many other areas, Congress could expressly condition the availability of pertinent federal funding on state compliance, although such a condition would have to operate within the limits of Article I.[361]

5. Implications for Congressional Consent

Congress will also need to consider the relationship between a reporting requirement and congressional consent under the Compact Clause. In *Virginia*,

357. *See generally* 1 U.S.C. § 112b (2021). *But see* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5947(a) (2022) (requiring each agency that enters into international agreements to designate a "Chief International Agreements Officer" to ensure that the agency transmits its agreements to the Secretary of State, and directing the Comptroller General to audit State Department compliance with the statute's reporting and publication provisions).

358. *See* Hathaway et al., *supra* note 5, at 668–77 (reporting evidence of non-compliance).

359. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

360. *Cf.* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1108–09 (2017) (discussing a transparency model whereby the law "den[ies] legal effect to policies and decisions that are not disclosed with sufficient notice to affected parties").

361. *See* South Dakota v. Dole, 483 U.S. 203, 207–11 (1987) (holding that conditions on federal funds made available to states must be adopted in pursuit of "the general welfare," expressed unambiguously, related to "the federal interest in particular national projects or programs," consistent with other provisions of the Constitution, and non-coercive).

the Court suggested that Congress can implicitly consent to an agreement or compact by knowingly "sanctioning its objects and aiding in enforcing them."[362] Recall, moreover, that where the subject matter of a binding agreement or compact is an appropriate subject for federal legislation, congressional consent transforms the instrument into federal law.[363] These doctrines suggest that the historical opacity of many agreements and compacts may have carried an underappreciated benefit: protection against not only state claims of implied consent, but also uncertainty about whether Congress created federal law through the mechanism of such consent. If Congress had no notice of commitments, it could not have implicitly consented to them. But the same logic suggests that a system of formal congressional notification may carry an underappreciated cost: more state claims of implied consent, and more uncertainty about federal legal status. To address this possibility, any new legislation should clarify that mere congressional inaction on a transmitted text shall not itself constitute, or support a finding of, consent.[364]

6. Publication

Finally, Congress should consider whether to mandate publication in addition to reporting. The Case Act operates alongside another statute that generally requires the Secretary of State to "cause to be compiled, edited, indexed, and published" a compilation of all treaties and other international agreements to which the United States is a party.[365] This statute also requires the Secretary to "make publicly available through the Internet website of the Department of State" each agreement that is proposed for inclusion in the official compilation.[366] A similar approach here would require states to transmit their commitments to the State Department and, in turn, require the Department to publish all transmitted texts on a public website in a timely manner, thereby ensuring access for Congress and promoting public knowledge.

On balance, such a requirement seems warranted. A recent literature has argued that disclosure laws can create significant financial costs, divert agencies from other work, encourage officials to rely on oral communications and sub rosa

362. Virginia v. Tennessee, 148 U.S. 503, 521 (1893).
363. *See* Cuyler v. Adams, 449 U.S. 433, 438–42 (1981).
364. *But cf.* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185 (2023) (arguing for an approach to interstate compacts whereby state submission plus congressional inaction operates as consent).
365. 1 U.S.C. § 112a(a).
366. *Id.* § 112a(d).

deals to avoid disclosure, and weaken rather than enhance public confidence in government.[367] But those critiques are far less persuasive in the present context. It is one thing to adopt a transparency law, such as the Freedom of Information Act, that enables private citizens to sue the U.S. government in pursuit of countless requests for all manner of public records—from formal legal opinions to the most trivial email communications—without regard for the public or even private importance of the records themselves. It is another thing to adopt a publication requirement for the international commitments of U.S. states.[368] As I have shown, these arrangements consistently address matters of considerable public importance.[369] Some operate as state and even federal law.[370] Given that states reported an average of only thirteen commitments each and a total of 637 commitments in force in 2020,[371] the State Department would likely encounter only limited financial and administrative costs in maintaining an online repository. A federal repository is likely to be much more efficient than a collection of separately administered state alternatives. There is recent precedent in foreign law.[372] And publication would help to inform citizens of the beneficial undertakings of their elected officials while discouraging commitments that fail to serve state or national interests.

7. A Second Look at Recent Proposals for Reform

With the above considerations in view, it is easier to evaluate the merits of recent proposals for reform. In the 116th Congress, Representative Ted Lieu and Senator Chris Murphy each introduced the City and State Diplomacy Act to require the State Department to "maintain[] a public database of subnational

367. *See* Pozen, *supra* note 360, at 1123–35.
368. *See* Pozen, *supra* note 360, at 1149–50 (arguing that affirmative disclosure regimes avoid many of the problems associated with the Freedom of Information Act).
369. *See supra* Part II.B.3.
370. *See supra* Table 3 (reporting that 23 percent of commitments contain binding language); *supra* pp. 336 (citing authority for the proposition that congressional consent, whether express or implied, can transform a binding agreement or compact into federal law).
371. *See supra* p. 344.
372. *See* Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 (Cth) pt. 5 div. 4 § 53 (Austl.) (requiring the Minister for Foreign Affairs to maintain a public register of information on subnational arrangements between Australian states and foreign governments); *see also Public Register, Foreign Arrangements Scheme*, AUSTL. GOV'T: DEPT. OF FOREIGN AFFS. & TRADE, https://www.foreignarrangements.gov.au/public-register (last visited Oct. 2, 2022) (publishing information about notified arrangements).

