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THE CHORUS DOCTRINE: PROMOTING SUB-NATIONAL DIPLOMACY IN REGIONAL GROWTH MANAGEMENT

Conor J. Mannix^{*}

Abstract: Sub-national diplomacy, also known as paradiplomacy, occurs when sub-national actors (think cities or states) engage in international relations, either with other sub-national actors or nation-states. Though typically the province of foreign policy scholarship, paradiplomacy touches on several legal issues, particularly where sovereignty and legal frameworks collide. In the United States, the federal system established by the Constitution gives individual states plenary power but reserves international relations to the federal government through the Supremacy Clause. However, the lines between federal power and state power with regards to international relations remain fuzzy.

Sub-national actors are taking advantage of this lack of sharply drawn lines to combat local, regional, and global issues. This Comment examines what sub-national actors in the United States can do on the international stage and details illustrative examples of previous attempts and iterations of American paradiplomacy. This Comment, while focusing on the Pacific Northwest, argues that the value and efficacy of these paradiplomatic efforts both encourage their acceptance by the federal government and serve as a call for standardization and increased federal oversight.

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹

—Justice Brandeis

INTRODUCTION

Nation states alone will not solve the global and regional problems of the twenty-first century. The old-world international order is too large and too slow—paralyzed by geopolitical rivalries and self-interest—to address complex problems.² Transnational issues such as climate change require coordination and sacrifice, which are consistently lacking in the

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

2. See generally G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFFS. 7 (2018).

Westphalian³ system of nation states.⁴ Paradoxically, solutions to these problems may come from an even smaller source: a province, state, or city.⁵ These sub-national actors can be nimble sources for desperately needed innovation. Unfortunately, the traditional international order works to exclude these sub-national actors from working together, both within and outside their sovereign nation states.⁶

When sub-national actors along an international border wish to coordinate with their foreign neighbors, they face physical, political, and structural barriers.⁷ These barriers slow or prevent coordination on issues in the real world based on constitutional power structures and an invisible legal line of an international border.⁸ This is because the global international community places a premium on international sovereignty, so most countries have structured their national governments to retain exclusive rights to officially engage with other international actors.⁹ Because the national governments are often hundreds, if not thousands, of miles from the edges of their borders, sub-national actors on those distant borders may find it difficult to get the national government's full attention on their issues.¹⁰ At the edges of a country's geographic boundary,

3. See generally Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20 (1948) (arguing that the Peace of Westphalia is commonly considered the starting point of the modern international order based on territorial sovereignty).

4. See Christian Lequesne & Stéphane Paquin, *Federalism, Paradiplomacy and Foreign Policy: A Case of Mutual Neglect*, 22 INT'L NEGOT. 183 (2017).

5. Some international organizations are actively trying to implement the dissolution of the Westphalian International Order and decentralize international relations power into local and regional governments. See *The Global Agenda of Local and Regional Governments*, UNITED CITIES & LOC. GOV'TS, <https://www.uclg.org/en/agenda/global-agenda-of-local-regional-governments> [<https://perma.cc/4EPY-LHT7>].

6. See Chrystie Swiney, *The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance*, 41 MICH. J. INT'L L. 227 (2020). But sub-national actors do not always play nice with each other. See generally Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537 (2019).

7. See Vivienne Bennett & Lawrence A. Herzog, *U.S.-Mexico Borderland Water Conflicts and Institutional Change: A Commentary*, 40 NAT. RES. J. 973 (2000). For a counterexample, look to the European Union's Schengen Zone, a supra-national solution to transborder issues. See Alan K. Henrikson, *Distance and Foreign Policy: A Political Geography Approach*, 23 INT'L POL. SCI. REV. 437, 461 (2002).

8. See Gary Gallegos, Alejandro Mungaray & Juan Antonio Martinez, *Building a Binational Infrastructure: Can San Diego/Tijuana Become a 21st Century Megacity?*, 23 T. JEFFERSON L. REV. 71 (2000).

