

NOTES

THE WESTERN CLIMATE INITIATIVE: CROSS-BORDER COLLABORATION AND CONSTITUTIONAL STRUCTURE IN THE UNITED STATES AND CANADA

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I. INTRODUCTION

Scientists have reached a consensus that global warming is a looming threat.¹ A surprisingly large number of national politicians are lagging behind. The U.S. federal government, though making some strides toward reducing national greenhouse gas (“GHG”) emissions, has only addressed the problem in a piecemeal and halting fashion.² In its place, the states have taken the lead. In Canada, the provinces have likewise taken the initiative in the face of federal inaction.³

In light of these locally driven efforts, it was only a matter of time before states and provinces began to collaborate in their efforts. The first of

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1. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2008), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (“Warming of the climate system is unequivocal.”).

2. For example, though Congress has been discussing possible climate change bills, the only concrete action to date has been the Environmental Protection Agency's decision to regulate GHGs under the Clean Air Act. See John M. Broder, *E.P.A. Clears Way for Greenhouse Gas Rules*, N.Y. TIMES, Apr. 18, 2009, at A15. But it is even possible that regulations will not be issued at all. Ian Talley, *EPA Chief Says CO₂ Finding May Not “Mean Regulation,”* WALL ST. J., May 13, 2009, at A9.

3. See *infra* notes 13–19.

these cross-border efforts originated in 2007, when the Western Climate Initiative (“WCI”), originally a GHG reduction partnership between a number of governors in the western United States, added British Columbia and Manitoba to its ranks.⁴

But there is an apparent barrier to such cross-border collaboration. As the U.S. Supreme Court noted in its most recent case on global warming, “When a State enters the Union, it surrenders certain sovereign prerogatives. . . . [I]t cannot negotiate an emissions treaty with China or India.”⁵

This Note examines the sources and implications of the Court’s dictum, as well as the host of other legal issues raised by cross-border partnerships such as the WCI. Numerous commentators have recently discussed the extraordinary potential of international cooperation between subnational actors, colorfully referring to such efforts as “transnational translocalism,” “bottom-up lawmaking,” “paradiplomacy,” and “gubernatorial foreign policy,” to name a few.⁶ Others (including the author of this Note) have examined the domestic legal implications of these efforts in the United States.⁷ But this Note is the first piece (to the author’s knowledge) to provide an overview of the various and sundry legal issues presented on *both sides of the border*. In doing so, it aims to untangle the web of potential constitutional barriers and show how cross-border collaborations can survive constitutional challenge, pointing toward a hopeful future for such cooperative engagements.

Part II of this Note discusses the basic facts of the WCI. Importantly, the WCI is framed as a voluntary collaboration between the states and

4. See W. CLIMATE INITIATIVE, WESTERN CLIMATE INITIATIVE UPDATE: AUGUST 27, 2007, at 1 (2007), available at http://www.climatechange.ca.gov/events/2007-08-30_wci/2007-08_WCU_UPDATE.PDF [hereinafter WCI UPDATE].

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

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

7. See, e.g., Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621 (2008); Jeremy Lawrence, *Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,796 (2008).

provinces in pursuing independently held goals of GHG reduction. The parties did not intend for their agreement to have legally binding effect. Though this would seem to be an undesirable method of cooperation, it is made possible by the underlying mechanics of the WCI's cap-and-trade approach. In short, the WCI can thrive as a voluntary collaboration because each member is made better off through its cooperation with the others.

Part III explains the necessary background of international law regarding treaties, nontreaty agreements, and federal subunits. Though federal subunits are not recognized as entities capable of creating binding treaty obligations, the WCI is permissible in international law as a self-enforcing nontreaty agreement.

Parts IV and V then examine the domestic constitutional mechanics of the WCI in the United States and Canada. Part IV.A and Part IV.B describe the constitutional law of foreign relations federalism in the United States and Canada, respectively. Part V then analyzes the validity of the WCI under the two bodies of constitutional law discussed in Part IV. Ultimately, the WCI seems carefully designed to survive constitutional scrutiny on both sides of the border.

Part VI examines the broader impact of the WCI. The comparative analysis of constitutional mechanics shows the variety of ways in which federal subunits are able to undertake such efforts. Generally, this points policymakers in a new direction toward the use of transborder cooperation to strengthen local regulations. One can only hope that the states, provinces, and respective federal governments share this opinion.

II. THE WCI AS A VOLUNTARY COLLABORATION

This part discusses the details and structure of the WCI. This discussion shows that the WCI is a voluntary and collaborative effort aimed at strengthening the states' and provinces' internal environmental regulations. The text of the WCI agreement shows that the joint effort is voluntary rather than mandatory; the context of the agreement shows that most of the states and provinces adopted GHG policies prior to entering into the agreement. This part then discusses the WCI's cap-and-trade mechanisms, explaining how a collaborative regulatory effort can lead to greater environmental benefits at a lower cost.

A. LANGUAGE AND CONTEXT

The language and the drafting history of the WCI agreement show that

the effort is entirely voluntary and collaborative. The parties did not establish legally binding obligations. Instead, they designed the program as a way to enhance their independent internal policy goals of reducing GHG emissions.

The WCI began in February 2007 as a partnership between the governors of Arizona, California, New Mexico, Oregon, and Washington.⁸ Since then, it has added a pair of new states (Montana and Utah), as well as a number of Canadian provinces (British Columbia, Manitoba, Ontario, and Quebec).⁹ The sole criterion for joining is that the members adopt a policy goal for GHG emissions reduction, as well as standards for vehicular GHG emissions.¹⁰

Throughout the WCI agreement, it is clear that the partnership is entirely voluntary and not legally binding. The agreement recites that the members “have set goals to significantly reduce GHG emissions from [their] respective states” and are collaborating in order to reduce GHG emissions “in [their] states collectively and to achieve related co-benefits.”¹¹ (As is discussed below, these “co-benefits” of cooperation include improved economic efficiency and/or greater environmental protection.)

The basic goal of the WCI is to reduce the members’ collective GHG emissions from the 2005 emissions level by 15 percent between now and 2020.¹² To do this, the members have agreed to set a regional limit on emissions by designing and implementing a “regional market-based multi-sector mechanism”—or, more colloquially, a cap-and-trade system.¹³ Notably, this program is meant to remain “consistent with state-by-state goals,” and the system for reporting and tracking the emissions will remain “consistent with state GHG reporting mechanisms and requirements.”¹⁴ In other words, the WCI is merely a vehicle for the members to collaborate

8. Western Regional Climate Action Initiative, Agreement Between Janet Napolitano, Governor of Arizona, Arnold Schwarzenegger, Governor of California, Bill Richardson, Governor of New Mexico, Theodore R. Kulongoski, Governor of Oregon, and Christine O. Gregoire, Governor of Washington (Feb. 26, 2007), available at <http://www.westernclimateinitiative.org/component/remository/func-startdown/12/> [hereinafter WCI Agreement].

9. See Western Climate Initiative, <http://www.westernclimateinitiative.org> (last visited June 11, 2009).

10. WCI UPDATE, *supra* note 4, at 2.

11. WCI Agreement, *supra* note 8, at 1–2.

12. W. CLIMATE INITIATIVE, WESTERN CLIMATE INITIATIVE STATEMENT OF REGIONAL GOAL: AUGUST 22, 2007, at 1 (2007), available at <http://www.sustain-nw.com/documents/WesternClimateInitiativeGoals082207.pdf> [hereinafter WCI REGIONAL GOAL].

13. WCI Agreement, *supra* note 8, at 2.

14. *Id.*

and cooperate in achieving their independent policy goals of reducing GHG emissions. The agreement creates no legal obligations binding the members.

The voluntariness of the WCI is bolstered by evidence regarding the members' emissions reduction policies adopted outside of the WCI framework, which shows that they are independently committed to reducing GHG emissions.¹⁵ California's Global Warming Solutions Act of 2006, for instance, committed the state to reducing its emissions to 1990 levels by 2020.¹⁶ Most of the other WCI members had either designed GHG reduction laws or stated clear reduction targets prior to joining the partnership.¹⁷ Additionally, subsequent to signing on to the WCI, a number of them enacted GHG reduction programs that went beyond the WCI's goals.¹⁸ For example, British Columbia enacted "the continent's first true carbon tax" that went beyond the scope of the WCI to cover retail and transportation emissions, which were to be unaffected by the WCI.¹⁹ In short, we can infer the voluntariness of the WCI on account of the fact that many WCI members have pursued GHG reduction policies independently of their involvement of the WCI.

There is additional evidence of the WCI's voluntariness—the legislatures of a number of members have enacted minimal GHG regulations and have pushed back against implementing more stringent ones. Most notably, members of the Utah senate went so far as to introduce a bill that would explicitly *prohibit* the state's governor from cooperating with the WCI or other regional arrangements.²⁰ Though the bill was (unsurprisingly) vetoed by the governor, the episode showed that each member's participation in the WCI is decided entirely through internal political processes—not through external legal mechanisms.²¹ In other words, the WCI is entirely voluntary and exists only at the pleasure of its members.

15. For a more thorough listing of pre-WCI state and provincial policies, see Lawrence, *supra* note 7, at 10,798 & nn.17–23.

16. CAL. HEALTH & SAFETY CODE § 38,550 (West 2009).

17. See Lawrence, *supra* note 7, at 10,798 & nn.19–20.

18. See *id.* at 10,798 & nn.21–23.

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

20. S.B. 144, 2008 Gen. Sess. (Utah 2008) (vetoed), available at <http://le.utah.gov/~2008/htmdoc/sbillhtm/SB0144S02.htm>.

21. See *id.* See also Editorial, *Restricting Governor: Bill to Limit Multistate Pacts Would Be Harmful*, SALT LAKE TRIB., Feb. 11, 2008 (suggesting that the senate bill was directed at Utah's participation in the WCI).

The voluntariness of the WCI helps strengthen the members' case that they are addressing an important local problem. This argument is important in order for the members to be able to justify the GHG regulations as a response to local threats. Though global warming is indeed a transnational phenomenon, the members have a legitimate argument that global warming presents particular threats to them due to their unique geographic or economic situations.²² As circumstantial evidence of this serious local interest, it is important to note that the states and provinces are engaging in self-imposed, costly regulations. If they are able and willing to implement such a plan, clearly they have strong interests at stake.²³

By joining the WCI, the member states and provinces have expressed (or reaffirmed) their independent policy goals of reducing GHG emissions. Both the language and the context of the WCI agreement suggest that it is a voluntary, nonbinding collaboration.

B. THE BENEFITS OF CAP-AND-TRADE

Given that WCI members are perfectly capable of enacting independent GHG regulations (and indeed many have done so), it is important to examine the benefits of cooperative action. Because the WCI is entirely voluntary, its existence and future success depend entirely on its ability to provide "co-benefits" to the members.²⁴ Ultimately, the WCI's cap-and-trade approach should allow the members to attain their independent environmental goals in a more economically efficient manner than if they acted independently.

The WCI's goal is to reduce GHG emissions from 2005 levels by 15 percent by 2020. To put this in perspective, note that from 1990 to 2002 Canada's overall GHG emissions increased by 20 percent²⁵ and the United States' overall GHG emissions increased by 13.8 percent.²⁶ Needless to say, it will require a drastic shift to change from an increase of greater than 20 percent to a reduction of 15 percent.

The WCI's chosen mechanism for achieving this goal is a cap-and-

22. See, e.g., WCI Agreement, *supra* note 8, at 1 (noting various environmental harms of climate change that will uniquely affect western states and provinces).

23. For additional discussion of local interests at stake in the climate change context, see *Massachusetts v. EPA*, 549 U.S. 497, 499, 517–23 (2007).

24. WCI Agreement, *supra* note 8, at 2.

25. GOV'T OF CAN., CANADA'S FOURTH NATIONAL REPORT ON CLIMATE CHANGE 12 (2006).

26. EPA, INVENTORY OF GREENHOUSE GAS EMISSIONS AND SINKS, 1990–2007, at 41 (2009).

trade emissions regulation system.²⁷ Generally, environmental regulation takes one of two basic forms: direct government regulation or market-based regulation.²⁸ Each approach has benefits and drawbacks, but ultimately the market-based options are preferred by both policymakers and academics.²⁹ Most emissions reduction proposals in the United States have included cap-and-trade mechanisms.³⁰ In contrast, methods involving direct government regulation, commonly known as “command-and-control” regulation, are disfavored among both policymakers³¹ and academics.³² In general, command-and-control approaches are most effective when addressing narrow, specific targets,³³ and even then they are generally viewed as being expensive and difficult to administer.³⁴ Given the vast scope of industries to be regulated with respect to climate change, command-and-control methods do not appear to be a viable stand-alone option and are instead viewed as a supplement to a market-based regime rather than as a true alternative method of regulation.³⁵

Market-based mechanisms are far preferable. Though there are strong theoretical arguments in favor of using GHG taxes to reduce emissions, political constraints prevent governments from imposing taxes of any kind.³⁶ Cap-and-trade programs like the one contemplated by the WCI are

27. Western Climate Initiative, The WCI Cap & Trade Program, <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program> (last visited June 11, 2009).

28. See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 704–13 (1999).

29. See *id.* at 714 (“After several decades of theoretical argument and practical experience at the national level, there is now virtual consensus that incentive instruments—taxes and tradeable allowances—are presumptively superior to conduct-based technology standards and fixed performance standards.”).

30. See Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal Is “Best”?*, 102 NW. U. L. REV. COLLOQUY 123, 135 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/32/> (noting that as of October 2007 all pending congressional climate change bills used a market-based approach, with the vast majority proposing cap-and-trade plans and the rest proposing taxes).

31. See *id.* at 123, 135, 137.

32. See Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333–39 (1985); Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 341, 343, 352 (1990).

33. See, e.g., Sandra B. Zellmer, *The Virtues of “Command and Control” Regulation: Barring Exotic Species from Aquatic Ecosystems*, 2000 U. ILL. L. REV. 1233, 1249–62 (comparing regulation with economic incentives in dealing with water pollution).

34. Ackerman & Stewart, *supra* note 32, at 1339–44.

35. William D. Nordhaus, *After Kyoto: Alternative Mechanisms to Control Global Warming*, AM. ECON. REV., May 2006, at 31, 31 (“[O]nly the tradable-quantity and the price-like regimes have any hope of being reasonably efficient.”); Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97, 149–50 (2005).

36. See Roberta F. Mann, *The Case for the Carbon Tax: How to Overcome Politics and Find*

relatively simple to understand. Regulators set a firm limit on the permissible level of industry- or area-wide emissions (“cap”),³⁷ industry participants receive permits to emit a certain level of emissions (beyond which they will be subject to stringent penalties),³⁸ and permit holders trade the permits with others (“trade”).³⁹

There are three basic benefits in this system. First, it allows the regulator to set a firm ceiling on emissions, thus ensuring that environmental goals are met.⁴⁰ Second, it allows the costs of reducing emissions to be borne by the party best situated to do so. Companies facing high costs to reduce emissions will prefer to buy permits on the market to the extent that the permits are less costly than internal emissions reduction efforts.⁴¹ Third, it incentivizes firms both to reduce their easy-to-reduce emissions (colloquially known as “low-hanging fruit”) and to develop innovative emissions reduction technologies and processes. The system allows otherwise costly low-emissions technologies (such as wind power or solar power) to become price competitive with traditional technologies.⁴²

These benefits help explain why WCI members would choose to adopt cap-and-trade as the mechanism for reducing GHG emissions. A further examination also shows the benefits of the WCI’s regional and collaborative approach. This is particularly interesting because WCI members are not actually legally bound to comply with the partnership’s approach. We can assume that each member possesses an independent preference to reduce GHG emissions (an assumption that is bolstered both by the members’ participation in the WCI, as well as by their non-WCI GHG efforts), so there must be some reason for them to select a regional approach to achieving their goals.⁴³ Thus, they choose to participate because the regional cap-and-trade system allows them to achieve their goals in a more efficient manner.

Our Green Destiny, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,118 (2009).

37. Dallas Burtraw et al., *Lessons for a Cap-and-Trade Program*, in *MANAGING GREENHOUSE GAS EMISSIONS IN CALIFORNIA* 6 (2006).

38. *Id.* at 6.

39. *Id.* at 6–7; Nordhaus & Danish, *supra* note 35, at 120–21.

40. Nordhaus & Danish, *supra* note 35, at 111–12.

41. *Id.* at 145, 160.

42. *Id.* See generally Thomas A. Weber & Karsten Neuhoff, *Carbon Markets and Technological Innovation* (June 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333244 (examining the effects of innovation on optimal cap-and-trade schemes and noting that an increase in the effectiveness of innovation leads to relaxed price controls).

43. It is beyond the scope of this Note to examine each member’s particular reasons for wanting to reduce GHG emissions. It is sufficient for this analysis simply to note that they possess a general policy preference for reducing GHG emissions.

The collaborative cap-and-trade approach is superior to independent local efforts for two reasons: it creates a more efficient and robust market for emissions permits, and it prevents the “race to the bottom” problem.

As with any market, the emissions-trading market improves as the number of participants increases. The market becomes more liquid when there are more buyers looking to buy permits and more sellers looking to sell permits. Liquid markets make it more likely and less costly for sellers to find buyers and vice versa.⁴⁴ This also means that prices are more stable and can more accurately incorporate information about the future. As a result, both buyers and sellers are better able to incorporate into their business plans the effects of emissions permit trading. This helps them achieve the most cost-efficient emissions reductions possible.⁴⁵ As a further benefit, the regional approach reduces the costs of regulatory compliance for market participants who operate in multiple jurisdictions. Rather than complying with a dozen different sets of emissions regulations and cap-and-trade markets, participants are able to streamline their compliance costs by focusing solely on WCI-promulgated requirements.⁴⁶

The second benefit is that WCI members preempt other members’ attempts to “race to the bottom.” When enacting and implementing environmental regulations, jurisdictions may be forced to compete with each other to attract industry and commerce.⁴⁷ Since environmental regulation burdens the local economy, local governments would generally prefer (all else being equal) that other jurisdictions impose more stringent environmental regulations.⁴⁸ This is particularly important in the climate change context, where the benefits of GHG reduction are felt globally but the costs are imposed locally.⁴⁹ To address these problems, regional collaboration helps to prevent industries from fleeing to neighboring

44. See Burtraw et al., *supra* note 37, at 7. See also Jeffrey M. Hirsch, *Emissions Allowance Trading Under the Clean Air Act: A Model for Future Environmental Regulations?*, 7 N.Y.U. ENVTL. L.J. 352, 368 n.105 (1999) (“A market that is too small could make the transition costs too high for significant trading to occur.”).

