

CONVENTIONAL WISDOM, DE-EMPTION AND  
UNCOOPERATIVE FEDERALISM IN INTERNATIONAL  
ENVIRONMENTAL AGREEMENTS

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“States should not dismiss the possibilities for creative initiatives at the international level, even if this does go against conventional wisdom.”  
—Robert C. Shinn and Matt Polsky, New Jersey Department of Environmental Protection<sup>1</sup>

**Abstract:**

What powers do the several states of the United States have individually to enter into environmental agreements with other sovereign nations? In this article, the author reviews the powers that states may have generally and then specifically regarding environmental agreements. Several traditional tools of analysis have historically been used including the constitutional doctrine of pre-emption, cooperative federalism and the foreign affairs doctrine. Some newer tools of analysis are also offered including the revival of the treaty-compact and the author’s own concept of “de-emption.” The United States Senate’s explicit refusal to ratify the Kyoto Protocol, coupled with the consequent state initiatives to control greenhouse gases—especially the documents concluded between New Jersey and the Netherlands, provide rich examples of these tools in contemporary action.

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<sup>1</sup> Robert C. Shinn, Jr. and Matthew Polsky, *The New Jersey Department of Environmental Protection’s Non-Traditional Role in Promoting Sustainable Development Internationally*, 3 SETON HALL J. DIPL. INT. REL. 93, 103 (2002).

**Introduction—A Brief Review of Conventional Wisdom on State Treaty Powers**

As conventional wisdom would have it, the several states of the United States of America have agreed that in constituting the sovereign United States, the several states would refrain from individually entering into treaties with foreign nations. Treaty power is a federal power. Article II, sec. 2 (2) of the United States' Constitution confers the treaty power on the President and the Senate,<sup>2</sup> and Article I, sec. 10 (1) prohibits states from "entering into any Treaty, Alliance or Confederation."<sup>3</sup> At first blush, one might conclude that this statement of the law is clear and exclusive, but the history of unchallenged state actions, as well as American court decisions in challenged state actions, have shown otherwise.<sup>4</sup>

The states and the courts in these actions and decisions have noted that neither Article I nor Article II declares that states have no foreign relations role to play, nor that they have no power to do so, as Edward T. Swaine and David R. Hodas have thoroughly catalogued this.<sup>5</sup> In reflection of this, recent years' scholarship has witnessed a progression from reviews of federalism and states' rights generally regarding treaty-making powers<sup>6</sup> to those specifically regarding such issues as state procurement<sup>7</sup> and environmental agreements with foreign powers.<sup>8</sup> The various types of agreements entered into by the several states with foreign countries has been most thoroughly catalogued by Edward T. Swaine.<sup>9</sup> Swaine's work covers a diverse and extensive range of areas but only touches lightly upon the natural environment. David R. Hodas extends the catalogue more recently to include the natural environment.<sup>10</sup> The recent interest in environmental agreements has blossomed largely, but not exclusively, in response to the United States Senate's explicit refusal to ratify the Kyoto Protocol.<sup>11</sup> The Senate and the Bush Administration have taken the position that the environmental benefits to be gained from the Kyoto Protocol do not outweigh the economic advantages for the United States to remain outside of its requirements.<sup>12</sup>

Swaine reminds us that although the United States Constitution prohibits states from entering into any treaty, alliance, or confederation, states may, *with the*

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<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> U.S. CONST. art. I, § 10.

<sup>4</sup> Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000) [hereinafter Swaine, *Negotiating Federalism*].

<sup>5</sup> *Id.* (providing a thorough catalogue of these decisions); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?* 103 COLUM. L. REV. 403 (2003) [hereinafter Swaine, *Does Federalism*]; David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?* 21 PACE ENVTL. L. REV. 53, 81 (2003).

<sup>6</sup> Swaine, *Negotiating Federalism*, *supra* note 5; Swaine, *Does Federalism*, *supra* note 6.

<sup>7</sup> Robert J. Delahunty, *Federalism beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1 (2001).

<sup>8</sup> Hodas, *supra* note 6.

<sup>9</sup> Swaine, *Negotiating Federalism*, *supra* note 4.

<sup>10</sup> Hodas, *supra* note 6.

<sup>11</sup> S. Res. 98, 105th Cong., 143 CONG. REC. 8113 (enacted).

<sup>12</sup> *Id.*

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*permission of Congress*, enter into an “Agreement or Compact” with a foreign government.<sup>13</sup> If we rely upon the intentions of the Constitutional authors (usually known by the phrase “framers’ intent”), the distinction between the permissible agreement, compact, the prohibited treaty, alliance, or confederation may be impossible to determine due to a lack of documentation in the records from the Constitutional Convention.<sup>14</sup> Recent sources assume that states may enter into foreign compacts prior to seeking consent from Congress, and may even conclude binding agreements without ever obtaining federal approval.<sup>15</sup> Louis Henkin punctuates this point when he notes that “no agreement between a state and a foreign power has been successfully challenged on the ground that it is a treaty which the state was forbidden to make.”<sup>16</sup> Furthermore, “not only does international law require federal states to interpret their constitutions so as to permit adhering to treaties, but the new federalism doctrines show a sensitivity toward preserving adequate means to pursue national and international ends like the treaty power, especially where those means turn on state consent.”<sup>17</sup>

In the following article, I briefly review and combine the work of Swaine and Hodas, and discuss the recent groundswell of states’ agreements with foreign countries. In addition to the interpretations that are largely presented in cases, Swaine and Hodas have each offered new ideas on pre-emption and the dormant treaty power, and I now add a new principle with which to analyze co-operative federalism that I call “de-emption.”<sup>18</sup>

### Tools of States’ Treaty Powers Analysis: Conventional Tools

#### 1. *Cooperative Federalism and States’ Rights*

Federal-state relations in the regulation of the environment have been as much a product of politics as of law and have generally yielded a functional, rather than a precisely legal working relationship known as “cooperative federalism.” Cooperative federalism in environmental regulation is a term used to describe the political co-operation necessary between the federal government and state governments to execute the mandate of federal environmental statutes and regulations by state enforcement agencies through federal and state statutes and regu-

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<sup>13</sup> U.S. CONST. art. I § 10, cl. 3.

<sup>14</sup> Swaine, *Negotiating Federalism*, *supra* note 5, at 1194, *citing* United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 459-63 & n.12: “The records of the Constitutional Convention. . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause.”). This provides a good example of why intentionality is dismissed as a mode of interpretation by philosophers and psychologists, and why an author’s intent is not privileged by literary experts. *See* Kirk W. Junker, *Reading Attitude in the Constitutional Wish*, S. CAL. INTERDISC. L. J. (forthcoming Winter, 2005).

<sup>15</sup> Swaine, *Negotiating Federalism*, *supra* note 5, at n.337.

<sup>16</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996).

<sup>17</sup> Swaine, *Does Federalism*, *supra* note 5, at 403.

<sup>18</sup> Regarding the need and appropriate use of neologisms *see* Kirk W. Junker, *De-diction*, 34 FUTURES 895 (2002).

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lations.<sup>19</sup> In areas where state programs cover the full range of necessary laws, with an enforcement regime as strict as or stricter than that of the federal government, states, rather than the federal government, are said to have enforcement “primacy.”<sup>20</sup> However there remains discretion within all enforcement regimes, and to the extent that states maintain their primacy by exercising discretion in conjunction with federal policy, a system of federal-state cooperation is necessary in order to maintain consistency. Cooperative federalism in environmental law works as a relationship of negotiated legal power, where federal and state legal power overlap in the quilt-work of federal statutes. The Clean Water Act, the Clean Air Act, and the Surface Mining Control and Reclamation Act,<sup>21</sup> the various states’ counterparts to those statutes, and the work of the federal and state agencies who enforce them demonstrate cooperative federalism in practice.

In the case of climate change, one might well assume the federal government, or its agent, the Environmental Protection Agency (“E.P.A.”), has taken a position regarding the United Nations Framework Convention on Climate Change (“U.N.F.C.C.C.”) or Kyoto Protocol or both to drive cooperative federalism with the states.<sup>22</sup> If we extend cooperative federalism beyond its strictly legal nature to include a policy agenda, the principle of cooperative federalism might therefore suggest that states should also be uninterested in carrying out any compulsory climate change law or policy. To the extent that some states have at least signed documents like memoranda of understanding, declarations, agreements, and aide memoirs with foreign countries, we are witnessing instead what might be called “uncooperative federalism,” certainly in regards to policy, and perhaps also in regards to law. Seen by its manifestations of simple legal mechanics, this situation begins to look very much like an extension of the trend in favor of states’ rights by the United States Supreme Court and similar-minded theorists. The situation is a bit peculiar, however, when one considers that politically by putting environmental rights back into the hands of the states, in this case, the result in fact has been a more favorable national environmental policy. This is most apparent with greenhouse gas regulation, which will be discussed later in section III A.