9. See J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 108 (1994).

10. See Alan K. Henrikson, *Distance and Foreign Policy: A Political Geography Approach*, 23 INT'L POL. SCI. REV. 437, 449 (2002) (“[Often] the peripheral areas and populations of countries are treated by the countries’ leaders, situated comfortably in national capitals, at or near their countries’ geographic centers, with relative indifference.”).

international borders present a legal barrier for sub-national actors to engage with their sub-national peers; but sub-national actors manage to innovate around these restrictions.¹¹

Despite structural hurdles, sub-national actors still find ways to engage with each other across borders, and thereby engage in paradiplomacy.¹² These engagements vary in scope and substance from cultural exchanges and sister cities¹³ to formal diplomatic and economic relationships.¹⁴ Although paradiplomacy can sometimes refer to intra-national relations (e.g., Kansas and Missouri), this Comment focuses on the international form of paradiplomacy (e.g., California and Quebec).¹⁵

Although urbanization does not seem inherently negative, it factors into many problems faced across the world, and climate change in particular.¹⁶ The world's population has more than tripled in the past seventy years, adding more than five billion people.¹⁷ At the same time, the world has become more urban.¹⁸ The United Nations estimates nearly 70% of the

11. See Noé Cornago, *Diplomacy and Paradiplomacy in the Redefinition of International Security: Dimensions of Conflict and Cooperation*, 9 REG'L & FED. STUD. 40 (1999).

12. The term and study of paradiplomacy originally comes from international relations scholarship. A generally accepted definition explains paradiplomacy as “non-central governments’ involvement in international relations through the establishment of permanent or ad hoc contacts with foreign public or private entities, with the aim to promote socio-economic or cultural issues, as well as any other foreign dimension of their constitutional competences.” See Cornago, *supra* note 11, at 40 (supplying a concise summary of paradiplomacy).

13. A sister city is a semi-diplomatic relationship between two cities in different countries. *What Is a Sister City?*, SISTER CITIES INT’L, <https://sistercities.org/about-us/what-is-a-sister-city-3/> [<https://perma.cc/4ESE-WG8E>].

14. See Swiney, *supra* note 6.

15. There are several terms for this paradiplomacy. See Thomas Jackson, *Paradiplomacy and Political Geography: The Geopolitics of Substate Regional Diplomacy*, 12 GEOGRAPHY COMPASS, Dec. 11, 2017, at 3–4 (listing the following definition synonyms for Paradiplomacy: microdiplomacy, constituent diplomacy, multilayered diplomacy, regional diplomacy, sub-state diplomacy, catalytic diplomacy, protodiplomacy, post-diplomacy); see also MICHAEL GLENNON & ROBERT SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 35 (2016) (“local internationalism”); Swiney, *supra* note 6, at 229 & n.11 (“glocal diplomacy,” a portmanteau of global and local).

16. See Matthew Cobb & Alex Braithwaite, *Urbanization: Poverty, Conflict, and Climate Change as Causes and Consequences*, in A RESEARCH AGENDA FOR POLITICAL DEMOGRAPHY 45 (Jennifer D. Sciubba ed., 2021).

17. Mohammed Hadad, *Infographic: How the World’s Population Tripled in 70 Years*, AL JAZEERA (July 11, 2020), <https://www.aljazeera.com/news/2020/7/11/infographic-how-the-worlds-population-tripled-in-70-years> [<https://perma.cc/U8ZH-AKZ8>]; see also U.N. Dep’t of Econ. and Soc. Affs., Population Div., *World Population Prospects 2019: Highlights*, U.N. Doc. ST/ESA/SER.A/423, at 5 (2019).

18. The definition of urban varies greatly, even within the U.N. dataset. See U.N. Dep’t of Econ. and Soc. Affs., Population Div., *World Urbanization Prospects: The 2018 Revision*, U.N. Doc. ST/ESA/SER.A/420, at 1, 5 (2019).

world's population will live in an urban setting by 2050.¹⁹ Today, just thirty-three megacities house more than one-eighth of the world's population.²⁰ While urbanization can be a “positive force for economic growth, poverty reduction and human development,”²¹ it is a double-edged sword. Unchecked urbanization can lead to overwhelmed infrastructure and worsens global warming.²²

The complexity of these issues grows with the urbanization boom: cities grow into megacities, which grow into megaregions.²³ The frame of this Comment is the Cascadia megaregion, comprised of three major cities: Vancouver, British Columbia; Seattle, Washington; and Portland, Oregon.²⁴ The Cascadia megaregion is typical of many international megaregions.²⁵ It has seen fast population growth and withering infrastructure investment and is comprised of national and sub-national actors.²⁶ Zooming in on one of the Cascadia megacities, the Seattle metropolitan area alone saw an influx of nearly 800,000 people between 2010 and 2017.²⁷

In Cascadia and across the United States, the effects of the recent rapid growth in urban population were fueled by historic shifts in culture and society.²⁸ Tracing a line back to slavery through redlining, exclusionary

19. *See id.*

20. Megacities are defined by the United Nations as cities with more than 10 million inhabitants. *See id.* at 55.

21. *Id.* at 1.

22. *See* Cobb & Braithwaite, *supra* note 16, at 50, 54–55.