45. Christopher Hooper, *Limiting the Use of Emissions Allowances*, 5 N.Y.U. ENVTL. L.J. 566, 577, 599 (1996); Nordhaus & Danish, *supra* note 35, at 116–17, 142–44.

46. See Burtraw et al., *supra* note 37, at 16–17.

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

48. Revesz, *supra* note 47, at 1215.

49. David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 838 (2008); Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 689 (2008).

jurisdictions to avoid costs of environmental compliance—in essence, there is nowhere to flee to, especially because the WCI includes most of the jurisdictions connected to the western electricity grid.⁵⁰ By coordinating their efforts, WCI members are better able to avoid the harms of jurisdictional competition and the ratcheting-down of environmental standards.

The WCI is therefore a classic example of coordination. The standard formulation of a coordination problem is that the parties “have a common interest in achieving a common objective”⁵¹ and they “receive higher payoffs if they engage in identical or symmetrical actions than if they do not.”⁵² Here, the common objective is the reduction of GHG emissions, and the higher payoffs are made possible through the regional cap-and-trade program. It is obvious, then, that the parties should coordinate their policies in order to achieve their desired goal of GHG reductions. Though the standard coordination problem “is neither complex nor particularly demanding,” its simplicity is both elegant and compelling.⁵³

In a more nuanced fashion, we might go a step further and characterize the WCI as a “harmonization network”: an agreement that fosters the convergence of state and provincial GHG policies toward a single standard.⁵⁴ This framework is inherently flexible, as it incorporates each party’s preferences through both negotiations and legislative implementation; thus, it is better able “to adapt to inevitable changes in the economic, technological, social, and political setting.”⁵⁵ Because each member’s policy preferences are represented in the agreement, they are more likely to comply.⁵⁶

There still may be concerns that the members will avoid complying, however, because the members may have an interest in free-riding on the environmental gains achieved at the others’ expense. A free-riding

50. See Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 70–71 (2005). Cf. Adelman & Engel, *supra* note 49, at 843–45 (discussing leakage).

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

52. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 12 (2005).

53. John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561, 582 (1992).

54. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 59–61, 169 (2004). Slaughter discusses harmonization networks among government regulators rather than political subunits; however, this is a minor point, as the basic idea applies to both. *See id.*

55. CHAYES & CHAYES, *supra* note 51, at 7.

56. *Id.*

jurisdiction is able to achieve its basic policy goal—environmental improvement—without incurring the costs associated with regulating emissions in its jurisdiction. There are two basic avenues of noncompliance: either outright nonparticipation in the trading scheme or subtler forms of cheating, such as manipulation of permit allocations and weakened monitoring and enforcement of local polluters.⁵⁷

These two problems can be addressed rather easily: the advantages of violation will not outweigh its costs.⁵⁸ The coordination game essentially solves the first problem (nonparticipation). If the parties are dedicated to reducing emissions and the agreement adequately represents their interests, then they are better off participating than not participating. Transparency solves the second problem (subtle cheating). If the parties are able to monitor each other's efforts, they will be aware of each other's ongoing compliance and will be reassured that the collective effort remains strong. And they will be deterred from cheating because they will know that the others will detect it, which in turn will lead the other parties to lose confidence and the collective effort to collapse, thus eliminating the original benefits of coordination.⁵⁹ Or, in simpler terms, in a nonbinding voluntary agreement such as the WCI, "the principal inducement to compliance is the desire to have the agreement continue."⁶⁰ Otherwise, the benefits of the agreement will be lost.

Ultimately, then, the key to the WCI's success is that the parties seriously desire to reduce GHG emissions within their jurisdictions. If that is indeed the case, then compliance problems will not even arise in the first place. Compared to a regime in which the members implemented independent, unrelated regulations, the WCI is more effective at reducing emissions and more efficient at limiting compliance costs.⁶¹ The members thus have no incentive to deviate from their cooperative efforts.

In summary, at its core the WCI is a form of traditional state- and province-based environmental regulation—many of the states and provinces enacted emissions reduction policies prior to their participation in the WCI. Their cooperation is a rational result of their independent

57. Brett Frischmann, *Using the Multi-Layered Nature of International Emissions Trading and of International-Domestic Legal Systems to Escape a Multi-State Compliance Dilemma*, 13 *GEO. INT'L ENVTL. L. REV.* 463, 475–80 (2001).

58. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 69 (2d ed. 1979) ("Usually a nation deliberately violates a norm or agreement because it expects that the advantages of violation will outweigh its costs.").

59. CHAYES & CHAYES, *supra* note 51, at 142–44, 151–52.

60. See HENKIN, *supra* note 58, at 58.

61. See *supra* notes 43–46 and accompanying text.

policy preferences of reducing GHG emissions. The WCI allows its members to regulate GHG emissions more effectively through harmonization with and reciprocity from others. Accordingly, the members face little incentive to deviate from their voluntary commitments to the WCI.

C. THE WCI'S CAP-AND-TRADE PLAN

So what will the WCI ultimately look like? There are limitless possible variations on the basic cap-and-trade program,⁶² and cap-and-trade market designers face a number of potential pitfalls, such as deciding which industries to regulate, how to allocate emissions permits, and how to enforce the regulations.⁶³ It is even harder when nine independent governments, each representing different types of producers and consumers, must agree on the details collectively and enact the plan into law independently. However, this Note adopts the basic assumption that each of the WCI members has a relatively strong policy preference in favor of controlling GHG emissions within its jurisdiction. From this starting point, it is possible to understand the options available to the WCI as it proceeds toward a multijurisdiction cap-and-trade program. These options include the legal form of the regulations, their scope, the allocation of emissions permits, and the enforcement of the regulatory policies against emitters.

1. Preliminary Considerations

Cooperation between political subunits takes a variety of forms. Compacts, discussed in Part IV.A.2.b.ii, are legally binding arrangements, often with a centralized administrative body that exercises regulatory authority over the member jurisdictions. However, given the need for congressional consent in the United States, this approach is less preferable.⁶⁴ Instead, the WCI is using reciprocal legislation to accomplish its goals.⁶⁵ In such an approach, the member jurisdictions implement local

62. See, e.g., Flatt, *supra* note 30, at 135 (listing six different cap-and-trade proposals pending in Congress as of October 2007).

63. The failure to address these problems can be fatal to any trading scheme, as was discovered in the early years of the RECLAIM smog control efforts in the Los Angeles area. See Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231, 251–58 (1999).

64. See *infra* Parts IV.A.2.b.ii, V.B.2.b.

65. W. CLIMATE INITIATIVE, DESIGN RECOMMENDATIONS 6 (2009) [hereinafter WCI DESIGN RECOMMENDATIONS].

emissions caps and distribute allowances within their jurisdiction.⁶⁶ While doing so, they harmonize their policies on caps and distribution and reciprocally allow for legal recognition of each other's allowances.⁶⁷ Technically, each individual member conducts its own separate cap-and-trade program; but by giving legal effect to each other's allowances, the members' separate programs link into a single regional cap on emissions and a market for trading allowances.⁶⁸

2. Scope

It is impossible for a trading program to cover every source of GHG emissions. While it is relatively easy to regulate emissions from concentrated industries like electric power generators, it would be much harder to regulate isolated, sporadic emitters such as residential wood-burning stoves and fireplaces. Policymakers must agree on three basic issues related to the scope of the program: emissions type, emissions source, and point of regulation.⁶⁹

The first step is to determine which specific emissions will be regulated. Consistent with international efforts such as the Kyoto Protocol, the WCI plans to regulate six major greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.⁷⁰

The next step is to determine which sources of these emissions will be regulated. The WCI plans to begin with electric power and large industrial emitters and will expand in the future to include fuels used in the

66. See Hannah Chang, *Foreign Affairs Federalism: The Legality of California's Link with the European Union Emissions Trading Scheme*, 37 ENVTL. L. REP. NEWS & ANALYSIS 10,771, 10,772-73 (2007) (citing Michael A. Mehling, *Bridging the Transatlantic Divide: Legal Aspects of a Link Between Regional Carbon Markets in Europe and the United States*, SUSTAINABLE DEV. L. & POL'Y, Winter 2007, at 46).

67. Garland C. Routt, *Interstate Compacts and Administrative Co-Operation*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1940, at 93, 95 (noting that forms of reciprocal cooperation include "(1) adoption of uniform rules and regulations for the interpretation of identical or similar legislation; [and] (2) adoption of uniform or contingent rules, regulations, and procedures to govern interstate dealings").

68. Mehling, *supra* note 66, at 46 ("[S]eparate trading schemes can be considered linked if allowances can flow between the respective schemes.").

69. See W. CLIMATE INITIATIVE, DRAFT PROGRAM SCOPE RECOMMENDATIONS 2 (2008), available at http://www.midwesternaccord.org/Meeting%20material%20pages/Scope%20and%20Electricity%20Meeting%201/Draft_WCI_Scope_Recommendation.pdf [hereinafter WCI PROGRAM SCOPE].

70. WCI REGIONAL GOAL, *supra* note 12, at 2. See also Kyoto Protocol to the United Nations Framework Convention on Climate Change, Annex A, Dec. 10, 1997, 37 I.L.M. 22.

transportation, residential, and commercial sectors.⁷¹

The final step is to determine the point of regulation—that is, which part of the supply chain will be regulated. There are three basic options: at the source of emission, such as an electricity generator; at the source of the fuel, such as a coal mine or oil refinery; or somewhere in between, such as a gas pipeline.⁷²

In the industrial sector, the WCI plans to regulate the sources of emissions directly.⁷³ In the electricity sector, the WCI plans to regulate the “first jurisdictional deliverer,” or in other words, “the first entity that the WCI partner has jurisdiction over that delivers power onto the WCI grid.”⁷⁴ Effectively, under this system WCI members will regulate both the in-state electricity generators and the out-of-state electricity importers.⁷⁵ This approach acknowledges two basic practical problems: first, WCI members can only regulate producers and transporters within their jurisdiction, and second, some of the electricity consumed in the WCI comes from generators located outside the WCI.⁷⁶ The hybrid approach covers virtually all of the electric power consumed within the WCI’s jurisdiction while avoiding the complexity of regulating every individual consumer.⁷⁷

3. Allocation

Having decided which industries to regulate, participants must agree on how they will distribute emissions allowances. This is the most

71. WCI PROGRAM SCOPE, *supra* note 69, at 17–18. These industrial sources are mainly manufacturing processes that release GHGs. *Id.* at 21–22. A common example is cement manufacturing, which is widely recognized as a significant source of emissions. *See, e.g.*, Tony Azios, *Industry Scrambles to Find a “Greener” Concrete*, CHRISTIAN SCI. MONITOR, Mar. 12, 2008, at 14 (“Roughly 5 to 10 percent of global CO₂ emissions are related to the manufacture and transportation of cement . . .”).

72. WCI PROGRAM SCOPE, *supra* note 69, at 2.

73. *Id.* at 21–22.

74. W. CLIMATE INITIATIVE, DRAFT ELECTRICITY POINT OF REGULATION RECOMMENDATIONS FOR PUBLIC REVIEW AND COMMENT 3 (2008), *available at* http://www.midwesternaccord.org/Meeting%20material%20pages/Scope%20and%20Electricity%20Meeting%201/WCI_Electricity_Scope_recommendation.pdf [hereinafter WCI ELECTRICITY REGULATION].

75. *Id.*

76. The WCI would prefer a simpler system that regulates only the generators. *Id.* at 2. But that would require the participation of the other governments in the western electricity grid, namely Alberta, Canada; the northern part of Baja California, Mexico; Colorado, Idaho, Nevada, and Wyoming; parts of Montana, South Dakota, and Texas; and various Native American tribes under federal jurisdiction located within that region. *See* North American Electric Reliability Corporation, Regional Entities, <http://www.nerc.com/page.php?cid=19|119> (last visited June 29, 2009).

77. WCI ELECTRICITY REGULATION, *supra* note 74, at 3–4.

politically fraught of all design decisions.⁷⁸ For each regulatory period (usually one year), permits must be allocated through either an auction or a predetermined formula based on historical or projected emissions.⁷⁹ If permits are to be distributed, the allocation formula must attempt to reward existing emissions gains (for example, by electricity producers that voluntarily reduced their emissions prior to the creation of the cap-and-trade program) without unduly punishing other entities.⁸⁰ The formula can be based on historical or projected data about emissions, revenues, output, or any other relevant figure.⁸¹ Adding to the complications, in each successive year the total number of allowances must decrease in order to reduce overall emissions.

The WCI has chosen to allow each jurisdiction to distribute allowances individually, with each jurisdiction receiving permits based on its historical share of emissions from 2001 to 2005.⁸² It has specifically provided for the possibility of future coordination of auctions.⁸³ Given the political controversy surrounding decisions of whether to auction or freely distribute emissions permits,⁸⁴ it is probably best that the WCI has chosen to let local political processes handle this problem. Nevertheless, the European Union's troubled experience with similar decentralized allocation methods should serve as a warning to the WCI that the members must carefully watch each other to ensure that none caves in to political pressure and overallocates permits to promote its own citizens' interests at the expense of market stability and environmental progress.⁸⁵

4. Enforcement

Participants must also agree on a uniform system of carbon accounting so that "a ton of carbon is always a ton of carbon."⁸⁶ Emissions must be

78. On allocations generally, see Burtraw et al., *supra* note 37, at 13–15.

79. Nordhaus & Danish, *supra* note 35, at 134–35.

80. Gary C. Bryner, *Carbon Markets: Reducing Greenhouse Gas Emissions Through Emissions Trading*, 17 TUL. ENVTL. L.J. 267, 290–91 (2004).

81. *Id.* at 292–94.

82. WCI DESIGN RECOMMENDATIONS, *supra* note 65, at 30–31.

83. *Id.* at 31–34.

84. See, e.g., David Wessel, *Pollution Politics and the Climate-Bill Giveaway*, WALL ST. J., May 23, 2009, at A2.

85. See Joëlle de Sépibus, *Scarcity and Allocation of Allowances in the EU Emissions Trading Scheme—A Legal Analysis* (NCCR Trade Regulation, Working Paper No. 2007/32, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088726.

86. See Peter L. Gray & Geraldine E. Edens, *Carbon Accounting: A Practical Guide for Lawyers*, 22 NAT. RESOURCES & ENV'T 41, 42 (2008). The accounting process is sometimes complicated by the use of "offsets"—credits for third-party efforts to reduce emissions. In theory, such an approach allows regulated entities to reduce costs by capturing the low-hanging fruit, especially in

monitored, either continuously through direct monitoring of the source or periodically through estimation based on fuel usage or some other objective factor.⁸⁷ Monitoring may be done by the government, the sources themselves, or a designated third party.⁸⁸ The WCI plans on using a third-party monitoring system.⁸⁹ This accounting and monitoring system must then be implemented through an accurate and up-to-date database that records each source's emissions and permits.⁹⁰ The WCI plans on making pertinent data publicly available to increase transparency and ensure effective compliance.⁹¹

Finally, and most importantly, there must be penalties for noncompliant polluters. All carbon-trading regimes must create sanctions that are costly enough to insure that the overall emissions cap is not exceeded, but not so costly as to put emitters out of business for isolated incidents of failure.⁹² The WCI has yet to decide on this issue and instead is allowing each individual jurisdiction to design its own system of sanctioning unpermitted emissions.

5. Summary of the WCI's Design

To summarize, WCI members will likely implement the agreement through reciprocal legislation that includes uniform regulations and mutual recognition of other members' emissions permits. The WCI initially plans to regulate GHG emissions from the electricity sector and large industrial sources. The electricity regulations may include a "first jurisdictional deliverer" approach that regulates both generators and transmitters in order to prevent increased consumption of unregulated non-WCI electricity. Finally, allocation and enforcement policies have not yet been proposed, but once agreed upon, will need to be implemented uniformly across the member jurisdictions.

D. A SUMMARY OF CAP-AND-TRADE

Cap-and-trade allows regulators to set a firm limit on emissions levels

developing countries where emissions reductions are relatively inexpensive.

87. Bryner, *supra* note 80, at 290.

88. *Id.* at 295.

89. WCI DESIGN RECOMMENDATIONS, *supra* note 65, at 44.

90. Bryner, *supra* note 80, at 290.

91. WCI DESIGN RECOMMENDATIONS, *supra* note 65, at 46–47.

92. See ERIC DANNENMAIER & ISAAC COHEN, PROMOTING MEANINGFUL COMPLIANCE WITH CLIMATE CHANGE COMMITMENTS 14 (2000), available at <http://www.pewclimate.org/docUploads/compliance.pdf>.

while providing clear economic incentives for emitters to reduce their emissions. The regional collaboration improves market liquidity and price certainty and helps assure participants that neighboring jurisdictions will not seek to attract industry by weakening their own regulations. To achieve these benefits, WCI members have agreed on a number of detailed guidelines for how best to structure the regional regulatory market.

III. FEDERAL SUBUNITS IN INTERNATIONAL LAW

This part discusses the international law status of agreements between government subunits such as states and provinces. International law defers to domestic law to determine whether such agreements are capable of having status as international law. Because the WCI is nonbinding, international law does not prohibit the agreement. It is also important to survey this issue because the United States incorporates international standards into its domestic Constitution.