### 2. Preemption

In addition to the cooperative federalism principle that outlines the relationship of the federal to the state governments regarding domestic environmental issues, there also exists the familiar principle designed to determine the relationship of the federal to state governments regarding international environmental

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<sup>19</sup> John C. Dernbach, *Pennsylvania’s Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How “Cooperative Federalism” Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REFORM 903 (1986).

<sup>20</sup> *Id.* at 904.

<sup>21</sup> 30 U.S.C. § 1201-1328 (1982). See Dernbach, *supra* note 20.

<sup>22</sup> Ann E. Carlson, *Preemption and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003); THE PEW FOUNDATION, *Pew Report on the Bush Administration’s Response to Kyoto*, in, INTERNATIONAL ENVIRONMENTAL LAW (2003).

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issues known as preemption.<sup>23</sup> From the language of the U. S. Constitution, one might well assume that the operation of the principle of preemption is clear regarding its application to state treaty powers. As the Supreme Court stated: “From the Supremacy Clause comes the preemption doctrine, which preempts state laws that Congress expressly preempts, when federal law occupies the field, or where the law, generally or as applied, obstructs a federal law from achieving its purpose.”<sup>24</sup> Simply put, if a state law is in conflict with a federal law, including the law of treaties, then that state law is preempted. But what if there is an international law situation that is likely to be subject to the federal law of treaties and there is no ratified treaty? In other words, what does preemption mean when the source of law is international law?

Given that the natural environment knows no national borders, the regulation of the natural environment has become a recurrent theme internationally regarding questions of federalism.<sup>25</sup> Conventionally stated, “from the international law vantage, international law prevails over any domestic law.”<sup>26</sup> At the same time, there are limits. As the Restatement makes clear: “But from the vantage of the United States legal system, international law has no bearing on the Constitution, which operates as an absolute constraint on how United States obligations may be observed.”<sup>27</sup>

The United States Constitution in “Article VI expressly declares that the laws and treaties of the United States are the supreme law of the land.”<sup>28</sup> Likewise, international agreements and federal determinations and interpretations of customary international law<sup>29</sup> are also considered supreme to state law and would preempt such law according to the courts.<sup>30</sup> State law is preempted when it is inconsistent with federal law or policy.<sup>31</sup> State law is also preempted if federal

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<sup>23</sup> Hodas, *supra* note 6, at 67.

<sup>24</sup> *Id.*, citing *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

<sup>25</sup> See, e.g., MICHAEL KLOEPFER, ed., *UMWELTFÖDERALISMUS: FÖDERALISMUS DEUTSCHLAND: MOTOR: ODER BREMSE FÜR DEN UMWELTSCHÜTZ? WISSENSCHAFTLICHE TAGUNG DES FORSCHUNGSZENTRUMS UMWELTRECH DER HUMBOLDT-UNIVERSITÄT ZU BERLIN* (Duncker & Humblot, 2002).

<sup>26</sup> Swaine, *Does Federalism*, *supra*, note 6, at 449, citing Advisory Opinion, Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 34, P57 (Apr. 26) (noting that it is a “fundamental principle of international law that international law prevails over domestic law”); MARTIN DIXON & ROBERT MCCORQUODALE, *CASES AND MATERIALS ON INTERNATIONAL LAW* (4th ed. 2003).

<sup>27</sup> See Swaine, *Does Federalism*, *supra*, note 6, at 449, citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987).

<sup>28</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 Reporter’s Note 5 (1987).

<sup>29</sup> Customary law is generally recognized as one of the three sources of international law. Article 38 of the Statute of the International Court of Justice explicitly directs the Court to use conventions, customs and general principles as primary sources of law in making its determinations. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

<sup>30</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Reporters’ notes 3 (1987) (referring to *In Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964) for the modern view of customary international law.)

<sup>31</sup> *Id.* at § 115(3). For a discussion of how this view is in part an anomaly of U.S. legal thinking, see Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 Am. J. Int’l L. 313, 329 (2001) cited in Swaine, *Does Federalism*, *supra* note 6 at n.188.

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authority occupies the field even if the state law is not inconsistent with the federal law or policy.<sup>32</sup> As the Restatement clarifies: “In principle, a United States treaty or international agreement may also be held to occupy a field and preempt a subject, and supercede State law or policy even though that law or policy is not necessarily in conflict with the international agreement, or when the matter has apparently not been adjudicated.”<sup>33</sup> In addition, “[a]s to international law, it has been authoritatively stated that even a subject that is strictly of domestic concern ‘ceases to be one solely within the domestic jurisdiction of the State, [and] enters the domain governed by international law,’ if states conclude an international agreement about it.”<sup>34</sup>

In the United States, under the doctrine of non-self execution, treaties may lack preemptive force until implemented by domestic legislation.<sup>35</sup> In those situations, theorists in support of a strong federal government have historically espoused what they have termed a “dormant treaty power,” that is the Treaty Clause’s putative preemption of state authority even in the absence of any ratified treaty.<sup>36</sup> The assumption here would presumably be that if the United States has signed a treaty, it would intend to ratify it and indeed the international principle of *pacta sunt servanda* would require it.<sup>37</sup> Moreover, if the United States were to sign a treaty, one might well expect that the federal government intended to claim the substantive area of the treaty for itself.

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<sup>32</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987).

<sup>33</sup> *Id.* at § 115 cmt. e.

<sup>34</sup> *Id.* at § 302 Reporters’ Note 2 (quoting *Nationality Decrees in Tunis and Morocco* (Great Britain v. France), P.C.I.J. ser. B, No. 4, p.26 (1923)).

<sup>35</sup> John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 323-27 (1992) (describing functional arguments, most relating to legislative authority, for disfavoring direct application). To the extent that the non-self-execution doctrine concerns the Supremacy Clause it pertains directly to the federal government’s authority relative to the states. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829) (Marshall, C.J.) (concluding that, save where state parties agreed that a treaty would not be self-executing, the Supremacy Clause required that a treaty “be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision”), overruled in part, *United States v. Percheman*, 32 U.S. 51, 88-89 (1833) (modifying *Foster*, on its facts, where subsequently unearthed Spanish version of treaty suggested that it was self-executing); *see also infra* note 263 (discussing *Foster*). But the insistence in *Foster v. Neilson* on a strong presumption in favor of self-execution has arguably eroded, making reliance on the Supremacy Clause more attenuated. Compare Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-47 (1995) (arguing for self-execution based, in part, on Supremacy Clause), and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2157-58 (1999) (suggesting the Supremacy Clause, as interpreted by the Supreme Court, indicates a “default rule” of self-execution), with Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 447-49 (2000) (arguing that the Supremacy Clause does not prohibit federal lawmakers from limiting the domestic application of treaties), and Swaine, *Does Federalism, supra*, note 6, at 413-14, *citing* John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2219-20 (1999) (arguing that the Constitution “. . . allow[s] the three branches to defer execution of a treaty until the President and Congress can determine how best to implement the nation’s treaty obligations”).

<sup>36</sup> Swaine, *Negotiating Federalism, supra* note 5, at 1138.

<sup>37</sup> The United States must perform in good faith all international agreements it has entered into and which are in force under the international principle of *pacta sunt servanda*. In addition, the principle implies “that international obligations survive restrictions imposed by domestic law.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (1987).