23. Megaregions are highly populated and interconnected areas that span city, county, state, and even international borders. *See* Olivia Posner, *What Are Megaregions?*, COOP. MOBILITY FOR COMPETITIVE MEGAREGIONS, UNIV. TRANSP. CTR., <https://sites.utexas.edu/cm2/what-are-megaregions> [<https://perma.cc/V5R9-SBLA>].

24. *See* YOAV HAGLER, REG'L PLAN. ASS'N, *DEFINING U.S. MEGAREGIONS* (2009), <https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/2050-Paper-Defining-US-Megaregions.pdf> [<https://perma.cc/374V-V2ZQ>].

25. *See* Richard Florida, *The Real Powerhouses That Drive the World's Economy*, BLOOMBERG: CITYLAB (Feb. 28, 2019, 6:57 AM), <https://www.bloomberg.com/news/articles/2019-02-28/mapping-the-mega-regions-powering-the-world-s-economy> [<https://perma.cc/K2VL-LGCL>] (identifying twenty-nine megaregions throughout the world).

26. *See* Brian Cochrane, *B.C.'s Economic Recovery Hinges upon Massive, Sustained Infrastructure Investment*, VANCOUVER SUN (Jan. 18, 2022), <https://vancouversun.com/sponsored/news-sponsored/b-c-s-economic-recovery-hinges-upon-massive-sustained-infrastructure-investment> [<https://perma.cc/JR6D-T8WP>]; Amanda Arden, *Oregon Infrastructure Needs Funding 'at Much Higher Level'*, KOIN 6 NEWS (Sept. 1, 2021, 6:30 PM), <https://www.koin.com/news/special-reports/oregon-infrastructure-needs-funding-at-much-higher-level/> [<https://perma.cc/5HL2-6G99>].

27. *See* Hanley Wood Data Studio, *The Amazon Effect: Lessons Learned from Seattle*, BUILDER (Apr. 9, 2018), <https://www.builderonline.com/money/economics/the-amazon-effect-lessons-learned-from-seattle> [<https://perma.cc/D3Y7-32A5>].

28. *See* Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1276–80 (2006).

real estate practices limited where African Americans could live.²⁹ American cities experienced an exodus of White people from the city to the suburbs, the “white flight,”³⁰ beginning post-World War II, accelerating through the Civil Rights movement, and reaching its zenith in the 1980s.³¹ So pervasive was this racial phenomenon that even the terms “urban” and “suburban” became coded language.³² As people and their tax dollars fled to the suburbs, cities saw a drastic drop in urban investment and infrastructure funding.³³

Now the exodus is reversing, however, and the suburban dream dwindling.³⁴ Partly driven by a cultural rejection of Baby Boomers’ suburbia, many young professionals now favor urban life.³⁵ The influx of new capital, including white, inter-generational wealth from the suburbs, contributes to skyrocketing rent and real estate prices in urban centers.³⁶ For underfunded city infrastructure and existing residents, the result is a “hypergentrification” of urban centers.³⁷

In Cascadia, cities that have been under-resourced for decades are now

29. DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* 4–9 (2007).

30. See William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOCIO. REV. 425, 426–27 (1979); see also Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189 (2016) (explaining that “white flight” not only reinforced racial and socio-economic segregation but removed capital in the form of tax revenues from the city budgets, in turn leading to stagnation of urban infrastructure).

31. See Frey, *supra* note 30.

32. See Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a ‘Race-Making Situation’*, 35 U. MICH. J.L. REFORM 749, 750 (2002) (“[S]uburban’ and ‘urban’ often function as racial shorthand—suburban for ‘White’ and urban for ‘Black.’”).

33. See James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 42 URB. LAW. 179, 186–87 (2010); Glaeser & Gottlieb, *supra* note 28, at 1276–80.

34. See Frederick Peters, *The Rise and Fall of the Suburbs*, FORBES (Aug. 14, 2019, 9:03 AM), <https://www.forbes.com/sites/fredpeters/2019/08/14/the-rise-and-fall-of-the-suburbs/?sh=d0c073a54991> [<https://perma.cc/C5NQ-6GKR>]; see also John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 436–37 (2003).

35. See Powell & Spencer, *supra* note 34, at 436–37; see also JOSEPH CORTRIGHT, *CEOS FOR CITIES, THE YOUNG AND RESTLESS IN A KNOWLEDGE ECONOMY* 1 (2005), <https://forwardcities.org/old/wp-content/uploads/2018/04/Young-and-Restless-in-a-Knowledge-Economy.pdf> [<http://perma.cc/AQK3-VLJV>] (explaining that urban centers have increasingly become the residential destination of choice for young college graduates); Glaeser & Gottlieb, *supra* note 28, at 1276–80.