The Vienna Convention on the Law of Treaties (“Convention”) establishes the central legal standards governing international agreements, and both the United States and Canada have agreed to be bound by its terms.⁹³

The Convention characterizes treaties according to their substance rather than their form. The basic condition for creating a treaty is that the parties show an “intention to create obligations under international law.”⁹⁴ This requirement of intent to be bound under international law reflects the Convention’s adherence to the principle *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹⁵ Intent is determined by looking at the agreement’s “validity, operation and effect, execution and enforcement, interpretation, and

93. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has accepted the principles of the Convention as binding customary international law. See Letter of Submittal from the Sec’y of State to the President, 65 DEP’T ST. BULL. 684, 685 (1971) (“Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.”). Canada is a party to the Convention. Canada Treaty Information, <http://www.treaty-accord.gc.ca/details.asp?id=104068> (last visited Sept. 1, 2009).

94. International Law Commission, Draft Articles on the Law of Treaties with Commentaries, in UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, FIRST AND SECOND SESSIONS, VIENNA, 26 MARCH–24 MAY 1968 AND 9 APRIL–22 MAY 1969, OFFICIAL RECORDS: DOCUMENTS OF THE CONFERENCE 9 (1971) (internal quotation marks omitted) [hereinafter Draft Articles]. The drafters decided not to include in the language of the Convention a specific requirement of intent because “the element of intention is embraced in the phrase ‘governed by international law.’” *Id.* See also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 17 (2000).

95. Vienna Convention, *supra* note 93, art. 26.

termination.”⁹⁶ To insure that parties are bound ex post, breaches of treaties have “legal consequences,”⁹⁷ such as adverse court judgments and political, economic, or military enforcement.⁹⁸

Nontreaty agreements are distinguishable because they do not contain an intent to be bound under international law.⁹⁹ Instead, they are private expressions of parties’ intentions to engage in a particular course of conduct, to which *pacta sunt servanda* does not apply.¹⁰⁰

With respect to nontreaty agreements such as the WCI, the Convention does not directly address the legality of cross-border agreements entered into by subnational government bodies. Instead, the Convention is specifically limited to agreements concluded “between States” (in the international sense, not as used in the United States).¹⁰¹ But the initial drafters recognized that political subdivisions might qualify as “States” capable of concluding international agreements “if such capacity is admitted by the federal constitution.”¹⁰² The drafters sought to acknowledge the reality that “frequently, the treaty-making capacity is vested exclusively in the federal government,” while admitting that “there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States.”¹⁰³

During negotiations over the Convention, a number of federal states expressed concern that this provision might cause future difficulties.¹⁰⁴ Some worried that the language was too narrow,¹⁰⁵ others that it was too vague.¹⁰⁶ At first, after slight modification,¹⁰⁷ the provision was adopted by

96. See Draft Articles, *supra* note 94, at 8.

97. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 301 cmt. e (1986).

98. Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 33–34. In reality, though, such enforcement measures are rarely necessary. In Louis Henkin’s famous phrase, “[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” See HENKIN, *supra* note 58, at 47.

99. AUST, *supra* note 94, at 17–18.

100. See *id.* at 18.

101. Vienna Convention, *supra* note 93, art. 2(a).

102. Draft Articles, *supra* note 94, art. 5(2), at 11.

103. *Id.* art. 3 cmt. 3, at 8.

104. UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, FIRST SESSION, VIENNA, 26 MARCH–24 MAY 1968, OFFICIAL RECORDS 59–60 (1969) [hereinafter FIRST SESSION].

105. See, e.g., *id.* at 60 (expressing Finland’s concern that the language was limited only to federal forms of “composite State[s]” and only to states using a single constitutional document as the “constituent instruments”).

106. See, e.g., *id.* (expressing New Zealand’s concern that the current phrasing, “States members of a federal union,” should be replaced with “Political sub-divisions,” “Constituent members,” or “Constituent elements”).

a vote of 49-39, with the United States and Canada voting against it.¹⁰⁸ But at the Second Session, after the delegates had “a long pause for reflection” for nearly a year,¹⁰⁹ renewed hostility¹¹⁰ to the section resulted in its rejection by a vote of 66-28.¹¹¹

Thus, neither the Convention nor its ratification debates clearly establish whether federal subunits can or cannot enter into treaties.¹¹² International law neither expressly allows nor prohibits such agreements. The debates over the wording of the Convention suggest that such agreements are different from agreements between nation-states in that they are not necessarily “governed by international law” or subject to punishment for noncompliance. Yet the Convention does recognize a potential role in international law for federal subunits since the debates leave open the question of whether a nation may delegate its treaty-making power or ratify its subunits’ agreements.¹¹³ Accordingly, we must examine the constitutions of the United States and Canada to determine whether the states and provinces are permitted to enter the WCI.

IV. FEDERALISM AND FOREIGN RELATIONS IN THE UNITED STATES AND CANADA

This part discusses the relevant history, text, and judicial interpretations of constitutional law in the United States and Canada. This discussion reveals that states face various legal barriers to cross-border collaboration, whereas provinces are less constrained. Despite the various legal difficulties, however, it is possible for states and provinces to collaborate, and this part concludes with a brief discussion of previous cross-border collaboration between states and provinces.

107. *Id.* at 148–49. The Drafting Committee settled on the phrase “Members of a federal union” and specified that the provision applied broadly to all federal unions, regardless of the manner in which the federation was constituted. *Id.*

108. *Id.* at 149.

109. UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, SECOND SESSION, VIENNA, 9 APRIL–22 MAY 1969, OFFICIAL RECORDS 1 (1970) [hereinafter SECOND SESSION]. Substantive discussions at the First Session concluded on May 24, 1968; discussions at the Second Session began on April 28, 1969. See FIRST SESSION, *supra* note 104, at 488–93; SECOND SESSION, *supra*, at 2–19.

110. See SECOND SESSION, *supra* note 109, at 6–15.

111. *Id.* at 15.

112. LUIGI DI MARZO, COMPONENT UNITS OF FEDERAL STATES AND INTERNATIONAL AGREEMENTS 21 (1980).

113. *Id.*

A. FEDERALISM AND FOREIGN RELATIONS IN THE UNITED STATES

In the United States, the federal government is the exclusive actor in foreign relations, and the states are subject to various restraints on their authority over matters affecting international and interstate affairs. Historically, the states were powerless in international relations even before the Constitution. The Constitution further limited states' authority by granting preemptive effect to federal laws, treaties, and even some nontreaty agreements. The Constitution also prevents the states from entering treaties with foreign governments and from entering certain nontreaty compacts without congressional consent. Finally, judicial doctrines inferred from the Constitution prevent the states from interfering with interstate commerce or international affairs. In short, the Constitution designates the federal government as the sole actor in most national and international matters.

1. The States and Foreign Relations Prior to the Constitution

The conventional view of history is that the colonies acted "as a unit" in declaring independence from Great Britain, and accordingly "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."¹¹⁴ Despite the protests of some courts and scholars,¹¹⁵ this conventional view is historically accurate.

When declaring independence from Great Britain, the representatives at the Second Continental Congress did not imagine that the thirteen newly independent states would be fully independent sovereign nations.¹¹⁶ Instead, they recognized that this newfound independence created a need for a coordinated system of government and a uniform approach to foreign

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

115. *See infra* note 125 and accompanying text. *See also* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224–25 (1796) (Chase, J.) ("From the 4th of July, 1776, the American States were de facto, as well as de jure, in the possession and actual exercise of all the rights of independent governments. . . . [A]ll laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments."). Justice Chase himself draws the key distinction between his and Justice Sutherland's views of the international legal position of the states after independence: "I entertain this general idea, that the several States retained all internal sovereignty; and that Congress properly possessed the great rights of external sovereignty." *Id.* at 232. *See also infra* text accompanying notes 144–47 (discussing *Ware* in greater depth).

116. *Cf.* THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("[T]hese United Colonies are, and of Right ought to be, Free and Independent States." (emphasis added)). Justice Sutherland properly noted that the colonies "act[ed] through a common agency" and evidenced no intent to create thirteen new nations. *Curtiss-Wright*, 299 U.S. at 316.

policy. In his groundbreaking June 7, 1776, proposal to Congress, Richard Henry Lee called on the colonies to declare their independence from Great Britain; at the same time, he sought for Congress to prepare both a plan of confederation and “effectual measures for forming foreign Alliances.”¹¹⁷ Thus, from the beginning of the United States, national government and uniform foreign relations were considered essential to achieving independence.¹¹⁸

John Adams’s first draft of the Plan of Treaties called for peace and friendship between the “united States of America” and its treaty partner.¹¹⁹ The final version of the Plan clearly reveals Congress’s vision of the United States as a uniform entity in diplomacy. This generic version of the Plan speaks of peace and friendship “between A. and B. and the Subjects of A. and of B.”¹²⁰ Here, “A” (the United States) is quite clearly on the same diplomatic plane as “B” (the United States’ treaty partner), and the United States’ component states are treated as nonexistent.¹²¹

The Articles of Confederation contained an even more explicit statement of Congress’s plan for uniformity in foreign affairs. Congress possessed “the sole and exclusive right and power of determining on peace and war . . . ; of sending and receiving ambassadors; [and of] entering into treaties and alliances.”¹²² Accordingly, states had to receive Congress’s permission to be able to send or receive an ambassador or enter into a “conference, agreement, alliance or treaty” with a foreign power.¹²³ The states were likewise prohibited from entering into a “treaty, confederation or alliance” with another state without Congress’s permission.¹²⁴

Of course, much has been said about the fact that the states did not always abide by Congress’s exercise of its exclusive foreign affairs power.¹²⁵ But as the U.S. District Court for the Northern District of New

117. V JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 425 & n.2 (Worthington Chauncey Ford ed. 1906).

118. John Adams even argued that the creation of a national government and foreign alliance must *precede* a declaration of independence—the exact opposite of what in fact occurred. *See* Letter from John Adams to John Winthrop (May 12, 1776), in 3 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 662, 662–63 (Paul H. Smith ed., 1978).

119. V JOURNALS, *supra* note 117, at 576.

120. *Id.* at 768.

121. *Id.*

122. IX JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 915 (Worthington Chauncey Ford ed. 1907).

123. *Id.* at 911.

124. *Id.*

125. *See, e.g.*, FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 151–52 (2d ed. 1986); BRADFORD PERKINS, THE CREATION OF A

York noted (while construing the Articles' powers over foreign and Indian affairs), "The fact that some of the states violated the Treaty of Paris and congress was powerless to enforce the treaty, did not legitimize the states' actions."¹²⁶ Legally, if not factually, the Articles were clear: the national government remained supreme in foreign relations.

Thus, the documentary and historical evidence supports the traditional view that the United States' legal "external sovereignty" resided exclusively in the national government in the period between independence and the Constitution.

2. The States and Foreign Relations in the Constitution: Text and Interpretation¹²⁷

The Constitution expands federal power vis-à-vis the states through the Supremacy Clause and the related judicial doctrine of preemption. The states are also limited by the express provisions of the Treaty Clause and the Compact Clause, as well as by the implied doctrines of the Dormant Commerce Clause and foreign affairs preemption.

a. Federal Supremacy in Foreign Affairs

In foreign affairs, the federal government is supreme under the federal Constitution. Federal supremacy is clearly stated in the Article VI Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."¹²⁸ The Supremacy Clause is a particularly powerful statement of federal primacy in foreign relations, as the federal legislature is authorized to regulate foreign commerce,¹²⁹ the federal executive to make treaties,¹³⁰ and the federal judiciary to construe treaties and federal law.¹³¹

Though the concept of federal supremacy is drawn from the Articles of Confederation,¹³² the 1787 Constitution was intended to remedy the

REPUBLICAN EMPIRE, 1776–1865, at 56, 61 (1993).

126. *Oneida Indian Nation v. New York*, 649 F. Supp. 420, 428 n.8 (N.D.N.Y. 1986).

127. Note that the following discussion of U.S. law largely follows the discussion presented in Lawrence, *supra* note 7, at 10,802–07.

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

129. U.S. CONST. art. I, § 8, cl. 3.

130. U.S. CONST. art. II, § 2, cl. 2.

131. U.S. CONST. art. III, § 2, cl. 1.

132. See Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of*

Articles' limitations and ensure federal supremacy and state compliance in foreign affairs.¹³³ There was little debate about this principle during either framing or ratification¹³⁴—for example, in the Federalist Papers, James Madison wrote that “[t]he prohibition against [states entering] treaties, alliances, and confederations, makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution.”¹³⁵

In practice, the Supremacy Clause “invalidates state laws that ‘interfere with, or are contrary to,’ federal law”¹³⁶ under the doctrine of preemption. Courts have identified four types of preemption—“express,” “field,” “conflict,” and “obstacle.” Though these categories are “not ‘rigidly distinct,’” they are still helpful.¹³⁷ Express preemption applies where a federal law explicitly invalidates related state laws.¹³⁸ Field preemption applies where Congress displays a “clear and manifest” intent to preempt state law,¹³⁹ and this intent is determined “from the depth and breadth of a congressional scheme that occupies the legislative field.”¹⁴⁰ Conflict preemption applies where compliance with a state law requires noncompliance with a federal law, or where compliance with a federal law requires noncompliance with a state law.¹⁴¹ Finally, the closely related concept of obstacle preemption¹⁴² applies where a state law prevents the “accomplishment and execution of the full purposes and objectives of Congress.”¹⁴³

Under the guise of the federal government’s foreign affairs power, the

the Articles of Confederation, 60 TENN. L. REV. 783, 784 (1993) (“Some of the most familiar parts of the Constitution . . . were drawn directly from the Articles of Confederation, while many of the additional textual powers granted to the new government were ones that the old government had been exercising in practice.”).

133. See generally MARKS, *supra* note 125.

134. See PERKINS, *supra* note 125, at 58 (“If there was comparatively little discussion at Philadelphia of diplomatic and even military matters, it was because almost everyone agreed that the mechanisms of foreign policy had to be changed.”).

135. See THE FEDERALIST NO. 44 (James Madison).

136. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

137. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

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

139. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

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

141. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

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

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

courts have increased the preemptive scope of congressional and presidential enactments. Treaties, statutes, and even executive agreements are potential sources of preemptive federal law.

Treaties are the most obvious source of foreign affairs preemption. In *Ware v. Hylton*, the Supreme Court invalidated a 1780 Virginia law that conflicted with the 1783 Treaty of Paris between the United States and Great Britain.¹⁴⁴ The state law allowed Virginian citizens who owed money to British creditors to extinguish their debts by paying the state treasury.¹⁴⁵ The peace treaty required U.S. citizens to repay their debts to British creditors.¹⁴⁶ The Court determined that Virginia retained the sovereign authority to establish such a law confiscating British property during the war,¹⁴⁷ but that the peace treaty superseded the state law.¹⁴⁸ Justice Chase relied on the simple logic of the Supremacy Clause: “A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way.”¹⁴⁹ The clear conflict between the federal treaty and the state law required the preemption of the state law.

Foreign relations statutes also have preemptive authority. In *Crosby v. National Foreign Trade Council*, the Court invalidated a Massachusetts law boycotting businesses that cooperated with Burma because a congressional statute had created a slightly different approach to sanctioning Burma.¹⁵⁰ Congress had given the president flexibility to impose sanctions and engage in multilateral diplomacy aimed at improving

144. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

145. *Id.* at 220–21.

146. *Id.* at 238–45.

147. *Id.* at 222–29.

148. *Id.* at 235–36. Interestingly, soon-to-be Chief Justice John Marshall argued on behalf of the defendants that Congress did not, in Justice Chase’s words, have the “power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts.” *Id.* at 235. Compare the position espoused by Marshall the advocate with that of Marshall the Chief Justice. See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (invalidating a state monopoly license that conflicted with a federal grant of licenses); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (invalidating a state law that imposed taxes on a branch of the national bank).

149. *Ware*, 3 U.S. (3 Dall.) at 236. By invalidating the Virginia law as inconsistent with the federal treaty, the Court foreshadowed two of its more famous (and more controversial) holdings of the following decades: *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 353–57 (1816) (exercising appellate jurisdiction over and invalidating a state court decision that was inconsistent with a treaty and a federal statute), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (invalidating a federal law that was inconsistent with the Constitution). See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 39 (1985) (contrasting *Ware* and *Marbury* and noting that the “crucial point” of *Ware* “passed almost unnoticed” at the time).

150. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366–67, 388 (2000).

human rights in Burma.¹⁵¹ The Court determined that the Massachusetts law undermined the purpose and effects of the federal law by creating *potential* conflicts with Congress's scheme: Congress had enacted a limited set of unsanctioned activities, granted the executive flexibility in creating new sanctions, and authorized the executive to exert multilateral diplomatic pressure.¹⁵² It was particularly noteworthy that executive branch officers had attested to the impediments created by the state law and that foreign governments had officially protested against the law.¹⁵³ These facts underscored the law's harmful impact on the nation's foreign affairs, thus strengthening the case for preemption.

State laws may even be preempted by valid executive agreements. Most recently, the Court applied this doctrine to preempt a California statute that required insurance companies to disclose their ties to the Nazi regime in Germany and the Holocaust.¹⁵⁴ In *American Insurance Ass'n v. Garamendi*, the Court held that the president's executive agreement with Germany, which provided a remedy for Holocaust-related claims against foreign governments and businesses, preempted the state's disclosure requirement.¹⁵⁵ The state requirement created a conflict with the executive agreement's policy of encouraging voluntary settlements of Holocaust-related claims.¹⁵⁶ The Court held that "resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs."¹⁵⁷ Some commentators have interpreted this result as a limitless expansion of the Supremacy Clause and preemption doctrine.¹⁵⁸ But the executive's ability to preempt state law must be done "within the President's constitutional authority"—otherwise the executive action would not be part of the laws or treaties of the United States, as required by the Supremacy Clause.¹⁵⁹

Thus, the Supremacy Clause and the federal government's treaty power provide a broad basis for federal primacy in foreign affairs. Though

151. *Id.* at 368–70.

152. *Id.* at 374–86.

153. *Id.* at 383–86.

154. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401, 408–10 (2003).

155. *Id.* at 421, 423.

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

157. *Garamendi*, 539 U.S. at 420.