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In the area of environmental law generally, but especially regarding greenhouse gas regulation, one can best analyze state-federal cooperation and pre-emption issues by applying a series of steps. First, at the clearest level of statutory law, one can observe that there is no federal statute that directly regulates greenhouse gas emissions and therefore, no states' laws are statutorily preempted in this area.<sup>38</sup> Second, no federal judicial decisions to date have found any federal constitutional statutory or regulatory pre-emption regarding greenhouse gases. Finally, if that were not enough, the E.P.A. went further. Rather than just leave legal scholars searching for an absence of evidence, the E.P.A. actively, explicitly, and affirmatively "announced that it does not have authority under the Clean Air Act to regulate carbon dioxide [the primary greenhouse gas] as a criteria pollutant<sup>39</sup> for which it would be obligated to establish a national ambient air quality standard."<sup>40</sup> One must keep in mind however, that ". . . even if the E.P.A. were to designate carbon dioxide to be a criteria pollutant, and were to promulgate national ambient air quality standards for carbon dioxide, that would not preclude a state from adopting and implementing a more stringent standard for that pollutant."<sup>41</sup>

### 3. *Foreign Affairs Doctrine*

Third in the list of conventional tools of analysis are the foreign affairs doctrine and the associated issue of whether state laws addressing greenhouse gas emissions violate this Constitutional doctrine.<sup>42</sup> In his consideration of environmental protection agreements entered into between states in the United States and foreign governments, David R. Hodas begins his analyses from the traditional position that state laws are preempted when they conflict with ratified treaties and the federal laws implementing them.<sup>43</sup> He goes on to note, however, that the current United States Supreme Court appears to be developing an uncertain foreign affairs doctrine, both in its specifics and in its boundaries of coverage.<sup>44</sup>

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<sup>38</sup> Hodas, *supra* note 6, at 74.

<sup>39</sup> Criteria pollutants are those air pollutants for which the Clean Air Act has established national numeric standards for emissions. See 42 U.S.C. § 7401.

<sup>40</sup> Hodas, *supra* note 6, at 74, citing *Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking*, 68 FR 52,922, 52,925-931 (Sept. 8, 2003).

<sup>41</sup> Hodas, *supra* note 6, at 74; 42 U.S.C. § 7416.

<sup>42</sup> Hodas, *supra* note 6, at 75-79.

<sup>43</sup> See *Missouri v. Holland*, 252 U.S. 416 (1920); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Ware v. Hylton*, 3 U.S. 199 (1796).

<sup>44</sup> See *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2389, 2401 (2003) (compare Justice Souter for the majority, "[i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption . . . but the question requires no answer here [,]" with Justice Ginsburg, dissenting:

. . . [W]e would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand. '[T]he Framers did not make the judiciary the overseer of our government. . . ' And judges should not be the expositors of the Nation's foreign policy, which is the role they play by acting when the President himself has not taken a clear stand. As I see it, courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds. . .

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The uncertainty is allowed in part because in the few foreign affairs cases that the Supreme Court has considered, it has not addressed the issue of whether the state greenhouse gas laws and initiatives offend foreign affairs powers of the President or Congress under the Constitution.<sup>45</sup> In these few cases, the Supreme Court has not seen fit to resolve this issue but, rather reminiscent of the political nature of cooperative federalism, has deemed it to be a political question better resolved by the President and Congress.<sup>46</sup>

Consequently, Hodas concludes that “no matter what theory of preemption is operative, be it traditional preemption, dormant foreign affairs preemption, or the recently proposed (and very attractive) approach of dormant Treaty Clause preemption, there is simply no federalism concern here.”<sup>47</sup> This is because the state greenhouse gas control initiatives that he considers do not conflict with any treaties, federal laws, or executive agreements.<sup>48</sup> “They do not impose any obligation, limitation, or condition on foreign government, nor do they interfere with federal settlement of disputes and claims against foreign countries or businesses.”<sup>49</sup> Hodas concludes that it is entirely constitutional for states to think globally and act locally, because the chief federal executive’s administration views the states’ efforts to be in the nation’s interest.<sup>50</sup>

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For more detailed analysis of the confusion in this area see *The Supreme Court, 2002 Term: Leading Cases: Constitutional Law*, 117 HARV. L. REV. 226, 235 (2003) (arguing that the dormant foreign affairs preemption concept is incoherent and deserves “burial”); Swaine, *Negotiating Federalism*, *supra* note 5; Hodas, *supra* note 6 at 77, citing Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832 (1989).

<sup>45</sup> Hodas, *supra* note 6, at 77-78.

<sup>46</sup> The Supreme Court has a long history of ruling that matters related to foreign affairs are nonjusticiable political questions. See *e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). However, the Court has ruled on the merits with respect to whether the President has the power to enter into executive agreements instead of treaties. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); See also *Missouri v. Holland*, 252 U.S. 416 (1920) (court decision as to whether the subject matter of a treaty is constitutional). The Supreme Court has held that political questions include disputes about: a) when a “war” begins or ends in *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923); b) the recognition of foreign governments or Indian tribes, in *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); and c) the validity, ratification, and interpretation of treaties in *Goldwater v. Carter*, 444 U.S. 996 (1979).

The Supreme Court has not addressed the issue of the President’s exercise of war powers, however federal courts have reasoned that disputes over the President’s exercise of war powers are political questions. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) (challenge to Vietnam War); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (challenge to President’s use of the military in El Salvador); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (challenge to the first Iraq war). The application of the political question doctrine has been the subject of vigorous scholarly debate. See, *e.g.*, Martin Redish, *Judicial Review and the Political Question*, 79 NW. U.L. REV. 1031 (1985); Hodas, *supra* note 6, at 78, citing Louis Henkin, *Vietnam in the Courts of the United States: Political Questions*, 63 AM. J. INT’L L. 284 (1969).

<sup>47</sup> Hodas, *supra* note 6, at 79 (Citations omitted).

<sup>48</sup> Prasad Sharma, *Comment: Restoring Participatory Democracy: Why the United States Should Listen to Citizen Voices While Engaging in International Environmental Lawmaking*, 12 EMORY INT’L L. REV. 1215, 1227 (Spring, 1998).

<sup>49</sup> Hodas, *supra* note 6, at 79.

<sup>50</sup> *Id.* at 81.



## Tools of States' Treaty Powers Analysis: New and Unconventional Tools

### 1. *Leaving the Dormant Treaty Power to Sleep*

In his analysis of the dormant treaty power, Edward T. Swaine makes an excellent point as to why the dormant treaty power and other so-called “dormant” doctrines are precisely that: dormant.<sup>51</sup> The historical record shows that the federal government has not precluded all state activities affecting foreign relations but only those state activities that bargain with foreign powers on matters of national concern. As a result, states have authority to engage in ordinary contractual relations with foreign governments but cannot bargain with foreign governments to secure concessions.<sup>52</sup> Since this record is so well documented by Swaine and Hodas,<sup>53</sup> I shall not repeat its details here. However, the failure of the Constitution to make explicit what powers are included in foreign affairs has left it to the courts to decide. Swaine notes, “for as many allusions as one can find to the competence of states in the arena of foreign affairs, there may be just as many alluding to the incompetence of the judiciary.”<sup>54</sup> Despite the position maintained by the Supreme Court in the seventy year range of cases thoroughly discussed by David R. Hodas, the branches of government have not fared any better in attempting politically to delineate the foreign affairs powers that are dormant.<sup>55</sup>

The dormant treaty power may be said to be over inclusive, because it condemns a wide range of arrangements that states seek to make with foreign governments.<sup>56</sup> Some bargaining between states and foreign governments may be unworthy of congressional attention, such as the negotiations between Virginia and the Kingdom of Belgium to open a foreign trade office in Brussels, for example.<sup>57</sup> “Similarly, whatever the scope of the Compact Clause [Article I, Section 10, clause 3], it does not appear to have been contemplated that it would extend to state activities of no national interest.”<sup>58</sup> Therefore, Professor Swaine concludes that states may conclude binding agreements with foreign governments without federal approval, particularly if there is no national interest in the state activity.<sup>59</sup>

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<sup>51</sup> Swaine, *Negotiating Federalism*, *supra* note 5, at 1150.

<sup>52</sup> *Id.* at 1138.

<sup>53</sup> Swaine, *Negotiating Federalism*, *supra* note 5; Hodas, *supra* note 6.

<sup>54</sup> Swaine, *Negotiating Federalism*, *supra* note 5, at 1151.

<sup>55</sup> *Id.* at 1154.

<sup>56</sup> *Id.* at 1269.

<sup>57</sup> Blaine Liner, *States and Localities in the Global Marketplace, Intergovernmental Persp.*, Spring 1990, at 11 (updating the impact of Virginia's choice to place an economic development office in Brussels); *see also*, Brenda S. Beerman, Comment, *State Involvement in the Promotion of Export Trade: Is It Time to Rethink the Concept of Federalism as It Pertains to Foreign Relations?*, 21 N.C.J. INT'L L. & COM. REG. 187, 206 (1995) (describing the state of North Carolina's activities), *cited in* Swaine, *Negotiating Federalism*, *supra* note 5, at 1269-70.

<sup>58</sup> Swaine, *Negotiating Federalism*, *supra* note 5, at 1272.

<sup>59</sup> *Id.* at 1273.