engagements,"[373] with "subnational engagements" defined as "formal meetings or events between elected officials of State or municipal governments and their foreign counterparts."[374] Congress, however, did not enact this reform. In the 117th Congress, Representative Lieu and Senator Murphy introduced newer bills that used the same definition of "subnational engagements" but omitted the original provision for a public database and instead proposed to task the State Department merely with "tracking subnational engagements."[375] This language also appeared in a version of the NDAA that passed the House of Representatives in September 2021,[376] but the language was missing in the final version of the NDAA, which President Biden signed into law in December 2021.[377]

The recent proposals are a step in the right direction, have garnered significant support,[378] and may reappear in the future,[379] but they are also deficient in several respects. First, the proposed definition of "subnational engagements" is underinclusive because state commitments with foreign governments are not "meetings or events," but at most the products of such occurrences, under the ordinary meaning of those terms. The *Oxford English Dictionary* defines "meeting" as "[t]he act or an instance of assembling or coming together for social, business, or other purposes,"[380] and defines "event" as "[a] planned public or

373. City and State Diplomacy Act, H.R. 3571, 116th Cong., § 4 (2019); City and State Diplomacy Act, S. 4426, 116th Cong., § 4 (2020).
374. H.R. 3571 § 4; S. 4426 § 4.
375. H.R. 4526, 117th Cong., § 4 (2021); S. 3072, 117th Cong., § 4 (2021).
376. National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. § 1341 (2021).
377. *See generally* National Defense Authorization Act for Fiscal Year 2022, S. 1605 (2021) (omitting the provision for tracking subnational engagements).
378. *See, e.g.*, TRUMAN CENTER FOR NATIONAL POLICY, TRANSFORMING STATE: PATHWAYS TO A MORE JUST, EQUITABLE, AND INNOVATIVE INSTITUTION 42 (2021) (expressing support for the City and State Diplomacy Act); Reta Jo Lewis, Benjamin Leffel, Corey Jacobson, Luis Renta & Kevin Cottrell, *It is Time for the United States to Institutionalize Subnational Diplomacy*, GERMAN MARSHALL FUND OF THE UNITED STATES (Jan. 26, 2021), https://www.gmfus.org/news/it-time-united-states-institutionalize-subnational-diplomacy [https://perma.cc/PT79-68NB] (same); The FSJ Editorial Board, *On a New Approach to City and State Diplomacy*, FOREIGN SERV. J. 20–34 (2022) (same).
379. The recently enacted NDAA for 2023 requires the State Department's Special Representative for Subnational Diplomacy to submit to Congress a strategic plan for inter alia "supporting subnational engagements" with foreign governments, but none of the new provisions call for federal or state efforts to gather or disseminate information on those engagements, so the problem of inadequate transparency remains to be addressed. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 9108 (2022).
380. *Meeting*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/search/dictionary/?scope=Entries&q=meeting [https://perma.cc/RV6B-GTU2]; *see also, e.g.*, Wisconsin Central Ltd. v. United States, 138

social occasion."[381] Strictly speaking, ceremonies at which parties sign their commitments would likely qualify under these definitions, but the commitments themselves would not.[382] The recent proposals would thus do nothing to promote public knowledge or federal monitoring of commitment texts.

Second, the proposed definition of "subnational engagements" is underinclusive because it focuses on activities "between *elected* officials of State or municipal governments and their foreign counterparts."[383] As shown above in Part II, it is common for a state governor to sign a commitment on behalf of his or her state, but it is even more common for a lower-ranking official to sign on behalf of an executive department or agency over which they preside.[384] Some of these officials are elected, but many others are not.[385] A 2018 MOU on agricultural cooperation between Arkansas and Ghana,[386] for example, was signed by the Arkansas Secretary of Agriculture, who was appointed.[387] As a result, many commitments would not qualify as "subnational engagements" even if one assumes for the sake of argument that commitments are "meetings or events."[388]

Third, the recent bills do not prescribe any measures to facilitate the proposed federal efforts to track or maintain a public database of state activity. There is no requirement for states to notify the State Department or Congress of their engagements. Nor is there a provision to enforce or even encourage state cooperation with federal monitoring. Given the general absence of state-level transparency in recent decades,[389] these omissions exacerbate the risk of incomplete knowledge on the part of federal authorities, along with underenforcement of Article I, Section 10.

S.Ct. 2067, 2070 (2018) (explaining that the Court will interpret the words of a statute in accordance with their "ordinary meaning" at the time of enactment).