158. See, e.g., Resnik, *supra* note 6, at 74–77, 84.

159. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 1 n.5 (1986). See also *Medellin v. Texas*, 128 S. Ct. 1346, 1368–71 (2008) (refusing to grant preemptive effect to a presidential memorandum attempting to implement treaty obligations where neither the treaty nor congressional actions had authorized the president to do so).

the nuances of individual cases may require different interpretations of the various doctrines of preemption, the fundamental supremacy of federal laws prevents states from acting in a manner contrary to treaties and federal statutes.

b. Express Limits on the States

The Constitution goes beyond the Supremacy Clause—which alone would appear sufficient to block the states from claiming any foreign affairs powers—and flatly prohibits the states from entering a “Treaty, Alliance, or Confederation.”¹⁶⁰ But a small niche is carved out for the states, which may enter an “Agreement or Compact” with either another state or a foreign power if Congress consents.¹⁶¹ Presumably, the states may only do so in exercise of their inherent police power.¹⁶² Of course, the Constitution does not actually define the distinctions between “treaty,” “alliance,” or “confederation,” (in this discussion, collectively referred to as “treaties”¹⁶³) on the one hand, and “agreement” or “compact,” (collectively, “compacts”¹⁶⁴) on the other. This task has instead been left to the courts, who have offered some guidance—but not much.

i. Treaty Clause

The strongest prohibition, the Treaty Clause, is the least judicially developed. The only major decision to interpret the clause is Chief Justice Taney’s plurality opinion in *Holmes v. Jennison*.¹⁶⁵ The case involved the arrest of a Canadian citizen by Vermont authorities on the basis of a grand jury indictment in the District of Quebec, then part of the British province of Lower Canada.¹⁶⁶ Following the arrest, Vermont’s governor ordered the

160. U.S. CONST. art. I, § 10, cl. 1.

161. U.S. CONST. art. I, § 10, cl. 3. The requirement of congressional consent appears to acknowledge that Congress remains supreme in the national and international arena. Congress remains supreme in that area, and its plenary powers include the power to authorize states to exercise subsidiary powers.

162. See U.S. CONST. amend. X.

163. See, e.g., 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1403 (1858).

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

165. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 561 (1840) (Taney, C.J.). The Court divided 4-4 on the outcome of the case; Taney’s opinion received the support of three Justices, while the other four Justices wrote separate opinions disagreeing with the outcome. The four Justices who disagreed with Taney believed that no agreement or treaty existed. See *infra* note 175 and accompanying text. However, all eight Justices agreed that if an agreement or treaty did exist, it would be invalid. See *id.*

166. *Holmes*, 39 U.S. (14 Pet.) at 561.

local sheriff to deliver Holmes to Canadian authorities.¹⁶⁷ Taney would have ruled that Vermont had improperly attempted to enter into a treaty.¹⁶⁸

Taney attempted to clarify the Constitution's distinction between treaties and agreements. Following a paean to the Framers that would make even the most diehard originalist blush,¹⁶⁹ Taney emphasized that these distinctions were based on "the essence and substance of things, and not . . . mere form."¹⁷⁰ He noted that the Treaty Clause necessarily "recogni[z]ed and enforce[d] . . . the principles of public [international] law."¹⁷¹ Quoting Vattel, an "eminent writer on the laws of nations," Taney explained that treaties aim at securing "public welfare" and apply "for a considerable time."¹⁷² In contrast, agreements differ from treaties in their "duration" and "object."¹⁷³ Taney voted to invalidate the state's efforts because international law only authorized nations to enter into extradition treaties, and accordingly any attempt to extradite a fugitive constituted an international treaty.¹⁷⁴ The four opposing Justices agreed that an extradition treaty or agreement between Vermont and Britain (or the Canadian province) would in fact be prohibited by the Constitution (as there was no congressional approval); however, they disagreed with Taney on the nature of Vermont's action, believing it to be a unilateral action that lacked the mutual assent necessary to create an international agreement or treaty.¹⁷⁵

Though Taney's substantive distinction between treaties and agreements has received support elsewhere,¹⁷⁶ no subsequent holdings have

167. *Id.*

168. *Id.* at 572–73.

169. *Id.* at 571 ("The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning . . .").

170. *Id.*

171. *Id.* at 569.

172. *Id.* at 572. Taney did not elaborate on the meaning of "alliances" or "confederations." *See id.*

173. *Id.* Taney adopted Vattel's approach of using the word "compact" broadly to describe any instrument conveying an agreement between two parties. *See id.*

174. *See id.* at 569 ("[T]he rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law . . ."); *id.* at 572–73.

175. *See, e.g., id.* at 595–96 (Catron, J.). Of the Justices opposed to Taney, Justice Catron provided the fullest explanation for why there was no agreement between Vermont and Britain (or the province). *See id.*

176. *See, e.g.,* 2 STORY, *supra* note 163, § 1403 (arguing that "treaty, alliance, or confederation" might be interpreted to refer to "treaties of a political character," such as political, military, and commercial matters, while "compacts and agreements" might be interpreted to refer to "mere private rights of sovereignty," such as boundary disputes and domestic regulations (internal quotation marks

applied his analysis¹⁷⁷ for a pair of reasons. First, it is inherently difficult for courts and commentators to distinguish between treaties and agreements, and without a large volume of cases,¹⁷⁸ it is possible that no workable doctrine will emerge. Second, Congress may be willing to consent to problematic state agreements so that a supposedly prohibited state treaty might be construed by courts as valid under Congress's foreign relations powers.¹⁷⁹ Later-Justice Felix Frankfurter and James M. Landis offer a nice summary of the practical effects of the Treaty Clause: "There is no self-executing test differentiating 'compact' from 'treaty.' . . . The attempt [to distinguish the terms] is bound to go shipwreck for we are in a field in which political judgment is, to say the least, one of the important factors."¹⁸⁰

ii. Compact Clause

Given the inconclusive nature of the Treaty Clause, it might be more helpful to analyze the substance of the Compact Clause instead. Historically, the Compact Clause analysis has largely been used for domestic compacts; however, compacts involving foreign entities such as provinces should be subject to the same basic analysis.¹⁸¹ In either case, a

omitted)). It is worth noting that Justice Story joined Taney's opinion in *Holmes*.

177. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 464–66 (1978) (discussing *Holmes* and the Compact Clause). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 152 (2d ed. 1996) ("No agreement between a state and a foreign power has been successfully challenged on the ground that it is a treaty which the state is forbidden to make.").

178. See HENKIN, *supra* note 177, at 152.

179. In particular, courts have recently recognized a form of congressional treaty-making power through "Congressional-Executive agreements." See *id.* at 215–18. A prominent example of this type of agreement is the North American Free Trade Agreement ("NAFTA"). For a thorough (though vacated) analysis of NAFTA's constitutionality under the foreign Commerce Clause, see *Made in the USA Foundation v. United States*, 56 F. Supp. 2d 1226, 1317–23 (N.D. Ala. 1999), *vacated as a nonjusticiable political question*, 242 F.3d 1300 (11th Cir. 2001).

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

181. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* §§ 201 n.9, 302 cmt. f (1986) (analogizing state compacts with foreign powers to interstate compacts). See also *Northeastern Interstate Forest Fire Protection Compact*, Pub. L. No. 82-340, 66 Stat. 71 (1952) (granting congressional authorization to a compact and allowing Canadian provinces to join); JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* 111 (2002) (noting that Quebec, New Brunswick, and Nova Scotia had joined the compact). It might be argued, however, that compacts involving foreign governments should be subjected to additional scrutiny, much as state regulations affecting foreign commerce receive greater scrutiny than state regulations affecting domestic interstate commerce. See *infra* Part IV.A.2.c.i (discussing the domestic Dormant Commerce Clause and the foreign Dormant Commerce Clause). But the foreign Dormant Commerce Clause analysis is essentially a form of dormant foreign affairs preemption analysis. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 350–51 (2d ed. 2006). Accordingly, for purposes of this Note, it is sufficient to point out that a "foreign Compact Clause"

compact is essentially a binding agreement between states governed by federal law, just as a treaty is a binding agreement between nations governed by international law.¹⁸²

There are two basic inquiries in a Compact Clause analysis.¹⁸³ The first inquiry is whether the compact or agreement increases the political authority of the member states and encroaches on federal supremacy.¹⁸⁴ If not, the compact is valid because it “does not fall within the scope of the [Compact] Clause.”¹⁸⁵ But if the compact does increase the state’s authority, the next inquiry is whether Congress has authorized the compact, either implicitly or explicitly, and either *ex ante* or *ex post*.¹⁸⁶

To determine whether an Article 1, Section 10 compact exists, courts determine whether the agreement exhibits the “classic indicia of a compact” and increases the political strength of the compacting states.¹⁸⁷ These indicia include evidence of cooperation among lawmakers, the creation of a joint regulatory organization, the reciprocal effectiveness of state legislation (that is, the effectiveness of each state’s legislation is conditioned on other states enacting similar legislation), and the inability of each state “to modify or repeal its law unilaterally.”¹⁸⁸ But ultimately the Compact Clause analysis focuses more on the substance rather than the form of the agreement.¹⁸⁹ The real issue is whether the compact actually or potentially¹⁹⁰ “encroach[es] upon or impair[s] the supremacy of the United

analysis would essentially be the same as the dormant foreign affairs preemption analysis in *Zschernig v. Miller*, 389 U.S. 429 (1968), discussed in Part IV.A.2.c.ii *infra*.

182. See ZIMMERMAN, *supra* note 181, at 51–53; Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 2–3 (1997).

183. See, e.g., *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986). This Note’s analysis leaves out a preliminary step, which is to examine whether or not an agreement even exists. See *id.* If there is no agreement at all, the Compact Clause obviously does not apply. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). It is quite clear, however, that the WCI is indeed an agreement for purposes of the Compact Clause. See, e.g., *supra* Part III.

184. See *infra* notes 187–97 and accompanying text.

185. *Cuyler*, 449 U.S. at 440.

186. See *infra* notes 198–205 and accompanying text.

187. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

188. *Id.* The *Northeast Bancorp* Court discussed an additional case-specific factor (“regional limitation”) regarding regional preferences of the compact at issue. *Id.* at 174–75. See *Seattle Master Builders Ass’n*, 786 F.2d at 1363 (citing *Ne. Bancorp*, 472 U.S. at 175) (omitting “regional limitation” from its discussion of the indicia of compacts).

189. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 470–71 & n.23 (1978). In particular, reciprocal legislation is not necessarily insulated from challenge under the Compact Clause. See *id.* at 471 n.23.

190. See *id.* at 472.

States” in a subject area that is the province of the federal government.¹⁹¹ It should be noted, however, “that no court has ever voided a state agreement” for encroaching on federal supremacy and failing to obtain congressional consent.¹⁹²

The leading Compact Clause case involved the Multistate Tax Commission, a collaborative effort aimed at apportioning and streamlining state taxation of multistate businesses.¹⁹³ The member states authorized the Commission to compile studies and relevant information on state taxation, to propose rules and regulations that would become legally binding only after implementation by the state legislatures, and to perform audits (which included the power to exercise compulsory process) on a state’s behalf if the state requested it to do so.¹⁹⁴ Member states were free to withdraw from the Commission through proper legislation.¹⁹⁵

The Court determined that, though the Commission increased the member states’ bargaining power over in-state corporations, it did not allow the member states to exercise any powers they did not otherwise possess.¹⁹⁶ Because the Commission’s powers arose from the member states’ inherent power to audit and tax in-state businesses, the Court rejected the appellants’ arguments that the Commission encroached on federal supremacy by interfering with interstate commerce, conflicting with foreign relations and impairing the sovereignty of nonmember states.¹⁹⁷

However, even if an Article 1, Section 10 compact encroaches on federal supremacy, the compact is still valid if it receives congressional authorization.¹⁹⁸ The easiest cases involve express authorization before the compact is created or goes into force.¹⁹⁹ Authorization may also be inferred *ex post* from congressional acquiescence²⁰⁰ or explicit retroactive

191. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

192. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 289 (2003) (citing David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 69 (1965)).

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

194. *Id.* at 456–57.

195. *Id.* at 457.

196. *Id.* at 473.

197. *Id.* at 473–78.

198. See U.S. CONST. art. I, § 10, cl. 3.

199. See, e.g., *Petty v. Tenn.-Miss. Bridge Comm’n*, 359 U.S. 275, 277–78 (1959) (citing Pub. L. No. 81-411, 63 Stat. 930, 930 (1949) (“[T]he consent of Congress is hereby given to the compact or agreement set forth below, and to each and every term and provision thereof.”)) (finding express *ex ante* authorization of a two-state bridge commission). See also Crime Compact Act of 1934, ch. 406, 48 Stat. 909.

200. See *Virginia v. Tennessee*, 148 U.S. 503, 525 (1893) (“The compact in this case [has]

ratification.²⁰¹ Overall, while congressional consent is an easy path to validity, it has been described as a “political obstacle course,” and scholars suggest that Congress takes a troublingly long time to approve compacts.²⁰² But once approved, a compact reaps some notable benefits over non-congressionally approved compacts. In approving a compact, Congress may allow the member states to establish a centralized regulatory body to oversee the project²⁰³ or provide for collective enforcement powers.²⁰⁴ Congressional authorization even allows the compact’s members to enforce the compact in federal court.²⁰⁵

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

c. Implied Limits on the States

Federal courts have developed various constitutional doctrines that do not appear on the face of the Constitution but are rooted in its structure, history, and text.²⁰⁶ The relevant implied doctrines are the Dormant Commerce Clause and dormant foreign affairs preemption. The Commerce Clause rulings prevent states from facially discriminating against or unduly burdening interstate commerce. The foreign affairs rulings prevent states

received the consent of congress, though not in express terms, yet impliedly, and subsequently, which is equally effective . . .”). In *Virginia v. Tennessee*, the Court determined that Congress recognized the two states’ ninety-year-old boundary agreement by using the boundary as a marker for electoral, judicial, and tax districts. *Id.* at 522.

201. ZIMMERMAN, *supra* note 181, at 49.

202. Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 78 (2008); Hasday, *supra* note 182, at 19 (noting that “writers frequently cite studies indicating that compacts take between four and nine years to enact”).

203. See, e.g., Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970); Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961). See generally ZIMMERMAN, *supra* note 181, at 69–132 (discussing various examples of compact commissions and other administrative bodies).

204. See, e.g., Ohio River Valley Water Sanitation Compact, Pub. L. No. 76-739, 54 Stat. 752 (1940).

205. ZIMMERMAN, *supra* note 181, at 51–53. See, e.g., *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (noting the federal judiciary’s “power . . . to provide one State a remedy for the breach of another”). See also *Culyer v. Adams*, 449 U.S. 433, 438 (1981) (stating that congressional approval “transforms an interstate compact . . . into a law of the United States”).

206. Cf. Resnik, *supra* note 6, at 36–37 (“[T]he United States Constitution never even uses the word federalism, let alone terms like foreign affairs preemption.”).

from interfering with the federal government's conducting of foreign affairs.

i. Dormant Commerce Clause Preemption

The Commerce Clause itself grants Congress the power to “regulate Commerce with foreign Nations, and among the several States.”²⁰⁷ From this positive grant of authority, the Court has inferred a negative corollary: the states may not interfere with foreign or interstate commerce.²⁰⁸ This principle has been turned into a two-part test: first, courts determine whether a law discriminates against out-of-state interests on its face or in its effects; second, courts determine whether the law's burden on interstate commerce outweighs its benefit to the state.²⁰⁹

Under the first line of analysis, a law that discriminates on its face or in its effects against out-of-state interests is assumed to be “simple economic protectionism” and is presumptively invalid.²¹⁰ Alternatively, courts will generally uphold a statute that applies evenly to in- and out-of-state entities.²¹¹ Impermissibly discriminatory regulations have included Oklahoma's requirement that in-state utilities use at least 10 percent Oklahoma-produced coal,²¹² New Jersey's outright ban on the importation of out-of-state waste,²¹³ New Hampshire's prohibition on the out-of-state sale of New Hampshire-produced hydroelectric power,²¹⁴ and Oklahoma's prohibition on the creation of gas pipelines that would transmit gas out of state.²¹⁵

After a statute is deemed valid under the first line of analysis, courts undertake the second line of analysis and examine whether the statute serves a legitimate local purpose and whether “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local

207. U.S. CONST. art. I, § 8.

208. *City of Phila. v. New Jersey*, 437 U.S. 617, 623 (1978) (“The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.”).

209. *Id.* at 623–24; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–43 (1970).

210. *See City of Phila.*, 437 U.S. at 624 (invalidating a facially discriminatory law that differentiated between in-state waste and out-of-state waste). *See also* *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353–54 (1977) (invalidating a facially neutral law that burdened out-of-state sellers but did not affect in-state sellers).

211. *See City of Phila.*, 437 U.S. at 624. Courts will also uphold a facially discriminatory statute if it is narrowly tailored to “serve[] a legitimate local purpose.” *Maine v. Taylor*, 477 U.S. 131, 138, 148 (1986).

212. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–57 (1992).

213. *City of Phila.*, 437 U.S. at 624.

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

215. *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 239–46 (1911).

benefits.”²¹⁶ This balancing is a “question . . . of degree” that largely “depend[s] on the nature of the local interest involved” and the availability of less restrictive alternatives.²¹⁷ This “fact dependent”—if not entirely ad hoc—approach “has been criticized for being unpredictable and arbitrary.”²¹⁸ Generally speaking, the courts will strike down state regulations that “afford residents an economic advantage at the expense of a free-flowing national market,” and uphold “local economic measures . . . if there is no discriminatory purpose or effect.”²¹⁹

ii. Dormant Foreign Affairs Preemption

A broad reading of the federal government’s foreign relations power requires the preemption of any state laws that affect foreign affairs. The Court endorsed this view in *Zschernig v. Miller*, a Cold War–era case that involved an Oregon law preventing nonresident aliens from inheriting an estate unless Americans enjoyed reciprocal inheritance rights in the foreign country and the foreign heirs could show that they would control the property “without confiscation” by their home government.²²⁰ The Court determined that the state statute affected foreign policy “in a persistent and subtle way” by leading state courts “into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements,” and into “unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”²²¹

In its key holding, the Court ruled that such “state involvement in foreign affairs and international relations” was impermissible because these matters are “entrust[ed] solely to the Federal Government.”²²² Regardless of the subject matter of the state regulation (here, inheritances), the Constitution does not permit the state “to establish its own foreign policy” or even to “impair the effective exercise of the Nation’s foreign policy.”²²³ Note, however, that the Supreme Court has never explicitly followed this holding,²²⁴ and the case has often been distinguished as a relic of the Cold

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

217. *Id.*

218. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 443 (3d ed. 2006).

219. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 251–52 (4th ed. 2007).

220. *Zschernig v. Miller*, 389 U.S. 429, 430–31 (1968).

221. *Id.* at 435, 440.

222. *Id.* at 436.

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

224. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) (“We have

War, when states were eager to demonstrate their anti-Communist bona fides, regardless of the constitutional implications of their actions.²²⁵ Commentators from both ends of the political spectrum have argued that there is little constitutional basis for such an intrusive judicial doctrine.²²⁶ Yet its logic is analogous to that of the well-established Dormant Commerce Clause, and it should be taken seriously until the Court expressly overrules it.

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

The history, text, and interpretations of the U.S. Constitution establish broad federal authority in foreign relations and interstate affairs. Federal laws, treaties, and even nontreaty agreements preempt contrary state laws. States may not enter into treaties with foreign governments and must

not relied on *Zschemig* since it was decided, and I would not resurrect that decision here.”); MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 263 (2007). The Court discussed *Zschemig* at some length in *Garamendi*. See *Garamendi*, 539 U.S. at 417–20. But that case did not specifically apply *Zschemig*’s doctrine of dormant preemption because it involved an executive agreement that expressed a federal foreign policy in “clear conflict” with the state law. *Id.* at 421. But see Resnik, *supra* note 6, at 74–77 (discussing *Zschemig*, *Crosby*, and *Garamendi* as related examples of a troubling new “foreign affairs preemption” doctrine that promotes “the exclusivity of national power based on general assertions of the risk of potential harms”).

Some have suggested that the foreign affairs preemption doctrine applies to foreign commerce. See, e.g., BRADLEY & GOLDSMITH, *supra* note 181, at 350–51. The Court has stated that “a more extensive constitutional inquiry is required” under the foreign Commerce Clause as compared to the domestic Commerce Clause, so that the states do not prevent the government “from speaking with one voice in regulating foreign trade.” *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 446, 452 (1979) (internal quotation marks omitted). Yet the Court’s application of this principle has followed the basic principles of statutory and treaty preemption discussed in Part IV.A.2.a *supra* rather than dormant foreign affairs preemption discussed here. Compare *Japan Line*, 441 U.S. at 446 n.10, 452–53 (invalidating California’s taxation of Japanese shipping containers because the United States had a policy, evidenced by both domestic statute and multilateral treaty, of not imposing duties and taxes on containers used in international shipping), with *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 303, 324–28 (1994) (upholding a California law taxing multinational corporations where the federal government had failed to pass proposed preemptive legislation and the Senate rejected a preemptive treaty).

225. See *Zschemig*, 389 U.S. at 435, 437 (“[W]e find that [recent cases] radiate some of the attitudes of the ‘cold war,’ where the search is for the ‘democracy quotient’ of a foreign regime as opposed to the Marxist theory. . . . [I]t seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata.”). See also *id.* at 435 n.6, 438 n.8; HENKIN, *supra* note 177, at 164.

226. See, e.g., Resnik, *supra* note 6, at 84 (“A review of foreign affairs preemption cases suggests that judges are easily impressed by the invocation of the ‘foreign,’ fearful of the risk that a court’s judgment could have an effect on international relations, and eager to extract themselves and lower courts from adjudicating such questions.”). See also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1698 (1997) (finding “little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption”).

receive congressional authority before entering into compacts with other states and foreign governments if the compact would encroach on federal supremacy. They may, however, enter into some agreements without congressional consent. Even so, the states face implied constitutional limitations in interstate commerce and foreign affairs. In short, the U.S. Constitution establishes broad federal authority on international and interstate issues and limits the states from interfering too much in these federal arenas.

B. FEDERALISM AND FOREIGN RELATIONS IN CANADA

In Canada, the federal government possesses exclusive authority over foreign and interprovincial affairs but possesses no authority whatsoever over intraprovincial matters. Historically, the provinces (particularly Quebec) have strongly asserted their autonomy over intraprovincial affairs. Canada's constitution and subsequent judicial interpretations have established a strict division between federal matters and provincial matters. The federal government possesses a very limited power to preempt provincial laws and cannot force provinces to implement or abide by treaties that affect intraprovincial matters. Provinces are even capable of entering into agreements with foreign governments as long as they do so in furtherance of their valid authority over intraprovincial affairs.

Problems of Canadian foreign relations federalism ultimately turn on a single question: Which level of government possesses constitutional authority to regulate the subject matter at issue? The federal government is solely capable of regulating international and interprovincial affairs but in most cases cannot regulate internal province issues. And as long as the province may regulate the matter, the provincial action is almost certainly valid. This division of authority into "watertight compartments"²²⁷ emerged from the history of imperialism, the constitutional text during Confederation, and subsequent judicial interpretations of that history and text.

1. The Provinces and Foreign Relations Prior to Confederation²²⁸

The history of the Canadian federation turns largely on two imperial

227. A-G for Can. v. A-G for Ont. (*Labour Conventions Case*), [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.).

228. One must keep in mind that "Canada's evolution from colony to fully independent state was gradual." Reference re Secession of Que., [1998] 2 S.C.R. 217, 246 (Can.). Though the provinces joined the 1867 Confederation, they were not fully sovereign until 1931. *See id.* at 244-46.

legacies. First, the division of powers between the federal and provincial governments arose from the fact that the British Crown could not control the details of local governance from across the Atlantic. Second, the provinces exercise strong control over internal matters and are unwilling to relinquish this control because of the country's long history of cultural diversity with respect to Quebec and the native population. These two historical factors help to account for the sharp division of powers within the Canadian constitution.

Unlike in the United States where the states exercised sovereign authority prior to joining the union,²²⁹ the Canadian provinces have always been a creature of imperial statute. Prior to 1867, the provinces were governed as British colonies, and the British government was solely responsible for the colonies' foreign affairs.²³⁰ Even following the creation of the Confederation in 1867, the Crown only gradually relinquished authority over the provinces.²³¹ The current federal-provincial division of power retains this initial imperial organization.

The distinct religious and cultural/linguistic character of Quebec played an important role in the adoption of the federal form of government at Confederation.²³² When France transferred Quebec to the British through the 1763 Treaty of Paris,²³³ the province's French-Catholic culture contrasted sharply with a British culture that was, in the memorable words of one historian, "protestant, commercial, maritime and free."²³⁴ The

229. This was true with regard to internal matters, at least. *See supra* notes 114–15 and accompanying text.

230. DI MARZO, *supra* note 112, at 42; L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 ARIZ. J. INT'L & COMP. L. 93, 95–98 (1998).

231. *See Hodge v. The Queen*, [1883] 9 App. Cas. 117, 132 (P.C.) (appeal taken from Ont.) (noting that the constitution conferred upon provincial legislatures "authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow"). It should be noted that the establishment of the Confederation in 1867 did not fully establish Canada's independence in international affairs. DI MARZO, *supra* note 112, at 43–44. The Canadian nation-state evolved gradually—from the 1867 Confederation through Canada's involvement in the Washington Treaty of 1871, Canada's independent declaration of war in World War II, and the delegation of imperial legislative and foreign affairs powers between the 1920s and 1940s. *Id.*

232. *Reference re Secession of Que.*, [1998] 2 S.C.R. at 252 ("The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.").

233. FREDERICK VAUGHAN, *THE CANADIAN FEDERALIST EXPERIMENT: FROM DEFIANT MONARCHY TO RELUCTANT REPUBLIC* 22–23 (2003).

234. DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE* 8 (2000). On the contrasting French and British political cultures in North America, see Wroth, *supra* note 230, at 99–106. On the connection between culture and sociopolitical institutional structure, see Richard Brooks,

British government's imposition of the Quebec Act of 1774 attempted to strike a balance between imperial control and cultural autonomy.²³⁵ It recognized the provinces' control over property and civil rights, thus allowing Quebec to remain French and Catholic.²³⁶ Quebec repeatedly pushed for greater sovereignty,²³⁷ and during negotiations leading up to the 1867 Confederation, the delegations from Quebec and the maritime colonies (which were culturally distinct in their own right) succeeded in retaining a great deal of the provinces' existing authority.²³⁸

2. The Provinces and Foreign Relations in the Constitution: Text

The constitution of Canada, which is the "sole" source of "lawful authority" at both the federal and provincial level,²³⁹ establishes a straightforward division of authority: each of the federal and provincial governments is "mistress in her own house."²⁴⁰ The provinces are responsible for intraprovincial matters, and the federal government is responsible for interprovincial and international matters.²⁴¹

This principle is codified in the British North America Act of 1867 ("BNA Act")²⁴² and subsequent amendments, which together constitute the Canadian constitution. Most important for federalism purposes are Sections 91 and 92 of the BNA Act, which enumerate the various heads of authority for the provincial and federal legislatures. Notably, almost all of these heads of authority are exclusive, so that the federal legislature cannot

Law and Civil Society in the United States, Canada, Quebec, and the First Nations, 15 ARIZ. J. INT'L & COMP. L. 1 (1998).

235. VAUGHAN, *supra* note 233, at 26–32.

236. *Id.*

237. *Id.* at 32–34, 38–47.

238. Quebec has, of course, presented a recurring problem for the strength of Canada's federal union. Notably, in 1965 the Gérin-Lajoie doctrine announced that Quebec had the right to pursue international objectives. See Christopher J. Kukucha, *Expanded Legitimacy: The Provinces as International Actors*, in READINGS IN CANADIAN FOREIGN POLICY: CLASSIC DEBATES AND NEW IDEAS 214, 216 (Duane Bratt & Christopher J. Kukucha eds., 2007). More recently, Quebec held a referendum on whether to secede from the union, which lost by the narrowest of margins, 50.6 percent to 49.4 percent. See *1995 Quebec Referendum a Period of High Drama*, CTV.CA NEWS, Oct. 31, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051030/1995_referendum_051030?s_name=&no_ads=.

239. Reference re Secession of Que., [1998] 2 S.C.R. 217, 258 (Can.).

240. Edwards v. A-G for Can., [1930] A.C. 124, 136 (P.C.) (appeal taken from Can.). Despite the apparent sexism of the Council's reference to each level of government being "mistress in her own house," the Council decided in that case that women were eligible to serve in the federal Senate. *Id.* at 143.

241. See *infra* Part IV.B.3.b.

242. Constitution (BNA) Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

legislate within the provinces' subject matter, and the provincial legislatures cannot legislate within the federal government's subject matter.²⁴³

With respect to the WCI, the provinces' relevant powers include regulatory authority over "[l]ocal works and undertakings,"²⁴⁴ "[p]roperty and [c]ivil [r]ights in the [p]rovince,"²⁴⁵ the "development, conservation and management of non-renewable natural resources,"²⁴⁶ the "generation and production of electrical energy,"²⁴⁷ and "all Matters of a merely local or private Nature."²⁴⁸ The provinces and the federal government share concurrent authority over the interprovincial export of nonrenewable natural resources and electricity, provided that such laws do not discriminate between products consumed locally and those exported to other parts of Canada.²⁴⁹ However, "[t]he provinces remain incompetent to regulate the export of electricity from Canada" to other countries.²⁵⁰

Parliament's relevant powers include the power to regulate trade and commerce,²⁵¹ nonlocal works and undertakings,²⁵² and the international export of natural resources and electricity.²⁵³ In addition, the federal legislature may "make [l]aws for the Peace, Order, and good Government of Canada" in subjects not expressly granted to the provinces.²⁵⁴ The legislature may also exercise authority over local works and undertakings if

243. BNA Act §§ 91–92.

244. *Id.* § 92(10).

245. *Id.* § 92(13).

246. *Id.* § 92A(1)(b). It should be noted that the provisions relating to nonrenewable resources and electrical energy were added in 1982. *See generally* William D. Moull, *Section 92A of the Constitution Act, 1867*, 61 CAN. BAR REV. 715 (1983).

247. BNA Act § 92A(1)(c).

248. *Id.* § 92(16).

249. *Id.* § 92A(2), (4). This nondiscrimination policy, of course, is similar to the United States' Dormant Commerce Clause limitations on state regulation. *See supra* Part IV.A.2.c.i.

250. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 597 (2d ed. 1985).

251. BNA Act § 91(2).

252. *See id.* § 92(10).

253. *See id.* § 92A(2).

254. *Id.* § 91. One provision grants the federal legislature "all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." *Id.* § 132. However, this grant of power applies only with respect to Canada's treaty obligations entered into as part of the British Empire, not treaty obligations entered into independently. *See* A-G for Can. v. A-G for Ont. (*Labour Conventions Case*), [1937] A.C. 326, 349 (P.C.) (appeal taken from Can.) (rejecting the claim that the federal government properly exercised authority under Section 132, noting that "[t]he obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries").

it deems such authority to be to the advantage of multiple provinces or the country as a whole.²⁵⁵ A further power to disallow acts of provincial legislatures “has not been exercised since 1943” and now exists mainly as fodder for academic debates.²⁵⁶

3. The Provinces and Foreign Relations in the Constitution: Interpretation

Though these provisions appear relatively clear on their face, there is always a need for judicial interpretation in the common law tradition.²⁵⁷ Indeed, the Judicial Committee of the Privy Council noted that the constitution is also “a living tree capable of growth and expansion within its natural limits.”²⁵⁸ Mixing its metaphors, the Council explained that it did not wish to “cut down” the tree through a narrow textual interpretation; instead, it aimed at “a large and liberal interpretation” so that the animating principle of federalism may be effectuated, and each of the levels of government would be “mistress in her own house.”²⁵⁹

a. Federal Paramountcy

Unlike in the United States, the Canadian constitution does not include a broad expression of federal supremacy.²⁶⁰ It would be difficult indeed for a provincial government to be “mistress in her own house” if the federal government continually barged through the front door and asserted authority. Thus, there is no broad preemption doctrine in Canadian constitutional law; instead, Canadian courts have developed the doctrine of federal “paramountcy,” which is “necessarily implied” by the federal structure.²⁶¹ Under this limited form of preemption, federal law preempts provincial law only if there is a clear inconsistency between the two.²⁶² Canadian paramountcy is analogous to American conflict preemption,

255. BNA Act § 92(10)(c).

256. HOGG, *supra* note 250, at 90 & n.47.

257. See Reference re Secession of Que., [1998] 2 S.C.R. 217, 239–40 (Can.) (“In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.”); Reference re Remuneration of Judges of the Provincial Court of P.E.I., [1997] 3 S.C.R. 3, 68 (Can.) (“[T]he Constitution embraces unwritten, as well as written rules . . .”).

258. Edwards v. A-G for Can., [1930] A.C. 124, 136 (P.C.) (appeal taken from Can.).

259. *Id.*

260. See *supra* Part IV.A.2.

261. 1 NEIL FINKELSTEIN, LASKIN’S CANADIAN CONSTITUTIONAL LAW 263–66 (5th ed. 1986); HOGG, *supra* note 250, at 354–67.

262. See HOGG, *supra* note 250, at 354, 367.

applying only if “compliance with one law involves breach of the other.”²⁶³ The Canadian courts have expressly rejected broader forms of paramountcy, including implied preemption akin to the American doctrine of field preemption.²⁶⁴ Even duplicative federal and provincial regulations are allowed absent a direct conflict, so that the federal government cannot invalidate provincial law merely by enacting a federal law that occupies the field.²⁶⁵

In short, the Canadian doctrine of paramountcy provides for limited federal preemption, which occurs only when the federal and provincial governments exercise concurrent authority over the same subject matter and their regulations are in direct conflict.

b. Federal Division of Powers²⁶⁶

Canadian federal supremacy is further limited by the fact that the federal government may only legislate in certain subject matter areas. In order to preserve each province’s ability to be mistress in its own house, the Canadian constitution separates the various federal and provincial powers into “watertight compartments.”²⁶⁷ These compartments may be easily summarized as follows: the provinces can only regulate intraprovincial matters, and the federal government may only regulate interprovincial and international matters.²⁶⁸ There are, of course, borderline cases that must be clarified by the courts. In such cases, the courts look to the “pith and substance” of a regulation in order to determine whether it falls within the heads of power granted to each level of government.²⁶⁹ Under a pith and substance analysis, the courts look at the law’s core

263. *Smith v. The Queen*, [1960] S.C.R. 776, 800 (Can.) (Martland, J.).

264. 1 FINKELSTEIN, *supra* note 261, at 263–66; HOGG, *supra* note 250, at 358–63.

265. *See Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 185–91 (Can.).

266. In Canadian jurisprudence, the phrase “division of powers” refers to vertical divisions of authority, akin to the word “federalism” in American jurisprudence. *See* BERNARD W. FUNSTON & EUGENE MEEHAN, *CANADA’S CONSTITUTIONAL LAW IN A NUTSHELL* 57 (3d ed. 2003) (“The ‘separation of powers’ doctrine is concerned with how [the legislative, executive, and judicial branches] *within a single level* of government relate to each other. It is not to be confused with the ‘division of powers’ which is concerned with how powers are distributed *between the federal and provincial levels* of government.”). The phrase “division of powers” should not be confused with the phrase “separation of powers,” which is used in both American and Canadian law to refer to the tripartite distribution of federal power among the executive, legislative, and judicial branches. *See, e.g., Fraser v. Pub. Serv. Staff Relations Bd.*, [1985] 2 S.C.R. 455, 469–70 (Can.) (discussing the separation of powers of the Canadian federal government).

267. *A-G for Can. v. A-G for Ont. (Labour Conventions Case)*, [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.).

268. *See* Constitution (BNA) Act, 30 & 31 Vict. Ch. 3 (U.K.), §§ 91–92, *as reprinted in R.S.C.*, No. 5 (Appendix 1985).