2. *Waking the Treaty-Compact*

To combat the dormant treaty power, Swaine applies a new sense of federalism to the little-used and now-resurrected concept of the “compact,” which, like the “agreement” is permitted to be used by states in the United States Constitution, while treaties, alliances and confederations are not.<sup>60</sup> He notes that if consented-to compacts outside the scope of Congress’s legislative authority are binding and enforceable compacts, but not federal law, it may seem natural to suppose that they are state law.<sup>61</sup> Yet they may be more. If federal action has failed, the states may make compacts to achieve the preferred solution.<sup>62</sup>

Of course state law pervades even those compacts within Congress’ legislative competence regardless of whether the state law replicates federal obligations or concerns itself with matters only of interest to a participating state.<sup>63</sup> Swaine then shifts his emphasis laterally when he writes:

Such compacts may also be enforceable on the international plane. Consistent with its equivocal remove from constitutional matters, international law leaves to national constitutions in the first instance the question of whether subnational entities enjoy the capacity to enter into international agreements. . . . Due to the infrequency with which U.S. foreign compacts have been perfected, and to the nominal constitutional prohibition against state ‘treaties,’ there is no settled view as to their international consequence, but an important factor in conferring legitimacy is the consent and control of the national government—which is surely enhanced where the compact tracked terms negotiated and ratified by national representatives.<sup>64</sup> The likely result, then, is that state obligations under foreign compacts would be enforceable in international law.<sup>65</sup>

To illustrate how a treaty-compact device works, Swaine begins with two examples from the United States federal government that coincidentally concern themselves with the regulation of the natural environment: the Ross Dam Treaty<sup>66</sup> and the Pacific Salmon Treaty of 1985.<sup>67</sup> The United States and Canada entered into the Ross Dam Treaty to establish water levels behind the Ross

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<sup>60</sup> Swaine, *Does Federalism*, *supra* note 6, at 499.

<sup>61</sup> *Id.* at 518.

<sup>62</sup> The recently litigated 1998 Multistate Agreement on tobacco litigation (MSA) might fit either description. See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 67 *MO. L. REV.* 83-90 (2003) (describing genesis of MSA); see *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 359-60 (4th Cir. 2002) (concluding that MSA was not a compact requiring congressional consent); see also Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 *FLA. L. REV.* 1, 10-11 (1997) (asserting that “threatened federal action spurs most compacts”), *cited in* Swaine, *Does Federalism*, *supra* note 6, at 502.

<sup>63</sup> Swaine, *Does Federalism*, *supra* note 6, at 518.

<sup>64</sup> See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 301 cmt. g & 302 cmt. f (1987) (indicating that some foreign compacts entered into by U.S. states may be international agreements within the meaning of international law, but excluding those not requiring congressional consent).

<sup>65</sup> Swaine, *Does Federalism*, *supra* note 6, at 520-21.

<sup>66</sup> Treaty Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d’Orielle River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11.088.

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Dam.<sup>68</sup> “The Ross Dam Treaty merges a treaty with a compact-like device<sup>69</sup> as a means of asserting national control over a matter implicating subnational authority, with Seattle’s incentive deriving from its own self-interest in the resolution and the pressure exerted by the ongoing International Joint Commission proceedings” on Seattle and British Columbia to reach agreement with respect to the water levels behind the Ross Dam.<sup>70</sup> For most federal preemption situations, these analyses will apply to the federal actions taken or omitted (in the case of dormant powers), but when the federal government goes further in its actions, the analysis must accommodate that further action.

### *3. De-emption as the Solution to Uncooperative Federalism in International Environmental Agreements*

De-emption concerns the explicit withdrawal of the federal government from an area and whether it can be treated as an affirmative statement that the federal government will not be acting in this area, as opposed to an area left to question because the federal government has never acted in the area nor commented upon it.

The United States government’s actions and statements against the Kyoto Protocol are best analyzed at three different levels: 1) those that are legal actions and statements of the government and its agencies in the province of their work, 2) those that are the policy actions and statements of the government and its agencies in the province of their work, and 3) those that are extraneous to the legal or policy provinces of the work of the government or its agencies.

Chronologically arranged, the first legal action in the chain of events came with the U.N.F.C.C.C.,<sup>71</sup> which sets a general framework for the goal of limiting greenhouse gases. Like all framework agreements, the U.N.F.C.C.C. lacked specific dates, amounts of reduction, or methods by which to achieve the reductions.<sup>72</sup> Indeed, while ratifying the U.N.F.C.C.C., “the Senate Committee on Foreign Relations noted that a decision to be bound by targets and timetables would require renewed Senate advice and consent.”<sup>73</sup> The United States signed the U.N.F.C.C.C., President Bush submitted it to the United States Senate for Article II ratification, and the United States Senate ratified it, making it the “law of the United States.”<sup>74</sup>

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<sup>67</sup> Treaty Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11-091, amended by Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon, June 30, 1999, U.S.-Can.

<sup>68</sup> Treaty Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d’Orielle River, Preamble, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11.088.

<sup>69</sup> Swaine notes that “[n]o compact was necessary, presumably, because Seattle, rather than the state of Washington, was a party.” Swaine, *Does Federalism*, *supra* note 6, at 512-13 n. 432.

<sup>70</sup> Swaine, *Does Federalism*, *supra* note 6, at 512-513.

<sup>71</sup> United Nations Framework Convention on Climate Change, May 9, 1992, New York.

<sup>72</sup> *Id.*

<sup>73</sup> S. Exec. Rept. 55, 102d Cong., 2d Sess., Oct. 1, 1992, at 14.

<sup>74</sup> U.S. CONST. art II.

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When it came time to set dates, gas amounts, and methods of reduction, the U.N.F.C.C.C. nations, including the United States, met in Kyoto, Japan to agree upon and sign a protocol. Indeed it has become clear among experts in international public law today that rarely are treaties produced without bundles of annexes and protocols.<sup>75</sup> On November 12, 1998 the United States signed the Kyoto Protocol; however, the United States Senate never ratified it.<sup>76</sup>

In addition to the President having a constitutional role in treaty negotiation and submission to the Senate (or more direct negotiation in the case of an executive agreement), the President has the service of executive officers among the various executive agencies such as the E.P.A. Christine Whitman (then Administrator of the E.P.A.) stated on March 27, 2001, “We have no interest in implementing that treaty.”<sup>77</sup>

One may ask how the Bush administration in effect could “unsign” the Protocol that the Clinton administration had signed.<sup>78</sup> Presidential spokesman Ari Fleischer at a press conference reiterated the Bush administration’s position that signing the Kyoto Protocol did not bind the United States and therefore there was no reason to unsign the treaty.<sup>79</sup> Echoing the letter, but perhaps not the spirit of the international principle of *pacta sunt servanda*, Fleischer stated that *the signature only prohibits the United States from working against the treaty*.<sup>80</sup> This statement fails to address the President’s clear act of legal discretion in not submitting the signed Protocol to the Senate for ratification, regardless of any prior statements by the Senate as to what it would do with a vote on the Protocol. Politically, that act of legal discretion can be interpreted to mean that the President regards submission to the Kyoto protocol as a waste of time or it can be interpreted to mean that he supports the Senate’s stated position. The latter is more likely the case because if he did not agree with the Senate’s position, he could still submit a protocol destined not to be ratified, and then make clear that he had done what he could, and that it was the Senate that blocked the measure. In this case, the Bush administration has stated it will not attempt to undermine the Kyoto Protocol.<sup>81</sup> In fact, on numerous occasions, President Bush has stated that he supports the U.N.F.C.C.C., which acts as the guiding principles behind

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<sup>75</sup> Lecture by Prof. Emer. Bernhard Schloh, University of Hamburg, Germany, and former counsel to the European Commission, Duquesne University School of Law (March 4, 2004).

<sup>76</sup> The United Nations Framework Convention on Climate Change Web Site (for a list of signatories to the the Kyoto Protocol), available at <http://unfccc.int/resource/kpstats.pdf>.

<sup>77</sup> *U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N. Y. TIMES, Mar. 28, 2001, at A 19, cited in, Greg Kahn, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Environment: The Fate of the Kyoto Protocol under the Bush Administration*, 21 BERKELEY J. INT'L L. 548, 551 (2003).

<sup>78</sup> Kahn, *supra* note 78, at 555.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* See also, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 (3) & cmt. i (1987) (“Prior to entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obligated to refrain from acts that would defeat the object and purpose of the agreement”).

<sup>81</sup> Kahn, *supra* note 78, at 555.