381. *Event*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/65287?isAdvanced=false&result=1&rskey=wRkVkT& [https://perma.cc/UQ8U-WDHL].

382. *Id.*

383. National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong., § 1341 (2021) (emphasis added).

384. *See supra* p. 348 (reporting that 57 percent of commitments were signed by state officials other than governors).

385. *See* 52 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 125–30 (2020) (compiling information on the methods of selection of state administrative officials).

386. Memorandum of Understanding for Establishing an Agricultural Development Partnership Between the Arkansas Agriculture Department, USA and Ghana Ministry of Food and Agriculture, the Republic of Ghana (2018).

387. 52 THE COUNCIL OF STATE GOV'TS, *supra* note 385, at 125.

388. National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong., § 1341 (2021).

389. *See supra* pp. 313–14 (describing this problem).

Finally, although the deficiencies discussed so far are common to all of the recent bills, the database and tracking proposals each suffer from additional problems of their own. With respect to the former, there is no prescribed time limit between the dates of the engagements and their inclusion within the database.[390] This creates a risk of belated collection and disclosure on the part of database managers. With respect to the latter, there is no requirement for the State Department to share with Congress or the public any information on subnational engagements that the Department manages to track. One provision would require annual briefings to Congress on the Department's "work" on subnational diplomacy, but not on subnational engagements per se.[391] The tracking proposal may thus fail to ensure congressional notice and public disclosure of commitments even if the definition of "subnational engagements" were not underinclusive in the ways described above.[392] It is hard to justify that effect in legal terms, given the central role of Congress under the Compact Clause.

In short, the recent bills on subnational diplomacy are a welcome development but have ample room for improvement. A requirement for the State Department to track or maintain a public database of a narrowly defined category of "subnational engagements" is unlikely to yield anything close to complete and timely access to information about future commitments for the State Department, much less Congress and the American public. To address these problems, reinforce the Constitution, promote the accountability of state officials, and discourage commitments that disserve national interests, Congress should enact a reporting and publication regime for subnational commitments.

C. State Transparency Requirements

Although federal legislation would likely be the most efficient means of promoting transparency and facilitating federal monitoring across the board, individual states should consider legislation of their own. At the time of writing, two states already have a statutory disclosure requirement of one form or another. North Carolina law provides that "[a] copy of all executed memoranda of understanding and agreements of a noncommercial nature otherwise subject to disclosure under the public record laws of this State, entered into by the State of North Carolina, or any agency of the State, and a foreign government shall

390. *See generally* City and State Diplomacy Act, H.R. 3571, 116th Cong., § 4 (2019); City and State Diplomacy Act, S. 4426, 116th Cong., § 4 (2020).
391. H.R. 3571, § 4; S. 4426, § 4.
392. *See supra* pp. 387–88.

be filed by the State agency with the Secretary of State."[393] In addition, California law requires the State Governor's Office of Planning and Research to "maintain and update, a full and comprehensive list of all state agreements made with foreign governments."[394] Given that all states now enter international commitments and that some do so in volume, the time is right for other state legislatures to replicate and build on these measures.

The ideal reform would have several features. First, like California's law, it would designate a single office within the state executive branch as responsible for maintaining comprehensive information about the commitments that are in force. Individual state legislatures will be in the best position to identify the most appropriate office for their state. Second, like North Carolina's law, the reform would require every state agency to transmit all commitments to the designated office. Third, unlike both laws, the reform would explicitly require that same office to publish in a timely fashion the text of all transmitted commitments on a public website.

Such a reform would carry several advantages. It would ensure that state executives are aware of all operative commitments, including those made by prior gubernatorial administrations, thereby fostering compliance. It would reinforce Article I, Section 10 and discourage actions that threaten federal supremacy by facilitating public and federal monitoring. And it would help to legitimize commitments that advance state and national interests by publicizing them and standardizing their administration. The reform would likely generate these benefits, moreover, with little financial cost to the state itself, and little if any disruption to the overwhelming majority of state engagement in foreign relations.

CONCLUSION

U.S. states have frequently entered commitments with foreign governments without active federal oversight, public knowledge, or even the awareness of many state officials. As a partial corrective to these conditions, this Article used the public records laws of the fifty states to collect and reveal new data pertaining to the timing, parties, principal subject matter, and legal status of hundreds of previously unpublished commitments. The resulting evidence suggests that state engagement in foreign relations is typically beneficial and lawful. But the evidence also shows that many commitments have been poorly drafted, that a nontrivial portion may violate the Article I Treaty Clause or the Compact Clause, and that

393. N.C. GEN. STAT. ANN. § 66–280 (West 1999).
394. CAL. GOV. CODE § 99502 (West 2006).

some raise serious policy concerns. To address these problems, relevant actors should follow drafting guidelines and enact transparency legislation. Among other benefits, these reforms would help to discipline modern practice and ensure its advancement of national, state, and public interests.