269. HOGG, *supra* note 250, at 314.

meaning, its purpose, and its effects.²⁷⁰

With respect to environmental regulations, the provinces' authority over "[p]roperty and [c]ivil [r]ights"²⁷¹ and "[l]ocal [w]orks and [u]ndertakings"²⁷² allows them to regulate "most aspects of mining, manufacturing and other business activity, including the regulation of emissions that could pollute the environment."²⁷³ They have authority over the production and intraprovince transmission of electricity and other natural resources.²⁷⁴ They can regulate the intraprovince export of electricity and natural resources (though this authority resides concurrently in the federal government).²⁷⁵ For example, in *Fulton v. Energy Resource Conservation Board*, the Canadian Supreme Court held under a "pith and substance" analysis that a proposed electricity generator and transmission station were "intraprovincial" when 99 percent of the electricity they produced and transmitted would remain inside the province.²⁷⁶

The federal government possesses sole authority over international and interprovincial aspects of commerce in electricity and natural resources, as these trades constitute interprovincial "trade and commerce" rather than intraprovincial "works or undertakings."²⁷⁷ In practice, the federal government exercises this authority over international and interprovincial electricity transmissions and energy trades through the

270. Reference re Firearms Act, [2000] 1 S.C.R. 783, 796–98 (Can.); HOGG, *supra* note 250, at 318–21.

271. BNA Act § 92(13).

272. *Id.* § 92(10).

273. HOGG, *supra* note 250, at 599 (citing *R. v. Lake Ont. Cement Ltd.*, [1973] 2 O.R. 247 (Ont. H.C.)).

274. British Columbia Transmission Corporation Act, S.B.C., ch. 44 (2003); British Columbia Utilities Commission Act, §§ 60, 65(2)–(3), 66(2)–(3), 67(2)–(3), 70, R.S.B.C., ch. 473 (1996); Manitoba Public Utilities Board Act, §§ 77, 121, 126(1), R.S.M., ch. R 280 (1987); Manitoba Hydro Act, §§ 15(4), 16(1)(d), 28(1)(a), R.S.M., ch. H 190 (1987); National Energy Board Act, § 58.2, R.S.C., ch. N 7 (1985); BNA Act § 92A(1)(c). Hogg notes that the constitutional provision added in 1982 to allow provinces to regulate intraprovincial electricity and resources is merely "declaratory of the pre-1982 law," as provinces have always been able to regulate "local works and undertakings." BNA Act § 92(10); HOGG, *supra* note 250, at 597.

275. BNA Act § 92A(2)–(3). If there are conflicts, federal law preempts provincial law. *Id.* § 92A(3) ("[W]here such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.").

276. *Fulton v. Energy Res. Conservation Bd.*, [1981] 1 S.C.R. 153, 166 (Can.). The Court also noted that the federal government was capable of preempting the local regulations with respect to interprovincial and international transmissions but that it had chosen not to do so. *Id.* at 169.

277. *Westcoast Energy, Inc. v. Can. Nat'l Energy Bd.*, [1998] 1 S.C.R. 322, 365–68 (Can.). See also HOGG, *supra* note 250, at 485–89 (discussing federal authority over "interprovincial undertakings"). Compare BNA Act § 91(2) (federal authority over "trade and commerce"), with *id.* § 92(10) (provincial authority over "[l]ocal [w]orks or [u]ndertakings").

National Energy Board.²⁷⁸ It may also regulate national and international trade and commerce²⁷⁹ and may incidentally affect intraprovincial trade and commerce in doing so.²⁸⁰ Finally, under its residual power to ensure “[p]eace, [o]rder, and good [g]overnment,”²⁸¹ it can regulate matters “beyond the capacity of the provinces to control.”²⁸² The Supreme Court has used this provision to allow federal regulation of marine pollution “because of its predominantly extra-provincial as well as international character and implications,” even though the sources of pollution themselves were under provincial jurisdiction.²⁸³

To summarize, the Canadian courts look to the “pith and substance” of a regulation to determine if it falls within the jurisdiction of the federal or provincial government. Most forms of environmental regulation fall within provincial jurisdiction under the BNA Act’s provisions relating to “civil rights and property” and “local works and undertakings.” The federal government, under its “trade and commerce” power, may regulate interprovincial and international transactions, and under its “peace, order, and good government” power, may regulate local matters if they are of national concern.

c. Federalism and Foreign Relations

Canada’s strict division of powers applies in all contexts, even foreign relations. Canadian constitutional law has not recognized a broad doctrine such as dormant foreign affairs preemption. Despite the federal government’s general authority over international commerce and diplomacy, it cannot force the provinces to abide by its international agreements, and the provinces are free to enter into international agreements (though not necessarily treaties²⁸⁴) if their pith and substance fall within provincial jurisdiction.

Even in treaty implementation—an area in which the U.S. federal

278. National Energy Board Act, §§ 2, 30, 58.1, 58.4, 116, 119.01, 119.02, 119.06(2), 119.09, 125, R.S.C., ch. N 7 (1985).

279. BNA Act § 91(2). *Cf.* *Citizens Ins. Co. of Can. v. Parsons*, [1881] 7 App. Cas. 96, 111–13 (P.C.) (appeal taken from Can.) (interpreting the federal “trade and commerce” power to include only international and interprovincial trade and commerce).

280. *Caloil v. A-G of Can.*, [1971] S.C.R. 543, 550–51 (Can.).

281. BNA Act § 91.

282. HOGG, *supra* note 250, at 599.

283. *R. v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401, 432–34, 436–37 (Can.).

284. The heated debate about the power of the provinces to enter full-blown international treaties is beyond the scope of this Note. For an introduction to the basic arguments, see DI MARZO, *supra* note 112, at 70–74, 91–94, 135–44.

government exercises wide authority²⁸⁵—the Canadian courts apply a strict division of powers between the federal and provincial governments. Consistent with Canada’s treaty obligations under International Labour Organization conventions, the federal legislature had enacted statutes regulating minimum wages, the length of the workday, and the length of the workweek.²⁸⁶ In the *Labour Conventions Case*, the Privy Council rejected the argument that the Section 91 Peace, Order, and Good Government Clause allowed the federal government to implement the international obligations.²⁸⁷ Instead, the subject matter of the statutes—namely “property and civil rights in the province”—fell within the exclusive authority of the provinces and thus was “expressly excluded” from the federal legislative powers.²⁸⁸

Because the provinces have plenary powers over the types of subject matter enumerated in Section 92, it has been said that “[t]here is no doubt that the provinces have the power to enter into arrangements with foreign countries or American states,” so long as the arrangements are “not intended to be binding in international law.”²⁸⁹ The Supreme Court of

285. See *infra* note 287 (discussing *Missouri v. Holland*, 252 U.S. 416 (1920)).

286. A-G for Can. v. A-G for Ont. (*Labour Conventions Case*), [1937] A.C. 326, 352–53 (P.C.) (appeal taken from Can.).

287. *Id.* at 352 (“It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the provinces, yet its Government not responsible to the provinces nor controlled by provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy. . . . In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.”).

For an interesting contrast between Canadian and American treaty law, compare this reasoning with Justice Holmes’s broad assertions in *Holland*, 252 U.S. at 433, 435 (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.”).

288. *Labour Conventions Case*, [1937] A.C. at 351 (quoting Constitution (BNA) Act, 30 & 31 Vict. Ch. 3 (U.K.), § 92(13), as reprinted in R.S.C., No. 5 (Appendix 1985)). The other major federal head of authority, the trade and commerce power, has been interpreted narrowly to prevent encroachment on provincial prerogatives. See *Citizens Ins. Co. of Can. v. Parsons*, [1881] 7 App. Cas. 96, 113 (P.C.) (appeal taken from Can.) (noting that federal trade and commerce power covers interprovincial and international trade and commerce and the “general regulation of trade affecting the whole dominion,” but that it “does not comprehend the power to regulate by legislation the contracts of a particular business or trade” (emphasis added)).

289. HOGG, *supra* note 250, at 254. Or as another author states it: “No doubt a province, as a

Canada upheld such a nonbinding agreement in *Attorney General for Ontario v. Scott*.²⁹⁰ The case involved reciprocal legislation enacted by Ontario and England regarding the joint recognition of spouse- and child-support payments.²⁹¹ Because the provincial enactment was within the province's express authority over family law matters, and the agreement with England was entirely voluntary and nonbinding, the law was upheld.²⁹²

Thus, these two cases illustrate the principle that Canadian constitutional doctrine does not give special solicitude to foreign relations. Instead, the provinces and federal government are only capable of regulating within their constitutionally authorized spheres, regardless of whether or not the regulations involve foreign relations.

4. Summary of the Provinces, Federalism, and Foreign Relations

This discussion of Canadian constitutional law shows that the provincial and federal governments possess distinct powers. This sharp division of authority into "watertight compartments" arose during Canada's history as an imperial colony. The text of the constitution and subsequent judicial decisions have affirmed these distinctions between federal and provincial authority. Generally, the federal government is responsible for international and interprovincial matters, and the provinces for local, intraprovincial matters. Even when the federal government exercises its foreign affairs powers, the provinces retain sole authority over local matters. Conversely, the provinces are capable of international activities as long as the subject matter is local.

V. THE LEGAL AND PRACTICAL VIABILITY OF THE WCI

This part analyzes the legal viability of the WCI under both American and Canadian constitutional law. It will briefly discuss relevant national GHG policies, setting the stage for later finding an absence of clear federal preemption in either country. With respect to U.S. constitutional law, there appears not to be any preemptive federal policies, either domestic or

juridical person, may deal across provincial or international boundaries with persons or private agencies, and as well with subordinate units of foreign states without raising thereby questions of international law." 1 FINKELSTEIN, *supra* note 261, at 413. On the broader (and more controversial) issue of whether the provinces can enter into treaties with sovereign nations governed by international law, see *supra* note 284.

290. *A-G for Ont. v. Scott*, [1956] S.C.R. 137 (Can.).

291. *Id.* at 140.

292. *Id.* at 140-43.

foreign. There are no problems under the Treaty Clause or the Compact Clause, as the WCI is entirely voluntary and nonbinding. Finally, there are minor difficulties under the Commerce Clause, but the WCI's core regulations are legally permissible. With respect to Canadian constitutional law, the proposed GHG regulations generally fit within the provinces' watertight compartments, though some international and interprovincial transactions may be under federal jurisdiction. Ultimately, though, the outlook for the WCI's future depends more on political events than legal challenges. Even if the states and provinces are able to agree to the details of the WCI and enact the plan into local law, the U.S. federal government may preempt the states' efforts at any time, thus leaving the WCI in the dustbin of history.

In both countries, it is important for the WCI to defend its regulations against potential federal objections. There is nothing particularly national about either the problem (which is transnational in scope, yet localized in impact) or the WCI's means (which are both subnational and transnational). These western states and provinces have organized to address a global threat that will have local impact, such as rising sea levels for the coastal areas and increasing temperatures and desertification for the inland desert areas. They have selected means that recognize the particular importance of *regional* rather than *national* boundaries. The WCI participants are connected together through a regional electric grid, to which neither Washington, DC, nor Ottawa, Ontario, is linked.

This leads us to a fundamental point that is not immediately obvious from the basic facts of the WCI: none of the WCI participants necessarily seeks to influence foreign relations. Remember that in *Zschernig*, the Court viewed Oregon's inheritance regulation as an attempt to influence Cold War politics, and in *Crosby*, it viewed Massachusetts's trade embargo as an attempt to change Burma's political system. Here, the WCI participants may indeed be using transnational methods, but they are fundamentally seeking to prevent local harm.²⁹³ These considerations are important to

293. Of course, California's public relations efforts weaken this argument to a certain extent. Consider that the California legislature, through its 2006 global warming law, hoped to achieve "far-reaching effects by encouraging other states, the federal government, and other countries to act." CAL. HEALTH & SAFETY CODE § 38,501(d) (West 2009). Additionally, when signing the bill into law, "the governor was joined by satellite feed with British prime minister Tony Blair." Matthew Visick, *If Not Now, When? The California Global Warming Solutions Act of 2006: California's Final Steps Toward Comprehensive Mandatory Greenhouse Gas Regulation*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 249, 262 (2007) (citing Press Release, Office of the Governor, Gov. Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions (Sept. 27, 2006), available at <http://gov.ca.gov/index.php?/press-release/4111>).

keep in mind throughout this part's issue-by-issue analysis.

A. EXISTING NATIONAL GHG EFFORTS

Before applying these legal doctrines to the WCI, it is helpful to summarize the current GHG efforts undertaken by the federal governments in the United States and Canada. These national policies will frame the underlying analysis of the state and provincial initiatives, but as will be shown, they do not ultimately affect the legality of the WCI in either the United States or Canada.

The United States has expressly rejected the Kyoto Protocol, the most prominent international GHG effort.²⁹⁴ But the United States remains committed to the basic international GHG framework²⁹⁵ and recently participated in negotiations to extend Kyoto beyond 2012, its current expiration date.²⁹⁶ While there are a number of legislative proposals floating around Congress, there is a general consensus that there will be no uniform federal climate change policy for at least a little while longer.²⁹⁷ In the absence of federal policymaking on the issue, twenty-five states have undertaken regional efforts.²⁹⁸

In contrast, Canada has ratified the Kyoto Protocol and recently announced plans to establish a national carbon-trading system.²⁹⁹ But given the lack of a federal treaty-implementation power,³⁰⁰ the national GHG effort is being frustrated by oil-rich Alberta. Alberta's premier has referred to the proposal as "an interregional transfer of wealth," as it would require the province to buy offset credits from its cleaner neighboring provinces.³⁰¹ The other provinces are less hesitant about supporting the national effort

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

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

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

297. See, e.g., Broder, *supra* note 2.

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

299. Shawn McCarthy, *National Carbon Market Faces Opposition: As Ottawa Moves to Establish an Emissions Trading System, Some Provinces Are Already Going Their Own Way*, GLOBE & MAIL (Toronto), Mar. 12, 2008, at B3.

300. This power lies with the provinces. See *supra* notes 285–88 and accompanying text.

301. McCarthy, *supra* note 299.

and have been critical of Alberta's foot-dragging.³⁰² For example, British Columbia, a WCI member, suggested that it would be willing to integrate its provincial system with the proposed federal one.³⁰³ On the whole, the Canadian federal and provincial governments other than Alberta support GHG regulations.

B. LEGAL ISSUES IN THE UNITED STATES³⁰⁴

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

1. Preemption

a. Domestic Law Preemption

Currently, no federal law, treaty, or executive agreement expressly preempts state efforts to regulate GHG emissions.³⁰⁵ Accordingly, we must search for potential conflict preemption, obstacle preemption, field preemption, or implied foreign affairs preemption.

One potential source of preemption is the federal Clean Air Act, under which the Environmental Protection Agency ("EPA") has recently decided to regulate GHG emissions from both stationary sources (such as power plants) and mobile sources (such as vehicles).³⁰⁶ It is clear that the federal government is willing to assert its supremacy in vehicular regulations, as the EPA recently denied California's request for a waiver so that it could impose additional regulations on tailpipe emissions.³⁰⁷ However, in rejecting California's bid to regulate vehicular emissions, the EPA reaffirmed that "California has independent authority to directly regulate

302. Jeffrey Simpson, *Alberta Risks Becoming a Pariah*, GLOBE & MAIL (Toronto), Feb. 29, 2008, at A19.

303. McCarthy, *supra* note 299.

304. Note that the following analysis of U.S. law largely follows the discussion presented in Lawrence, *supra* note 7, at 10,808–12.

305. See David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 79 (2003); Nordhaus & Danish, *supra* note 35, at 102–09.

306. See Broder, *supra* note 2.

307. See California State Motor Vehicle Pollution Control Standards, 73 Fed. Reg. 12,156, 12,156–57 (EPA Mar. 6, 2008) (notice) [hereinafter EPA Denial of Waiver].

stationary sources [of air pollutants] in the State.”³⁰⁸ Even if the EPA’s regulations were preemptive, it has been exceedingly slow in developing economy-wide GHG standards.³⁰⁹ Thus, federal law only imperils the WCI’s plan to regulate the transportation sector, but this is only a small portion of the WCI’s program and is not even part of the initial planning recommendations. The EPA may force the WCI to rethink its scope, but it will not imperil the broader effort.

Another potential source of preemption is that federal law has established the Federal Energy Regulatory Commission (“FERC”) as the central regulatory authority over interstate electricity transmission and wholesaling.³¹⁰ FERC’s main role is to oversee pricing and reliability of interstate transmission grids.³¹¹ Yet this grant of federal power over wholesale electrical energy does not prevent states from enacting any regulations on electricity generation and transmission within the state.³¹² The WCI’s plan is for the members to impose caps on the “first jurisdictional deliverer” of electricity—that is, the first electricity provider over which the WCI member has regulatory authority. Though such a regulatory scheme raises Commerce Clause concerns,³¹³ it does not interfere with FERC’s authority to regulate pricing and reliability. There is no conflict preemption, as the WCI’s imposition of costs on GHG emissions will not necessarily conflict with FERC regulations such that compliance with the WCI would prevent compliance with FERC. Finally, there is no field preemption, as there is no evidence that Congress intended FERC to occupy the field of electricity regulation such that states are prevented from imposing any regulation whatsoever on electrical power generation, distribution, and sales.³¹⁴

308. *Id.*

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

310. 16 U.S.C. § 824(b)–(c) (2006).

311. *Id.* §§ 824a-2, 824d, 824e, 824o, 824s, 824t. *See also* New York v. FERC, 535 U.S. 1, 6–7 (2002) (discussing the history of federal regulation of interstate electricity transmission); Jeffrey S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause: Tampa Electric Co. v. Garcia and State Restrictions on the Development of Merchant Power Plants*, 43 NAT. RESOURCES J. 615, 625 (2003).

312. *See* Dennis, *supra* note 311, at 629–30 (discussing state regulation of electricity).