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the Kyoto Protocol, but he has withdrawn from any negotiations dealing with the Protocol.<sup>82</sup>

What remains then, is to determine whether the several states of the United States can in fact be the legally responsible parties to carry out a sustainable development agenda for the twenty-first century by directly agreeing with foreign countries to do what the unratified Kyoto Protocol leaves undone. At the level of policy, between the environmental groups that pressured the United States to make specific commitments to limit greenhouse gases and the industry lobbyists, it was industry that won, as attested by the Senate's Byrd-Hagel Resolution, which passed by a vote of 95 to 0 on July 25, 1997.<sup>83</sup> The resolution conveyed that the United States should not sign the Kyoto agreement "unless the protocol or other agreement also mandated new specific scheduled commitments to limit or reduce green house gas emissions for developing country parties within the same compliance period" or it would "result in serious harm to the economy of the United States."<sup>84</sup> Through this resolution, the United States implicitly repudiated those principles of the U.N.F.C.C.C. that had already been ratified by the United States, which called for developed countries to take the lead in reducing greenhouse gas emissions.<sup>85</sup> As a result of the Byrd-Hagel Resolution, the Clinton administration announced that it would not submit the Kyoto Protocol for Senate ratification until it had secured agreements to participate in the Kyoto Protocol from developing nations.<sup>86</sup>

The Byrd-Hagel Resolution was not the only policy act by the federal government to indicate that it would not ratify, enforce, or otherwise approve the Kyoto Protocol. Congress, in an effort to make sure no "backdoor" ratification of the Kyoto Protocol would take place, attempted to prohibit executive branch agencies, including the E.P.A., from working on climate issues in the executive branch appropriations acts.<sup>87</sup> This atmosphere effectively hindered the state and local governments who voluntarily wished to take steps to reduce greenhouse emissions from working with the E.P.A.<sup>88</sup>

The Bush administration came into office in January 2001 and one of its first actions was to send a letter to four senators, including Nebraska Senator Chuck Hagel, to outline its environmental policy.<sup>89</sup> According to that letter, President

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<sup>82</sup> Kahn, *supra* note 78, at 559. See also, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 (1) & cmt. a (1987) ("... withdrawal of a party from an agreement, may take place only (a) in conformity with the agreement. . ."). President Bush did withdraw from the Kyoto Protocol in conformity with its terms.

<sup>83</sup> S. Res. 98, 105th Cong., 1st Sess. (July 22, 1997), *Congressional Record*, 143 S8117, daily ed. (July 25, 1997), cited in DONALD A. BROWN, *AMERICAN HEAT* 26, 31 (Rowman & Littlefield, 2002).

<sup>84</sup> Morrissey, *Global Climate Change*, cited in DONALD A. BROWN, *AMERICAN HEAT* 31, (Rowman & Littlefield 2002).

<sup>85</sup> BROWN, *supra* note 85, at 31.

<sup>86</sup> *Id.* at 36.

<sup>87</sup> See, e.g., Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Act, 1999, Public Law 105-279, 112 Stat. 2496, cited in BROWN *supra* note 85, at 37.

<sup>88</sup> BROWN, *supra* note 85, at 37.

<sup>89</sup> Kahn, *supra* note 78, at 551.

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Bush agreed with the Senate in opposing the Kyoto Protocol because it exempted eighty percent of the world, including large population centers in China and India, which would seriously harm the United States' economy.<sup>90</sup> As support for this position, the Bush administration noted that only Romania had ratified the treaty and that this signaled that worldwide, others agree with the President's position on the treaty.<sup>91</sup> Since then, more than one hundred countries have ratified the Kyoto Protocol.<sup>92</sup> May one use this evidence to now assume that others "worldwide" disagree?

Extra icing may have been added to the de-emption cake when federal officials with no legal or policy-making capacity in matters of environmental regulation publicly recorded their opinions on the ratification of the Kyoto Protocol. As the *New York Times* noted: "Senator Chuck Hagel echoed the anger of other United States legislators with the Clinton administration's position when he said, 'any way you measure this, this is a bad deal for America.'" <sup>93</sup> Senator Hagel predicted that if the Kyoto Protocol ever appeared for ratification before the Senate it would be dead on arrival.<sup>94</sup> Condoleeza Rice, President Bush's national security advisor, has also publicly stated that "Kyoto is dead."<sup>95</sup>

Consequently, one could say that at best, it would appear that the United States federal government's approach supports existing and encourages future state and local innovations regarding global warming policy.<sup>96</sup> It has been suggested that this federalism approach has come about as a result of the international criticism the United States federal government has received for its failure to respond to global warming.<sup>97</sup> In order to deflect this criticism the federal government cites the state and local efforts as an approach to address global warming from the

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<sup>90</sup> *Letter to Members of the Senate on the Kyoto Protocol on Climate Change*, 37 WEEKLY COMP. PRES. DOC. 444 (Mar. 13, 2001), cited in Kahn *supra* note 78, at 551.

<sup>91</sup> *Excerpts: White House Briefing Comments on Kyoto Protocol*, U.S. DEP'T OF STATE, INT'L INFO. PROGRAMS, Mar. 28, 2001, at <http://usinfo.state.gov/topical/global/climate/01032801.html> (last visited Mar. 6, 2003), cited in Kahn *supra* note 78, at 551.

<sup>92</sup> UN Protocol on Substances that Deplete the Ozone Layer, Nov. 1987.

<sup>93</sup> William Stevens, "Meeting Reaches Accord to Reduce Greenhouse Gases," *NEW YORK TIMES*, December 11, 1997, A10, International section, cited in BROWN *supra* note 85, at 37.

<sup>94</sup> BROWN *supra* note 85, at 37.

<sup>95</sup> Patrick J. Michaels, "The Kyoto Killers," August 8, 2001, The Cato Institute, at <https://www.cato.org/dailys/08-08-01.html>.

<sup>96</sup> Hodas, *supra* note 6, at 81.

<sup>97</sup> Andrew C. Revkin & Jennifer Lee, *White House Attacked for Letting States Lead on Climate Policy*, *N.Y. TIMES*, Dec. 11, 2003, at A32 [hereinafter *Climate Policy*] (paraphrasing Dr. Harlan L. Watson, the Bush Administration's chief negotiator at the Milan Conference of the Parties to the United Nations Framework Convention on Climate Change, held in December 2003). The EPA's global warming website takes a similar approach. On its website, EPA touts a range of state activities as important policy initiatives: "Action at the state level is a key component of the US response to the potential impacts posed by climate change." See <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ActionsState.html> (last visited Jan. 10, 2004). The site reviews twenty-eight state plans, many case studies, and legislative efforts across the nation. As to local initiatives, EPA's position is that:

Cities and towns across the U.S. are on the front lines of climate change and feel the effects of changes such as in precipitation, temperature, sea-level rise, and air quality. Cities and towns are also in the position to take a variety of energy efficiency and renewable energy actions that can have multiple benefits including saving money, creating jobs, promoting sustainable growth, and reducing criteria pollutants.

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bottom (that is, local and state initiatives) up, rather than from the top (that is, federal initiatives) down.<sup>98</sup>

The conventional position that one might take regarding states' rights to enter into agreements with foreign nations is that the states are pre-empted from doing so in those areas of the law where the federal government has clearly taken action. Having done so, that area of the law is either explicitly or implicitly an area controlled by the federal government. But what happens if the federal government takes action and thereby presumably pre-emptes the states from doing so, but then rescinds that action? In this case, I maintain that the federal jurisdictional claim has moved from pre-emption to "de-emption." That is to say, not only can the federal government no longer claim to be active in the field and therefore pre-emptive of state action, it cannot even claim to have been silent in the field. It has extinguished the possibility that this was an area for federal and not state action in which the federal government had simply not yet acted. In this case rather, the rescission of action (such as the explicit refusal even to submit the Kyoto Protocol to the United States Senate for ratification by Presidents Bill Clinton or George W. Bush) is tantamount to saying simply that the federal government will not be acting in this area, thereby relinquishing its pre-emptive jurisdictional claim and expressly handing the job back to the states. Furthermore, although the Supremacy Clause in Article VI of the United States Constitution provides that state law must yield to federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,"<sup>99</sup> that does not prohibit states from acting in the field altogether. "When a state law or constitutional provision merely supplements a federal provision, it is not 'contrary' to that provision within the meaning of Article VI."<sup>100</sup>

This is precisely where de-emption enters the picture. Not only has the federal government not taken any legal action with which state initiatives conflict, the federal government, through its treaty-responsible organ, the United States Senate, has explicitly stated it will not ratify the current stock-in-trade of international greenhouse gas regulation—the Kyoto Protocol. This active step to declare that the federal government will not act is more than just not acting, it is an affirmative step that gives states a clear and unambiguous message that the federal government will not be acting in that area. Hence, the states are not pre-empted from acting; on the contrary, the federal government has de-empted itself and thereby released the power to the states.

So one turns to examine the nature of the various work agreements already in place in the bottom-up attempt by states to control greenhouse gas emissions. Pioneers Robert Shinn and Matt Polsky maintain that all of these agreements have the common goal of "sustainability."<sup>101</sup> Three factors make up this exami-

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See <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ActionsLocal.html> (last visited Jan. 10, 2004), cited in Hodas, *supra* note 6, at 80.

<sup>98</sup> *Climate Policy*, *supra* note 98, as cited in Hodas, *supra* note 6, at 80-81.

<sup>99</sup> U.S. CONST. art. VI, § 2.

<sup>100</sup> Ken Gormley, *Exploring A European Constitution: Unexpected Lessons from the American Experience*, 35 RUTGERS L. J. 69, 79 (2003).

<sup>101</sup> Shinn, *supra*, note 2, at 102.

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nation: First, what agreements among these are binding?<sup>102</sup> Second, what function do non-binding “programs,” “workshops” and “presentations” have? Third, to what degree is state-federal co-operative federalism practiced in these agreements?<sup>103</sup>

As an example, now it would seem that the federal government has withdrawn from the area of regulating carbon dioxide emissions.<sup>104</sup> Yet due to international criticism for its lack of effort, the United States has encouraged state efforts in addressing carbon dioxide emissions as a bottom up approach.<sup>105</sup> The current position of the United States at the national level is a hands-off approach as to regulation of additional pollutants not included as criteria pollutants under the Clean Air Act, due in large part to the lobbying efforts of fossil fuel interests.<sup>106</sup> This national position could last for an indefinite time period. So, at the present time the withdrawal by the federal government could be seen as an affirmative statement that the federal government will not be acting in this area and it is therefore left open to the states. However, the President and Congress have the power in the future to preempt the states in this area by enacting legislation or occupying the field. It is worth noting for application in international law that the principle of preemption has been instituted fundamentally in the *acquis communautaire* of European Union law in the related concepts of proportionality and subsidiarity.<sup>107</sup> Within that system of international preemption, it is clearer when member states may make treaties with third countries outside of the European Union.<sup>108</sup>

### **The Strange Bedfellows of States’ Rights and Protection of the Natural Environment: New Compacts in Action**

Conventional wisdom sets up our attitude toward international agreements as an enthymeme. The enthymeme works as follows: the United States Constitution tells us that if there is to be a treaty, then the federal government must conclude it, and that if the federal government concludes it, then it is binding.<sup>109</sup> Since we think of “federal” as a dialectic term paired with “state” in American legal think-

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<sup>102</sup> A beginning guide to answer this question is the United Nations’ Treaty Reference Guide, which provides guidance as to the binding nature of various international documents by category. One must remain aware, of course, that some documents use the categorical names differently, and that the names alone are not a certain test of the binding nature of the documents. *See*, <http://untreaty.un.org/English/guide.asp>.

<sup>103</sup> Shinn, *supra* note 2, at 102.

<sup>104</sup> *Climate Policy*, *supra* note 98.

<sup>105</sup> *Id.*

<sup>106</sup> Dernbach, *supra* note 20.

<sup>107</sup> In the celebrated Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1141 (1964), the European Court of Justice noted that “By creating a Community of unlimited duration, having its own institutions, its own personality and its (own) legal capacity . . . the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”

<sup>108</sup> Rudolf Geiger, External Competences of the European Union Treaty-Making Power of Its Member States, 14 *ARIZ. J. INT’L. & COMP. L.* 319, 326 (1997).

<sup>109</sup> U.S. CONST. art. II, § 2, cl. 2.



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ing, one cannot help but supply the unsaid terms regarding states when these pronouncements on federal power are made. Thinking in dialectic pairs, then, when the term “federal” is used, the dialectic counterpart “state” is assumed. When the federal is said to “have the power,” the dialectic counterpart that one supplies by operation of the enthymeme is that the state does not possess the power. And finally, if the federal exercise of its international agreement power through treaties is “binding,” then an additional enthymeme is constructed in which the term to characterize state power in international agreements is missing, but the dialectic comparison to “binding” will most easily be fulfilled by the term “non-binding.”

With this enthymematic structure in place, we may unreflectively treat states as objects internal to the federation’s subject. The historical-empirical evidence disputes this supplied term to the enthymeme, however. The historical-empirical record of public law does not give us a tidy catalogue of types of agreements and powers and levels of enforceability. It is perhaps because of this lack of clear categories and levels that the entire area is ignored. That ignorance is only due to the sloppiness of the catalogue, however, and not due to its existence.

In international co-operation in general, and in particular in international environmental co-operation, it is often the case that nations will enter into a framework convention or treaty that sets forth an outline of the problems to be addressed, the establishment of the institutions that will address it, the types of measures to be taken, the goals to be achieved through these institutions and measures. In this vein, one may look to the Chlorofluorocarbon (“C.F.C.”) Treaty<sup>110</sup> and the U.N.F.C.C.C., for example. Thereafter, specialists will work to determine precisely how those institutions and organs will function, the methods by which the measures will be affected, and the assessment of the results. In this vein, one may look to the Montreal Protocol<sup>111</sup> or the Kyoto Protocol, for example, in their respective roles to give specificity to the C.F.C. Treaty or the U.N.F.C.C.C. Treaty, respectively.

While the United States participated in the U.N.F.C.C.C. and ratified the Treaty, when it came time to put some flesh on the bones of the Framework through the Kyoto Protocol, the United States balked.<sup>112</sup> The refusal of the United States to follow the Kyoto Protocol has ramifications far beyond the literal and figurative borders of the United States.<sup>113</sup> It is no secret that although the United States is only approximately six percent of the world’s population, it consumes approximately twenty-five percent of the world’s natural resources, including fossil fuels, the burning of which results in global warming and climate change.<sup>114</sup> Under the terms of the Kyoto Protocol, any signatory state’s obliga-

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<sup>110</sup> Chlorofluorocarbon Treaty, Montreal 1987.

<sup>111</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989). As amended up to 1999, available at <http://hq.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf>.

<sup>112</sup> BROWN, *supra* note 85, at 35-36.

<sup>113</sup> *Id.* at 39-40.

<sup>114</sup> See CIA World Fact Book, available at <http://www.odci.gov/cia/publications/factbook>.

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tions are only triggered after fifty-five states have ratified and when more than fifty-five percent of emissions are under control of the Protocol.<sup>115</sup> After most of the smaller states had approved the Protocol, it became clear that the fifty-five states and fifty-five percent needed count not be met if neither the United States nor Russia agreed.<sup>116</sup> During an international trade show in Cologne, Germany on June 10, 2004, Russian acting chief executive Mikhail Rogankov of Kyoto Protocol implementation organization, the Carbon Energy Fund, announced that Russia would be certain to ratify the Protocol “within the next six months” and that “it is only a question of when,”<sup>117</sup> and on November 4, 2004, Russian President Vladimir Putin signed the federal law to ratify the Kyoto Protocol, making Russia the one hundred and twenty-sixth country to do so.<sup>118</sup> The U.S. refusal to follow the Kyoto Protocol is measurable not only in tons of carbon emitted into the atmosphere each day, or in the mean global temperature increases, but also in the signal that a world leader in industry, technology and economy sends when it practices such Machiavellian statehood.