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

314. *Cf.* Yvonne Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO₂ Cap-and-Trade Programs*, 28 T. JEFFERSON L. REV. 205, 230–31 (2005) (“Because FERC’s regulation in the area of interstate transmission and wholesale of electric energy is broad and complex, the logical inference is that Congress intended FERC to occupy the field of any regulations relating to GHGs in the electric power sector.”). Such an inferential leap—that FERC’s authority over pricing and reliability of interstate standards constitutes a “broad and complex” regulatory regime—is one this Note

Another potential source of preemption is the Energy Policy Act of 2005, which expressed a federal preference for voluntary emissions reduction. The Act included tax credits for renewable energy programs, but did not include mandatory GHG emissions limits.³¹⁵ It is difficult to conclude from these limited regulations and initiatives that the federal government has truly occupied the field of GHG regulation.³¹⁶ These general policy statements and limited mandates do not constitute a “broad and complex” regulation scheme that preempts more rigorous state efforts.

Most important, though, is the federal cap-and-trade bill being discussed as this Note goes to press.³¹⁷ The federal cap-and-trade system will almost certainly preempt much of the WCI’s efforts but may leave room for the WCI and similar organizations to implement more stringent emissions reductions.³¹⁸

b. Foreign Affairs Preemption

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

Factually, there is no real American “foreign policy” regarding GHG reductions. The U.S. District Court for the Eastern District of California, after receiving briefs and exhibits solely on this issue, determined that U.S. foreign policy toward climate change consists mainly of a commitment to “individually negotiated voluntary agreements, partnerships or economic initiatives with foreign countries (rather than through binding international treaties, such as Kyoto, that omit developing nations).”³¹⁹ The court also determined that this foreign policy does not “hold in abeyance internal [that is, state] efforts to reduce greenhouse gas emissions in order to leverage

is unwilling to take.

315. 42 U.S.C. § 15801 (2006).

316. *Cf.* Gross, *supra* note 314, at 232–33 (suggesting that “a strong inference is that at least for the present, Congress intends a voluntary market-based approach towards the regulation of CO₂ emissions, rather than mandatory measures,” but failing to recognize that Congress’s inferred intent is an insufficient basis for ordinary statutory preemption).

317. John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, at A1.

318. *See infra* Part VI.

319. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1185–86 (E.D. Cal. 2007).

foreign cooperation.”³²⁰

Indeed, the State Department³²¹ noted the president’s “commitment to reduce the GHG intensity of the U.S. economy by 18 percent by 2012,”³²² which would seem to be consistent with state efforts. The State Department even acknowledged that “[a] number of U.S. states and cities are implementing a range of voluntary, incentive-based, and locally relevant mandatory measures.”³²³ As this Note has argued, the WCI is a voluntary organization, using market-based regulatory tools to decrease local GHG emissions, so that it falls neatly under the State Department’s statement of federal policy.³²⁴

Legally, then, there are no federal policies leading to preemption as in *Ware v. Hylton*, *Crosby v. National Foreign Trade Council*, and *American Insurance Ass’n v. Garamendi*. The WCI does not conflict with an international treaty as the Virginia statute that conflicted with the Treaty of Paris in *Ware*.³²⁵ Congress has not occupied the field of GHG regulations as it did by enacting comprehensive sanctions against Burma in *Crosby*.³²⁶ Finally, the president has not exercised one of his constitutional foreign affairs powers as he did in *Garamendi* by entering into an executive agreement to extinguish Americans’ claims against foreign governments and businesses.³²⁷ Thus, there are no sources of treaty, statutory, or executive preemption.

Yet the specter of *Zschernig v. Miller* looms as a “brooding omnipresence in the sky,” to steal the immortal words of Justice Holmes.³²⁸ *Zschernig*’s dormant foreign affairs doctrine is flexible enough to be used to strike down any state regulation by finding that it “impair[s] the effective exercise of the Nation’s foreign policy.”³²⁹ Obviously, then, it is impossible to predict how the courts might apply *Zschernig* to the WCI, other than to note that the judges will be animated at least in part by “their own views on

320. *Id.* at 1187.

321. The Supreme Court helped clarify this matter by specifying that the State Department is ultimately responsible for formulating and promulgating this policy. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (“Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate.”).

322. U.S. STATE DEP’T, U.S. CLIMATE ACTION REPORT 4 (2006), available at <http://www.state.gov/documents/organization/89646.pdf>.

323. *Id.*

324. *See supra* Part II.

325. *See supra* notes 144–49 and accompanying text.

326. *See supra* notes 150–53 and accompanying text.

327. *See supra* notes 154–59 and accompanying text.

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

329. *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

climate change policy and their level of sympathy with the state's approach."³³⁰ The best argument to be made in the WCI's favor is that, unlike the Oregon statute and court decisions at issue in *Zschemig*, the WCI is a measure designed to strengthen local regulation rather than to affect foreign countries' behavior.³³¹ And in the absence of a clear federal policy on GHG regulation, it is unclear that there is a "[n]ation[al] foreign policy" that the WCI could "impair."³³²

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

The "bargaining chip" theory of interference [with foreign policy] also embraces an impermissibly broad range of activities that fall within the traditional powers of states to regulate under their own police powers for the health and welfare of their own citizens. If states can be barred from taking action to curb their greenhouse emissions, then the efforts of the various states to encourage the use of compact florescent light bulbs, subsidize the installation of solar electric generating panels, grant tax rebates for hybrid automobiles, fund renewable energy start-ups, specify enhanced energy efficiency in building codes, or any other activity that results in lower fuel or energy use would likewise constitute an interference with the President's alleged "bargaining chip policy."³³³

Needless to say, if the courts adopted such an overbroad theory of foreign affairs preemption, a great deal of state legislation would be invalidated along with the WCI.³³⁴ It seems unlikely that courts would be willing to take that step.

However, given the Supreme Court's occasional willingness to use a broad form of foreign affairs preemption, it is worth considering whether the Court would develop a new doctrine to prevent cross-border subnational agreements. Some would distinguish between political

330. Note, *supra* note 156, at 1896. See also Chang, *supra* note 66, at 10,778–79 (discussing the uncertainty of the *Zschemig* doctrine as applied to state GHG regulations).

331. See *supra* notes 15–19 and accompanying text (discussing WCI members' GHG policies adopted independently of WCI requirements and suggesting that members are fundamentally concerned with reducing local GHG emissions); *supra* notes 220–23 and accompanying text (discussing *Zschemig*'s critique of state regulations that required state courts to sit in judgment of foreign governments).

332. *Zschemig*, 389 U.S. at 440.

333. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1187–88 (E.D. Cal. 2007).

334. See, e.g., *supra* notes 15–19 and accompanying text (discussing how WCI members' adoption of GHG policies was independent of WCI requirements).

subunits' involvement in foreign affairs through mutual bargaining with foreign governments (unacceptable) and unilateral conduct directed expressly or incidentally at foreign affairs (acceptable).³³⁵ But the existing foreign affairs preemption doctrine probably cannot strike down a voluntary and collaborative WCI unless it is seen as a form of subnational foreign policy that is aimed at impacting national and international GHG policy.³³⁶ This problem can be avoided if WCI members frame their actions as an effort to strengthen local regulations rather than influence national foreign policy.

c. Preemption Summary

Thus, because state regulation does not contradict or conflict with an express federal policy—indeed, state regulation appears to further federal aims—there is no statutory preemption or foreign affairs preemption. Though dormant foreign affairs preemption poses a possible threat, the WCI fundamentally aims at strengthening internal regulations rather than affecting international affairs. In the absence of a contrary federal foreign policy, it ought to be, and more likely than not will be, upheld.

2. Treaty and Compact Clauses

With respect to the Treaty and Compact Clauses, the WCI's saving grace is that it is completely voluntary. The WCI's regulations will arise from domestic and internal political processes rather than being imposed externally through legal obligations to the other members.³³⁷ The WCI's voluntary nature suggests that WCI members are not arrogating power, either vertically vis-à-vis the federal government, or horizontally vis-à-vis nonmember states, and thus will not require Congress's consent to proceed.

a. Treaty Clause

The WCI is unproblematic under the Treaty Clause because the WCI is not a treaty. The various Justices in *Holmes v. Jennison* agreed that the Treaty Clause incorporates the “principles of public [international] law,”³³⁸

335. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1261–74 (2000).

336. Some commentators view the WCI and similar efforts as aiming to have an impact on national and international climate change policy. For example, one scholar suggested that efforts such as the WCI are “subvert[ing] the President’s choice not to join Kyoto.” Levit, *supra* note 6, at 404.

337. Cf. SLAUGHTER, *supra* note 54, at 221–24 (discussing concerns about unaccountable transnational regulatory networks, which “are industry-dominated, do not provide an opportunity for input by interested individuals or potentially affected communities, and generally conduct their operations behind closed doors”).

338. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840).

and the WCI agreement does not include any indicia of a treaty under international law. WCI members are not bound to comply as a matter of international law, and the agreement contains no political, economic, or legal enforcement mechanisms. WCI members have not expressed any intent to be bound to the agreement. Thus, even if international law were to recognize subnational agreements as treaties—a notion that was rejected during the drafting of the Vienna Convention³³⁹—the WCI would not constitute a treaty under international law. Accordingly, assuming that the *Holmes* decision correctly incorporated the international law definition of treaties into the Treaty Clause, the WCI does not violate that provision of the Constitution.

b. Compact Clause

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

As it is currently constituted, the WCI does not raise Compact Clause concerns. Comparing the features of the WCI to the Supreme Court's list of the "indicia of a compact,"³⁴⁰ it is clear that the WCI agreement does not create a joint regulatory organization; it does not condition the effectiveness of the law in each state on other states' adopting similar laws, and it allows states to modify or withdraw from the WCI unilaterally.³⁴¹ Most importantly, it does not encroach on federal authority. As noted, the WCI is not preempted by any federal law or foreign policy, so there is no direct conflict with federal authority under the Compact Clause analysis.³⁴² Additionally, as with the Multistate Tax Commission, WCI members are simply coordinating their laws in order to strengthen their inherent regulatory powers. Though the WCI is a more effective form of traditional regulation since it avoids the collective action problems associated with local environmental regulation, it remains an exercise of the state's inherent police powers. As such, it is permissible under the Compact Clause.³⁴³

339. See *supra* Part III.

340. *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

341. See *id.*

342. See *supra* Part V.B.1, B.2.b.

343. Accord Michael S. Smith, Note, *Murky Precedent Meets Hazy Air: The Compact Clause and*

However, WCI members might want to incorporate stronger regulatory teeth into the organization in order to improve the likelihood of its success; however, while these changes might improve the WCI's chances of success, they would also invite additional Compact Clause scrutiny. WCI members might require implementing legislation to be reciprocal—that is, one member's laws do not take effect until the other members enact similar laws, and members who unilaterally modify their laws are excluded from the reciprocal system. Under such a scheme, the individual members would be exercising their inherent regulatory authority over local matters and refusing to grant special privileges (permit trading) to noncompliant states and provinces. A reciprocal implementation system, in the words of the leading Compact Clause case, does not “purport to authorize member States to exercise any powers they could not exercise in its absence.”³⁴⁴

The members might even elect to incorporate more rigorous regulatory requirements. They could create a central regulatory organization in order to oversee the allocation and monitoring of emissions permits, and to punish deviations from the agreement. Under the Compact Clause, however, WCI members would not be able to delegate their sovereign powers to a central organization without Congress's support. The creation of a multistate regulatory entity is not an inherent state power; instead, such a regulatory body resembles an administrative agency established under Congress's power to regulate interstate commerce.³⁴⁵ Through the central regulatory body, the members would gain new powers over each other to enforce compliance with the WCI's standards. At the same time, they would be giving up their own inherent authorities in an impermissible manner.³⁴⁶ Accordingly, if the WCI is to be enacted with regulatory teeth, congressional authorization would be necessary.³⁴⁷

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

the Regional Greenhouse Gas Initiative, 34 B.C. ENVTL. AFF. L. REV. 387, 407–11 (2007) (analyzing a GHG agreement between northeastern states and determining that it was valid under the Compact Clause without congressional authorization).

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

345. See *id.*

346. See *id.* (disapproving of states' “delegation of sovereign power” through a compact).

347. Accord Smith, *supra* note 343, at 411–15 (analyzing a GHG agreement and suggesting that the inclusion of a centralized regulatory authority would require congressional authorization).

3. Commerce Clause

The Dormant Commerce Clause is the final possible challenge to the WCI under the U.S. Constitution. The WCI is structured to apply evenly to in-state and out-of-state entities, not to protect in-state businesses. Courts could conceivably find the regulations impose an excessive burden in comparison to the local benefits, but given the nature of cap-and-trade, it is likely that the WCI will be environmentally effective and economically efficient.

The WCI inevitably affects interstate commerce. “[Electricity] transmission is inherently interstate. It takes place over a network or grid, which consists of a configuration of interconnected transmission lines that cross state lines.”³⁴⁸ WCI members export and import significant amounts of electricity.³⁴⁹ Yet the Commerce Clause does not prohibit all burdens on interstate commerce; it prohibits discriminatory and unreasonable burdens.

The WCI appears to be carefully planned to avoid Commerce Clause problems. The electricity plan might appear to discriminate facially against non-WCI imports because it specifically targets imported electricity transmissions.³⁵⁰ However, in-state electricity producers are regulated in the same manner. The “first jurisdictional deliverer” approach regulates imported electricity in order to level the playing field between in- and out-of-state producers, not to allow non-WCI members to import unregulated electricity at significantly lower prices. The system regulates in a fair and even manner “the first entity that the WCI partner has jurisdiction over that delivers power onto the WCI grid.”³⁵¹ Framed in this manner, WCI members have consciously refused to discriminate unevenly against out-of-state entities; instead, their proposed regulations will discriminate evenly against entities that emit higher levels of carbon, regardless of where the entities are located.³⁵²

348. *New York v. FERC*, 535 U.S. 1, 31–32 (2002) (Thomas, J., dissenting) (footnote omitted).

349. See ENERGY INFO. ADMIN., STATE ELECTRICITY PROFILES 2006, at 15, 25, 135, 160, 190, 225, 240 (2007), available at http://www.eia.doe.gov/cneaf/electricity/st_profiles/sep2006.pdf.

350. WCI ELECTRICITY REGULATION, *supra* note 74, at 2–3. Cf. Heddy Bolster, Note, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737, 744–47 (2006) (discussing the difficulties of regulating electricity imports under the Commerce Clause). Though the plans for transportation and commercial regulation have not yet been drafted, one can assume that any remaining concerns about uniformity will be addressed in a similar manner.

351. WCI ELECTRICITY REGULATION, *supra* note 74, at 3.

352. Cf. Gross, *supra* note 314, at 224–26 (describing a possible California cap-and-trade program as having a discriminatory effect on interstate commerce because California energy producers are generally cleaner, but failing to acknowledge that California’s regulations would also benefit cleaner

But even facially neutral laws are subject to invalidation under the Commerce Clause if they place an unreasonable burden on interstate commerce. The *Pike* balancing test is unpredictable and fact specific. But the WCI appears to satisfy both of *Pike*'s requirements: it regulates an important local interest, and it does so in a cost-effective manner. The Supreme Court has recognized that states have a significant interest in reducing GHG emissions in order to reduce the threat of global warming.³⁵³ And the WCI's cap-and-trade approach is a cost-effective method of regulating GHG emissions.³⁵⁴ Accordingly, it appears that "the burden imposed on such commerce" by the WCI is not "clearly excessive in relation to the putative local benefits."³⁵⁵ It would be a troubling act of judicial intervention to strike down state GHG initiatives on the "unpredictable and arbitrary" basis of the *Pike* test.³⁵⁶

4. Summary of Challenges Under the American Constitution

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

C. LEGAL ISSUES IN CANADA

Compared to the intricate constitutional analysis required in the United States, the WCI raises relatively few constitutional concerns north of the border. Indeed, the current concern in Canada is not whether the

out-of-state producers and burden dirtier in-state producers).

353. *Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007). In *Massachusetts v. EPA*, the Court recited evidence regarding the specific threats to petitioner Massachusetts. The WCI states face similar localized threats, such as coastal flooding, melting snowpack, drought, and wildfires. See EPA Denial of Waiver, *supra* note 307, at 30–32, 39–40, 42–44.

354. See *supra* Part II.B.

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

356. CHEMERINSKY, *supra* note 218, at 443.

provinces can implement GHG regulations—that is quite clear—but whether the *federal government* can force provincial actions so that the country as a whole meets its GHG treaty obligations.³⁵⁷ The legal analysis of the provinces' involvement in the WCI is the same regardless of the federal government's ratification of Kyoto, as the Canadian federal government does not possess a broad treaty-implementation power.³⁵⁸

Instead, all Canadian regulations, even those required by a treaty such as Kyoto, must be implemented according to the “watertight compartments” of federal and provincial subject matters. The provinces have a clear and exclusive authority over the “development, conservation, and management” of electricity generation and nonrenewable resources³⁵⁹ and have regulatory authority over industry and business under the “property and civil rights” provision of the Constitution.³⁶⁰ Accordingly, there is no barrier to the provinces applying a cap-and-trade program to electricity producers, energy producers, and other GHG-emitting industries located in the province.

There are potential problems, however, in regulating electricity imports under the WCI's “first jurisdictional deliverer” model. Though this plan constitutes an evenhanded regulation under the U.S. Constitution's Dormant Commerce Clause, it is more problematic under Canadian law's “pith and substance” analysis. The Canadian constitution explicitly distinguishes between electricity generation and interprovincial/international imports, allowing provinces to regulate the former but not the latter.³⁶¹ Courts may view the first jurisdictional

357. See, e.g., McCarthy, *supra* note 299. For an overview of the legal issues surrounding federal attempts to regulate GHG emissions, see Philip Barton, Note, *Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading Without Provincial Co-Operation?*, 40 ALTA. L. REV. 417, 421–23 (2002). Back in 2002 the Canadian prime minister explicitly acknowledged that the federal government “need[ed] the collaboration of the provinces” in order to implement the country's Kyoto Protocol obligations. S. Chase, *Provinces Have Kyoto Role: PM Says Protocol Can Be Ratified at Federal Level*, GLOBE & MAIL (Toronto), Apr. 24, 2002, at A4.