### 1. *New Jersey Practices De-Emption*

What extra effects in the law or policy of environmental regulation might de-emption afford? A look at New Jersey’s efforts provides an example. Given the similarities of population density and coastline resource dependency, New Jersey and the Netherlands found themselves in similar situations regarding greenhouse gases and global warming.<sup>119</sup> Since New Jersey is a coastal state, it is threatened directly by the rise in sea levels that would result from global warming.<sup>120</sup> The impact of higher sea levels could increase flooding and destroy ecosystems which in turn would decrease tourism.<sup>121</sup> In addition, global warming threatens public health in New Jersey by increasing air pollution.<sup>122</sup> Also, higher temperatures and the accompanying increased evaporation magnify the frequency and intensity of droughts and rainstorms.<sup>123</sup>

Recognizing that (i) the U.N.F.C.C.C. was written to be completed by a document like the Kyoto Protocol, (ii) that the United States would not be adopting

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<sup>115</sup> Steven Lee Myers, *THE NEW YORK TIMES*, *Russia’s Lower House Approves Kyoto Treaty on Emissions*, A3.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Steven Lee Myers, *Russia Sings Global Warming Pact*, *THE NEW YORK TIMES*, November 5, 2004. Putin’s signature followed ratification of the Protocol by the State Duma (October 22, 2004) and the Federation Council (October 27, 2004). The final step in the ratification process will be the deposit of the formal instrument of ratification with the Secretary-General of the United Nations in New York. This is expected to occur in the coming weeks. The Kyoto Protocol will enter into force ninety days after Russia’s instrument of ratification has been received. See <http://unfccc.int/> (last accessed November 29, 2004).

<sup>119</sup> Shinn, *supra* note 2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 97.

<sup>123</sup> *Id.*

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the Kyoto Protocol any time soon, and (iii) that if Russia does ratify, the United States participation is not legally necessary, states like New Jersey took it upon themselves to negotiate an agreement with foreign partners that would reflect the goals of the U.N.F.C.C.C. Treaty and Kyoto Protocol through more specific documents designed to create institutions and methods for achieving the U.N.F.C.C.C. goal of slowing global warming.<sup>124</sup> To effect this end and in a manner not unlike the U.N.F.C.C.C., on June 5, 1998, the Department Environmental Protection of the State of New Jersey (“N.J.D.E.P”) and The Ministry of Housing, Spatial Planning and the Environment of The Netherlands signed a Letter of Intent to convey “the understanding of the Signatories of their intention to cooperate in addressing the challenges posed by the prospect of climate change.”<sup>125</sup>

Thereafter, on December 7, 1999, with both a purpose and a method not unlike the Kyoto Protocol, the same two parties signed a more specific agreement—an Aide Memoire<sup>126</sup>—that “summariz[ed] the main topics of discussion and agreed conclusions for further actions of the Technical meeting, held in Scheveningen, The Netherlands December 6 and 7, 1999.”<sup>127</sup> The Commissioner of the N.J.D.E.P., Robert C. Shinn, Jr., together with Matt Polsky, later characterized their efforts by noting that “[s]tates should not dismiss the possibilities for creative initiatives at the international level, even if this does go against conventional wisdom.”<sup>128</sup>

To take its greenhouse gas concerns yet further on the international scene, in 2000, the New Jersey Department of Environmental Protection signed the International Declaration on Cleaner Production, committing the agency to join with other states and nations to seek reductions in emissions to increase environmental and economic sustainability worldwide.<sup>129</sup> Granted, this declaration is neither a convention<sup>130</sup> nor a treaty and thus does not bind New Jersey in the “conven-

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<sup>124</sup> Laura Kosloff & Mark Trexler, *State Climate Change Initiatives: Think Locally, Act Globally*, 18 NAT. RESOURCES & ENV'T. 46, 47-48 (Winter, 2004), for a discussion on other states' initiatives.

<sup>125</sup> Shinn, *supra* note 2.

<sup>126</sup> *The United Nations Treaty Reference Guide* does not define “aide memoire.” United Nations, *The United Nations Treaty Collection: Treaty Reference Guide*, 1999, at <http://untreaty.un.org/English/guide.pdf> [hereinafter *Treaty Reference Guide*].

<sup>127</sup> NJDEP Press Release Dec. 12, 1999, Commissioner Shinn Signs Historic Agreement to Develop Prototype for International Emissions Trade, *available at* [http://www.state.nj.us/dep/newsrel/releases/99\\_0151.htm](http://www.state.nj.us/dep/newsrel/releases/99_0151.htm).

<sup>128</sup> Shinn, *supra* note 2.

<sup>129</sup> *Id.*

<sup>130</sup> *The United Nations Treaty Service Reference Guide* defines “convention”:

The term “convention” again can have both a generic and a specific meaning. (a) Convention as a generic term: Art.38 (1) (a) of the Statute of the International Court of Justice refers to “international conventions, whether general or particular” as a source of law, apart from international customary rules and general principles of international law and - as a secondary source - judicial decisions and the teachings of the most highly qualified publicists. This generic use of the term “convention” embraces all international agreements, in the same way as does the generic term “treaty”. Black letter law is also regularly referred to as “conventional law”, in order to distinguish it from the other sources of international law, such as customary law or the general principles of international law. The generic term “convention” thus is synonymous with the generic term “treaty”. (b) Convention as a specific term: Whereas in the last century the term “conven-

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tional” way. However, it is nevertheless an exercise of state power in foreign relations, and in this case, in a manner at odds with federal foreign relations on the issue of emissions reductions. Thus, while states typically work with the federal government to establish a relatively unified body of environmental law for domestic matters under the rubric of “cooperative federalism,”<sup>131</sup> when it comes to international matters, states may and have sought their own path. When the federal government, which has explicitly taken the regulation of the natural environment as a federal power, fails to protect the environment, states can and do take actions both domestically and internationally.

The “subsidiarity principle”<sup>132</sup> borrowed from European Union law “states that each problem is best addressed at the level most affected by the problem;” thus, the best way to solve a problem is to address it at the lowest level it can be solved.<sup>133</sup> Global warming is one of those issues that is global in scale but has local effects.<sup>134</sup> Yet local action is not common even though the Earth Summit back in 1992 called for action at the local level to address sustainability issues.<sup>135</sup>

Air pollution flows across political boundaries and the N.J.D.E.P. has therefore become active in national and international organizations which attempt to reduce air pollution.<sup>136</sup> These organizations include the Center for Clean Air Policy, the North American Research Strategy for Tropospheric Ozone, the Ozone Transport commission and the Ozone Transport Assessment Group.<sup>137</sup>

N.J.D.E.P. has focused on greenhouse gases, which contribute to global warming. Of primary concern are carbon dioxide emissions, the biggest contributor of all.<sup>138</sup> In 1998, in a first-of-its-kind action, the State of New Jersey signed an agreement with a foreign government, the Netherlands, to jointly work on global

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tion” was regularly employed for bilateral agreements, it now is generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of states. Usually the instruments negotiated under the auspices of an international organization are entitled conventions (e.g. Convention on Biological Diversity of 1992, United Nations Convention on the Law of the Sea of 1982, Vienna Convention on the Law of Treaties of 1969). The same holds true for instruments adopted by an organ of an international organization (e.g. the 1951 ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted by the International Labour Conference or the 1989 Convention on the Rights of the Child, adopted by the General Assembly of the UN).

See *Treaty Reference Guide*, *supra* note 126.

<sup>131</sup> See, Dernbach, *supra* note 20, at 904.

<sup>132</sup> The often-cited Article 38 of the Statute of the International Court of Justice tells the International Court of Justice that it shall consider three sources of international law in making its determinations: customs, conventions, and general principles. Article 38 of the International Court of Justice, June 26, 1945, Department of State publications 2349 and 2353, Conference Series 71 and 74, available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstature.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm). See also Shinn, *supra* note 2, n. 3.

<sup>133</sup> Shinn, *supra* note 2, at 93.

<sup>134</sup> *Id.*

<sup>135</sup> Donald Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at the State and Local Levels in the United States*, 5 DICK. J. ENV. L. POL. 175, 177 (Summer 1996).

<sup>136</sup> Shinn, *supra* note 2, at 97.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

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warming issues.<sup>139</sup> In an effort to control global warming, the agreement identifies strategies for developing pilot projects to trade carbon dioxide emission credits internationally.<sup>140</sup>

Shinn and Polsky relay in their article that “part of the purpose for each party [is] to gain experience in emissions trading for expanding use in the future if and when global trading becomes a more commonplace means of addressing global warming.”<sup>141</sup> One such potential emission trade project involves the purchase by the Netherlands of carbon dioxide credits from a United States electric utility program which captures methane at a landfill in New Jersey.<sup>142</sup> The methane collection system that is employed by the electric utility program captures the methane and uses it as an energy source.<sup>143</sup> Prior to the collection systems implementation, the methane gas was vented into the atmosphere and contributed to global warming.<sup>144</sup>

The N.J.D.E.P in 2000 signed an international declaration involving other states and nations, which committed the agency to reduce emissions with the idea of increasing environmental and economic sustainability worldwide.<sup>145</sup> This declaration was called the International Declaration on Cleaner Production and was sponsored by the United Nations’ Environmental Program (“U.N.E.P.”).<sup>146</sup> Nearly forty countries and more than one thousand business entities have signed the declaration.<sup>147</sup>

New Jersey and the Netherlands signed two agreements: *Letter of Intent Between the Ministry of Housing, Spatial Planning and The Environment, The Netherlands and The Department of Environmental Protection, The State of New Jersey* (Letter of Intent) and *Aide Memoire [Between] The Department of Environmental Protection, The State of New Jersey and The Ministry of Housing, Spatial Planning and the Environment, The Netherlands* (Aide Memoire).<sup>148</sup> Neither the Letter of Intent nor the Aide Memoire is binding on either signatory. Although, the Commissioner for the Department of Environmental Protection (in this case Robert C. Shinn, Jr.) does have the authority to bind New Jersey to agreements.<sup>149</sup>

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<sup>139</sup> *Id.* at 99.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 96.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Letter of Intent Between the Ministry of Housing, Spatial Planning and The Environment, The Netherlands and The Department of Environmental Protection, The State of New Jersey*, available at <http://www.state.nj.us/dep/dsr/Netherlands.PDF> [Hereinafter *Letter of Intent*].