358. See *supra* notes 285–88 and accompanying text.

359. Constitution (BNA) Act, 30 & 31 Vict. Ch. 3 (U.K.), § 92A(1)(b), as reprinted in R.S.C., No. 5 (Appendix 1985). This exclusive provincial authority over electricity generation and natural resources applies even if the resources are destined for interprovincial or international export. See *R. v. E. Terminal Elevator Co.*, [1925] S.C.R. 434 (invalidating federal regulations of grain production, as such production was solely within provincial authority even though a significant amount of the grain was destined for export).

360. BNA Act § 92(13).

361. Compare *id.* § 92A(1)(c) (“In each province, the legislature may exclusively make laws in relation to . . . development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.”), with *id.* § 92A(3) (reaffirming federal jurisdiction over interprovincial and international export of electricity), and HOGG, *supra* note 250, at 485–89 (discussing federal jurisdiction over interprovincial works and undertakings generally).

deliverer approach as a legal fiction aimed at regulating electricity imports in an otherwise impermissible manner. However, remember that the Canadian Supreme Court held in *Fulton v. Energy Resources Conservation Board* that an electricity generator that exported only about 1 percent of its electricity was a “local work or undertaking” within the province’s jurisdiction.³⁶² For example, then, note that British Columbia would apply GHG regulations to only about 2 percent of its overall electricity consumption,³⁶³ and Manitoba likewise to about 4 percent.³⁶⁴ It is at least plausible, if not likely, that a court would accept the first jurisdictional deliverer approach as a wholly intraprovincial regulation under the rationale of *Fulton*. However, even if the courts do not accept such an argument, the WCI would remain effective at regulating GHG emissions, even if 2 percent of British Columbia’s electricity and 4 percent of Manitoba’s electricity goes unregulated. It is worth noting too that the federal government may very well consent to the provinces’ regulatory approach, given its widespread support for GHG reductions.³⁶⁵

Thus, under a straightforward “watertight compartment” analysis of the Canadian federal system, the provinces possess a wide range of regulatory authority over local industry, energy production, and electricity

362. *Fulton v. Energy Res. Conservation Bd.*, [1981] 1 S.C.R. 153, 166 (Can.).

363. These percentages require some explanation. First, it is important to recognize that the provinces would not have to regulate electricity imported from WCI members, as this electricity would already be subject to GHG regulations. The percentages listed are an amalgamation of data on electricity consumption in British Columbia and importation from Alberta and various non-WCI states. The numbers are drawn from government sources from 2004, 2005, and 2007. However, complete data were not available for any given year, so these percentages are rough estimates rather than precise calculations. See BC HYDRO, 2007 CONSERVATION POTENTIAL REVIEW: THE POTENTIAL FOR ELECTRICITY SAVINGS, 2006–2026, at 9 (2007), available at http://www.bchydro.com/about/company_information/reports/electricity_conservation.html (follow “2007 CPR Summary Report” hyperlink) (noting British Columbia’s 2006 overall electricity consumption); NAT’L ENERGY BD., ELECTRICITY EXPORTS AND IMPORTS: MONTHLY STATISTICS FOR DECEMBER 2007, at 12, 23–25 (2007), available at http://www.neb.gc.ca/clf-nsi/rnrgynfntn/sttstc/lctctyxpmtmpt/2007/lctctyxpmtmpt2007_12-eng.pdf [hereinafter NAT’L ENERGY BD., ELECTRICITY EXPORTS] (listing British Columbia’s 2007 electricity imports from the United States, broken down by state); NAT’L ENERGY BD., OUTLOOK FOR ELECTRICITY MARKETS, 2005–2006, at 12–20 (2005), available at <http://www.neb.gc.ca/clf-nsi/rnrgynfntn/nrgyrprt/lctcty/lctctymrkt20052006-eng.pdf> [hereinafter NAT’L ENERGY BD., OUTLOOK] (noting British Columbia’s 2004 electricity imports from other Canadian provinces).

364. These numbers are subject to the caveats listed in note 363 *supra*. See MAN. HYDRO-ELEC. BD., WE’RE THERE: 56TH ANNUAL REPORT 67 (2007), available at http://www.hydro.mb.ca/corporate/ar/2006/AR_0607_web.pdf (noting Manitoba’s 2006 overall electricity consumption); NAT’L ENERGY BD., ELECTRICITY EXPORTS, *supra* note 363, at 12, 23–25 (listing Manitoba’s 2007 electricity imports from the United States, broken down by state); NAT’L ENERGY BD., OUTLOOK, *supra* note 363, at 11 (noting Manitoba’s 2004 electricity imports from other Canadian provinces).

365. See *supra* notes 299–303 and accompanying text.

generation. It is also possible that the WCI's first jurisdictional deliverer approach will allow the provinces to regulate electricity imported from non-WCI sources. But only a tiny fraction of the provinces' electricity comes from outside the WCI, so a "pith and substance" analysis might recognize such a regulation as a substantially local undertaking. However, even if the first jurisdictional deliverer approach is not legally valid, the provinces would still be able to regulate the vast majority of electricity consumed in their territory.

D. THE PROGNOSIS FOR THE WCI

In the United States, the shadow of Congress looms large. Depending on political moods, it may facilitate the WCI by consenting to it as a formal compact. But it may also inhibit the WCI by preempting it with weaker regulations that occupy the field.³⁶⁶ One author has suggested three broad factors to consider when assessing the likelihood of congressional approval: first, whether the proposal is partisan or bipartisan; second, whether the proposal is supported by the affected stakeholders, such as industry or activists; and third, whether the proposal interferes with interstate commerce, as Congress would be unlikely to approve "blatant regional protectionism."³⁶⁷

However, the WCI does not require congressional approval—it only requires Congress to refrain from preempting it. It is unlikely that Congress will act specifically to preempt the WCI, as half of the states now participate in regional efforts to reduce GHG emissions.³⁶⁸ However, it is *very* likely that Congress will expand on the WCI's effort and implement a similar program on a national scale. Thus, while the WCI itself might not live to achieve its GHG goals by 2020, its American members will have succeeded.

Things are more complicated on the Canadian side. Nationwide GHG plans are being stymied by Alberta, and the federal government is unable to enact comprehensive regulations without full provincial support.³⁶⁹ If the United States enacts national regulations before Canada does, British Columbia and Manitoba may attempt to negotiate some form of regulatory linkage with the American GHG program. Legally, such cross-border

366. ZIMMERMAN, *supra* note 181, at 214, 217–18.

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

368. *See supra* note 298 and accompanying text.

369. *See supra* notes 300–03 and accompanying text.

regulation would essentially be the same as the WCI.³⁷⁰ However, the provinces may choose instead to remain independent of a U.S. system and to implement a Canada-wide plan, with or without Alberta.³⁷¹

VI. THE MEANING OF THE WCI

In addition to raising thorny questions about legal and practical viability, the WCI raises broader questions about the desirability of cross-border, subnational collaboration. This part briefly addresses the benefits and drawbacks of subnational regulation and also discusses the future potential of WCI-like, cross-border efforts to strengthen local regulation.

Little needs to be added to the voluminous literature on federalism. Some view local regulation as more responsive to citizen needs³⁷² or as more capable of innovation.³⁷³ In environmental regulation, Justice Brandeis's well-known *New State Ice Co. v. Liebmann* dissent is particularly apt: “[C]ourageous state[s] may . . . choose [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³⁷⁴

But piecemeal local regulation may prove to be an inadequate response to a global problem and is also likely to impose unnecessary transaction costs on regulated entities. Since global warming is a worldwide phenomenon, the WCI's potential reduction is only a drop in the bucket of necessary global changes.³⁷⁵ And the WCI's small benefits may be far outweighed by the costs of designing and complying with the final regulatory system. For example, a leading industrial executive has expressed frustration with the “impossible labyrinth of regulations” his firm has faced, describing it as “a certain kind of hell.”³⁷⁶

370. See *supra* Part V.C.

371. See *supra* text accompanying note 301.

372. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 315 (1998) (“A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions, where local may mean municipal, county, state, or regional as the problem requires.”).

373. Revesz, *supra* note 47, at 1233–44.

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

375. See generally Cary Coglianese & Jocelyn D’Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411 (2008) (examining why ad hoc responses to climate change could be worse than taking no action at all).

376. Jeffrey Ball, *ECO:nomics: Creating Environmental Capital*, WALL ST. J., Mar. 24, 2008, at R1; Alan Murray & Kimberly A. Strassel, *Ahead of the Pack: GE’s Jeffrey Immelt on Why It’s Business, Not Personal*, WALL ST. J., Mar. 24, 2008, at R3. Similar sentiments have been aired in Canada. For example, Canada’s finance minister, Jim Flaherty, worried that divergent provincial

The key benefit of the WCI is that it has the potential to win praise from the first group while muting the criticism of the second. The WCI's regulations are locally created and locally enforced and allow for a level of experimentation that is unavailable in the national sphere. At the same time, the WCI regulations cover a broad swath of western North America, thus easing the burden on regulated entities.

Even if the federal governments implement their own national-level regulations, the states and provinces have an important role to play in regulating climate change. This is particularly true with respect to purely local regulations such as land-use planning³⁷⁷ and “renewable portfolio standards,” which are requirements that electricity producers use a certain amount of renewable resources.³⁷⁸ Local regulation will diversify the types of approaches used to mitigate climate change, decreasing the likelihood of catastrophic problems if federal regulatory efforts fail to meet expectations.³⁷⁹

It is harder to make a case for the retention of regional cap-and-trade programs once federal ones are put into place.³⁸⁰ If the regional systems are substantially similar to the federal ones, then a continuation of regional efforts would simply impose an unnecessary layer of burdensome regulatory requirements. On the other hand, if the regional systems are significantly different from the federal ones, then a continuation of the regional efforts could create regulatory confusion, especially if there are conflicting emissions standards, fragmented markets for emissions permits, and different methods for allocating permits.³⁸¹ These problems, of course, are what the doctrines of preemption (in the United States) and paramourty (in Canada) aim to avoid.

Nevertheless, there may still be a role for regional cap-and-trade programs once federal systems are put into place. States and provinces might simply adopt the federal mechanisms but impose slightly more stringent emissions reduction standards for entities operating inside their jurisdiction.³⁸² If states and provinces choose this route (and it is permitted

regulations would hamper international investment in Canada; at a speech in Vancouver, the CEO of international mining giant Rio Tinto concurred. *See* Brethour, *supra* note 19.

377. *See generally* Katherine M. Baldwin, Note, *NEPA & CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769 (2009) (discussing the potential for using land-use regulation to address climate change).

378. Adelman & Engel, *supra* note 49, at 866–67.

379. *Id.* at 875–78.

380. *See id.* at 875–76; Stewart, *supra* note 49, at 703–04.

381. *See* Adelman & Engel, *supra* note 49, at 876.

382. *See id.* at 875.

by the federal legislation), then the regional approach is preferable to a piecemeal state-by-state or province-by-province approach.³⁸³ In particular, due to the fragmented nature of the electricity grid, regional cap-and-trade variations that encompass a significant portion of a particular grid would allow for more stringent emissions reductions in the electricity sector while avoiding the leakage problem.³⁸⁴ In this regard, regional regulation is preferable to federal regulation (to the extent that the regional emissions standard is more stringent than the federal one) and to state or provincial regulation (to the extent that the regional approach coordinates efforts by the various states and provinces that operate on the same electric grid).

Regardless of its success in forestalling the onset of global warming, the WCI's biggest impact may come as an example of how subnational governments can cooperate across borders. Up until the formation of the WCI, the history of state-province cooperation has been relatively unimportant.³⁸⁵ The successful agreements are extremely limited in scope,³⁸⁶ involving matters such as river drainage,³⁸⁷ traffic regulation and infrastructure,³⁸⁸ and fire prevention.³⁸⁹

In contrast, the WCI could serve as a model for how states and provinces can cooperate to improve the strength of their internal regulations. Though commentators often view cross-border, subnational collaboration as beneficial because the subnational actors add new voices

383. See *supra* note 368 and accompanying text.

384. See *supra* note 49 and accompanying text.

385. Or as one scholar has put it, "[I]t is . . . important not to overstate these developments." Kukucha, *supra* note 238, at 226.

386. See A. JACOMY-MILLETTE, *TREATY LAW IN CANADA* 71 (1975).

387. *Freeman v. Trimble*, 129 N.W. 83, 84–85 (N.D. 1910). A subsequent decision on the same agreement, *McHenry County v. Brady*, 163 N.W. 540 (N.D. 1917), appears to be the only American court decision to rule on the validity of an agreement between an American state and a local Canadian government (in this case, a municipality). The court upheld the river drainage agreement under two relevant theories: under the Compact Clause analysis discussed in Part IV.A.2.b.ii *supra*, the agreement did not encroach on federal sovereignty, and under the treaty preemption analysis discussed in Part IV.A.2.a *supra*, the contemporary treaty between the United States and Canada did not regulate the drainage of surface water. *McHenry County*, 163 N.W. at 547–48. The case's precedential value is of course limited to North Dakota courts and serves as persuasive authority only to the extent that it conforms to current Supreme Court doctrines regarding states, international agreements, and federal foreign affairs powers.

388. ZIMMERMAN, *supra* note 181, at 186 (citing Kenneth C. Crowe, *Policy a Roadblock to Speeding Truckers*, *TIMES UNION* (Albany), Aug. 26, 2001, at E1) (noting "administrative reciprocity agreements" between New York, Ontario, and Quebec whereby the state and provinces suspend the licenses of truck drivers who fail to pay fines in the other jurisdictions); Kukucha, *supra* note 238, at 224. See also *ACID RAIN: THE VIEW FROM THE STATES* 57, 78 (James C. White ed., 1988); JACOMY-MILLETTE, *supra* note 386, at 70–71.

389. JACOMY-MILLETTE, *supra* note 386, at 70–71.

to the policy discourse,³⁹⁰ the WCI is a slightly different type of effort. By coordinating regulatory policies, subnational actors are able to extract real, quantifiable regulatory benefits. The benefits of regulatory coordination have been widely identified at the national level³⁹¹ but are only beginning to be discussed at the level of subnational government units.³⁹² Hopefully, the existence—and perhaps even success—of the WCI will provoke further thought on the potential for local government actors to engage in serious cross-border policy coordination.

Even if it does not succeed in seriously curtailing GHG emissions, the WCI will at least be a successful example of how thoughtful regulators can tailor their programs to satisfy varying legal regimes. Properly designed, these efforts can strengthen both local regulations and cross-border relations—without running afoul of constitutional limitations on either side of the border. Notably, the constitutional validity owes a great deal to the WCI's collaborative and interactive bottom-up approach. Because the affected government entities are taking the lead in designing the policy mechanisms, their concerns—both political and legal—are capable of being addressed in a meaningful way.

This Note's analysis helps illustrate some of the variety among constitutional systems. Different countries have different constitutional limits, and the United States and Canada offer interesting case studies in issues of foreign relations and federalism. The two countries share similar basic legal institutions derived from the British common law tradition, and federal structures that developed independently but in a similar manner.³⁹³ By engaging in a parallel analysis of their governmental structures, we can

390. See *supra* note 6.

391. CHAYES & CHAYES, *supra* note 51. Cf. SLAUGHTER, *supra* note 54, at 31–32 (discussing transnational rulemaking in the context of the modern “disaggregating” state, which includes a variety of government actors). *But see* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 126–29 (2009) (discussing the effect of internal political constraints on transnational regulatory networks).

392. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1218–21 (2008). Cf. SLAUGHTER, *supra* note 54 (discussing a variety of government actors involved in transnational lawmaking, but with relatively little attention to subnational government units).

393. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 411 (2003) (“The U.S. and Canadian legal systems, including the Supreme Courts of both countries, share many common characteristics. As followers of the common law tradition, they adhere to similar interpretations of the rule of law, follow similar procedural and evidentiary rules, and believe strongly in the concept of stare decisis. Both Courts also adhere to a robust notion of judicial review.” (footnotes omitted)); Gerard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212 (1994) (“Both countries share a common law heritage in private law and in liberal democratic and federal structures of government.”).

view more clearly the unique aspects of their constitutions. Most importantly, each of these constitutional case studies shows how domestic constitutions can be amenable to transnational, subnational relations that are voluntary and beneficial.

But if we are truly daring, we each might even be willing to embrace the more appealing aspects of the other's structure and jettison the less appealing ones of our own. Cross-border collaboration is certainly not going to be able to solve the heated contemporary debate about the use of foreign law in interpreting the U.S. Constitution.³⁹⁴ Perhaps American supporters of the Rehnquist Court's federalist revolution would be willing to adopt Canada's province-driven approach to federalism and endorse the WCI as legitimate. And while Canadians have already imported aspects of American constitutional law,³⁹⁵ they might begin to do so in a more systematized and conscious manner, perhaps by enacting clear limits on the provinces along the lines of the Compact Clause or the state Treaty Clause.

Ultimately, this transnational form of federalism opens the door to both stronger local regulations and stronger international connections. In their decades-old study of interstate compacts, Felix Frankfurter and James Landis stated that "[t]he imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions."³⁹⁶ Their article helped spur the growth of interstate cooperation in the twentieth century.³⁹⁷ In the twenty-first century, social and economic interdependence have spread across national borders so that Frankfurter and Landis's call for greater cooperation between political subunits now applies transnationally. The WCI may very well stand as a model for future voluntary cross-border cooperation between states, provinces, and other political subunits around the globe.

394. For the Supreme Court opinions that inspired the recent debates over the use of foreign law in domestic adjudication, compare *Roper v. Simmons*, 543 U.S. 551 (2005), with *id.* at 607 (Scalia, J., dissenting). The Court's debate mirrored—and rejuvenated—a similar debate in Congress. See generally Elizabeth Bulat Turner, *The Relevancy of Foreign Law as Persuasive Authority and Congress's Response to Its Use: A Preemptive Attack on the Constitution Restoration Act*, 23 GA. ST. U. L. REV. 455 (2008) (discussing Congress's statutory responses to the Supreme Court's use of foreign law).

395. See generally HOGG, *supra* note 250 (discussing Canadian law, often using American concepts).

396. Frankfurter & Landis, *supra* note 180, at 729.

397. ZIMMERMAN, *supra* note 181, at 204–05.