<sup>149</sup> Telephone Interview with Marybeth Brenner, Director, Office of Constituent Relations & Customer Service with the N.J.D.E.P. (April, 2004).

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As a general observation, the Letter of Intent is similar to the U.N.F.C.C.C. in that it conveys an understanding as to what the goals are.<sup>150</sup> Along the same lines, the Aide Memoire, like the Kyoto Protocol, is more specific in its language and provides the plan of action to accomplish those goals.<sup>151</sup> Indeed, the Letter of Intent makes multiple references to the U.N.F.C.C.C. and the Kyoto Protocol. Item B references the preamble to the U.N.F.C.C.C. and “calls for the widest possible cooperation by all countries and participation in an effective and appropriate international response” to climate change.<sup>152</sup> Item D references Article 3, paragraph 3 of the U.N.F.C.C.C. and mentions the policies and measures implemented to address climate change should be cost effective and “. . . carried out cooperatively by interested parties.”<sup>153</sup> Item E references Article 4.2a of the UNFCCC acknowledging awareness that the Annex I parties committed themselves to “adopt national policies” and take appropriate action to mitigate climate changes which can be carried out through joint efforts.<sup>154</sup> Item F references Articles 2, 3, & 4 of the Kyoto Protocol acknowledging awareness that parties should cooperate with each other to promote sustainable development by sharing their experience and exchanging information.<sup>155</sup> Item G references Article 17 of the Kyoto Protocol allowing participation in emissions trading to fulfill commitments under Article 3 of the Kyoto Protocol.<sup>156</sup> Finally, Item H referencing the Kyoto Protocol expresses the need of the parties to gain practical experience in emissions trading.<sup>157</sup>

The Aide Memoire follows the Letter of Intent and lays out a plan of action for its implementation.<sup>158</sup> Item C mentions a need for a standing committee to facilitate the exchange of information and experiences.<sup>159</sup> This standing committee was later created.<sup>160</sup> Item G discusses implementing a pilot emissions trading project.<sup>161</sup> One trade did occur under this pilot emissions trading project.<sup>162</sup> However, no further emissions trading have taken place due to administration and policy changes in the Netherlands, New Jersey, and United States since implementation of the Aide Memoire.<sup>163</sup>

New Jersey’s plan to promote the exchange of environmental technology and information has expanded to include international agreements with Canada, Thai-

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<sup>150</sup> Kosloff & Trexler, *supra* note 124, at 46.

<sup>151</sup> *Id.*

<sup>152</sup> *Letter of Intent*, *supra* note 148.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Interview with Marybeth Brenner, *supra* note 149.

<sup>161</sup> *Letter of Intent*, *supra* note 148.

<sup>162</sup> Interview with Marybeth Brenner, *supra* note 149.

<sup>163</sup> *Id.*

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land, Brazil, Germany, Israel, and France.<sup>164</sup> Shinn and Polsky conclude that “[s]tates should take the initiative in addressing global level problems that have both an effect at the local level and for which effective local action can be taken.”<sup>165</sup> However, the forging of international agreements by states may be the most effective means of addressing global environmental issues impacting states today.<sup>166</sup> Other states have since entered into discussions or agreements with foreign nations, including a regional greenhouse gas reduction plan circulated among the governors of New England states and the premiers of the provinces in eastern Canada that will be international in scope once it is finalized.<sup>167</sup>

### Conclusions

We have before us a problem of climate change that is certainly and measurably already harmful to human life that yields long-term and deep changes to the atmosphere. All life depends upon it, therefore, this problem promises harm not yet realized. This is agreed by the world’s scientific community to be man-made.

Much debate has occurred and continues to occur as to what the United States as a nation should do, can do and has done legally. In the meantime, what else is possible? Operating under the principle “think globally; act locally” the nations that signed the Climate Change Convention at Rio de Janeiro in 1992, agreed that in addition to the international Agenda 21 plan for sustainability worldwide, it was necessary for individual countries to adopt national Agenda 21, and depending upon the internal organization of the respective countries, they also agreed that it was necessary for states, provinces, counties, boroughs, cities, parishes and other forms of local municipal governments to adopt local Agenda 21 as well.<sup>168</sup> Against this conceptual understanding of the problem of global warming and at least one way forward, we have the notion of a sustainable plan for the twenty-first century — one that balances environmental, social and economic needs of the present without harming the needs of the future, where state and local initiatives are taken, and where state and local governments and citizens, who identify themselves as members of these communities, act within those local governments at some less-than-national level.

It is against the backdrop of this agenda and this manner of execution, that one must consider legal problems such as the United States’ signing and ratification of the U.N.F.C.C.C., its’ signing of the Kyoto Protocol but its refusal to ratify the same. In doing so, within the United States’ domestic law, even having taken

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<sup>164</sup> Shinn, *supra* note 2 at 99.

<sup>165</sup> *Id.* at 103.

<sup>166</sup> *Id.*

<sup>167</sup> See Ken Colburn & Amy Royden, *New England States and Eastern Canadian Provinces Team Up to Tackle Climate Change*, 2003 ABA SEC. ENV’T, ENERGY & RES. 7, available at <http://abanet.org/enviro/committees/climatechange/newsletter/june03/newengland/home.html> (last visited Oct. 18, 2004), cited in Hodas, *supra* note 6, at 55.

<sup>168</sup> United Nations Conference on Environment & Development, adopted Rio de Janeiro, June 14, 1992.

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this opportunity to explore new and conventional tools of analysis for state treaty powers, one can never stray too far from the core issues concerning sovereignty.

These issues can be categorized by first asking what the general legal natures of “supremacy” and “sovereignty” are within the meaning of the United States Constitution. Second, one must then apply those general categories to the problems that arise in an actual situation as, for example, when New Jersey wishes to enter into a binding agreement with the Netherlands (whether it is called a “treaty” or not). Third, one must determine what the supremacy of the United States is when, for example a state wishes to enter into either non-treaty trade agreements recognized officially and historically as exceptions to federal supremacy, or other types of non-treaty agreements. It is at this point that the federal government’s express actions in law and policy not to adopt the Kyoto Protocol, that is, its de-emption from the field, invites the states to make their own attempts at dealing with climate changes by invitation and with legal confidence.

Finally, however, one might find some insight into solutions by looking to other federalist situations. Agenda 21 and the principles contained therein suggest that sustainability needs to be addressed locally—states are more local than the federal government and in Europe, only when the federation is better suited is it to carry out a law. Second, the United States federal position has been to date to be uninterested in executing the needed detail of the U.N.F.C.C.C., even if the United States, as a federation, is better suited to carry out its agreed-upon duties under the U.N.F.C.C.C. and Agenda 21. Research could be advanced in alternative solutions by determining what preemptive effect a binding international agreement between a state and a foreign government would have internationally and domestically, if the federal government tried to re-enter the field and preempt the state’s international agreement. Finally, shared international and domestic competence, in the form of an “open constitution,” wherein states openly concede some of their sovereignty at the constitutional level, also dawns on the horizon as a possible solution in addressing climate changes.<sup>169</sup>

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<sup>169</sup> STEPHAN HOBE, *Individuals and Groups as Global Actors: The Denationalization of International Transactions*, in NONSTATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM OF THE KIEL WALTHER-SCHUCKING INSTITUTE OF INTERNATIONAL LAW, 115-135 (Rainer Hofmann, ed., Duncker & Humblot 1999).