36. See Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 467 (2018); see also Swati Prakash, *Racial Dimensions of Property Value Protection under the Fair Housing Act*, 101 CALIF. L. REV. 1437 (2013); Gene Balk, *As Seattle Gentrifies, One-Quarter of Recent Movers Were Forced Out, Survey Shows*, SEATTLE TIMES (July 26, 2020, 3:56 PM), <https://www.seattletimes.com/seattle-news/data/as-seattle-gentrifies-one-quarter-of-recent-movers-were-forced-out-survey-shows> [<http://perma.cc/3DMR-MZ56>].

37. See Li, *supra* note 30; see also Olatunde C.A. Johnson, *Unjust Cities?: Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835 (2019).

feeling the two-fold effects of rapid urbanization and climate change straining their infrastructure.³⁸ Like most large American cities, Seattle is scrambling to reinvest in its infrastructure, from transportation³⁹ to sewage.⁴⁰ In Portland, recent heat waves have buckled city streets, illustrating the effects of underfunded infrastructure paired with the increasing threat of climate change.⁴¹ Vancouver also faces similar infrastructure pressures from urbanization⁴² and climate change.⁴³

The threat posed by climate change is not unique to the Cascadia megaregion, but its impact is shockingly apparent.⁴⁴ As global temperatures increase, so too do the temperatures and extreme weather in the historically mild Pacific Northwest.⁴⁵ The summer heat wave of 2021 did not just set new record high temperatures, it did so by as much as five degrees Celsius.⁴⁶ The heat wave would not have been possible without climate change.⁴⁷ The effects of climate change go beyond just warmer

38. See RHYS ROTH, CTR. FOR SUSTAINABLE INFRASTRUCTURE, *INFRASTRUCTURE CRISIS, SUSTAINABLE SOLUTIONS: RETHINKING OUR INFRASTRUCTURE INVESTMENT STRATEGIES 4-6* (Craig Partridge ed., 2014), <http://centerforsustainableinfrastructure.org/wp-content/uploads/2018/09/CSI-Infrastructure-Crisis-Report.pdf> [<https://perma.cc/BZ7D-GPRC>].

39. See Heidi Groover, *Seattle Scales Back Earthquake Work on City Bridges as Costs Soar*, SEATTLE TIMES (Dec. 21, 2020, 10:57 AM), <https://www.seattletimes.com/seattle-news/transportation/seattle-scales-back-earthquake-work-on-city-bridges-as-costs-soar> [<https://perma.cc/65ZT-W887>].

40. See Pritchett & Qiao, *supra* note 36; David Fox, *Halting Urban Sprawl: Smart Growth in Vancouver and Seattle*, 33 B.C. INT'L & COMP. L. REV. 43 (2010); see also Jonathan Rosenbloom, *Fifty Shades of Gray Infrastructure: Land Use and the Failure to Create Resilient Cities*, 93 WASH. L. REV. 317 (2018).

41. See Mark Puleo, *Records Smashed Again: Portland Infrastructure Crumbles under 116-Degree Heat*, ACCUWEATHER (July 1, 2021, 12:49 AM), <https://www.accuweather.com/en/weather-news/portland-infrastructure-crumbles-record-116-degree-heat/970936> [<https://perma.cc/Z3HQ-CY62>].

42. See Frances Bula, *Mad Dash to Build Vancouver Housing Leaves Infrastructure Behind*, GLOBE & MAIL (Aug. 3, 2021), <https://www.theglobeandmail.com/canada/british-columbia/article-mad-dash-to-build-vancouver-housing-leaves-infrastructure-behind/> [<https://perma.cc/PY8L-SS3D>].

43. See Ian Austen & Vjosa Isai, *Vancouver Is Marooned by Flooding and Besieged Again by Climate Change*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/2021/11/21/canada-flooding-climate-change.html> [<https://perma.cc/UDG4-UE8R>].

44. See Oliver Milman, *'Nowhere Is Safe': Heat Shatters Vision of Pacific North-West as Climate Refuge*, GUARDIAN (July 22, 2021, 2:00 AM), <https://www.theguardian.com/us-news/2021/jul/21/pacific-northwest-heatwave-dome-climate-change> [<https://perma.cc/LEE6-W8MD>].

45. See Carolyn Gramling, *Human-Driven Climate Change Sent Pacific Northwest Temperatures Soaring*, SCIENCE NEWS (July 7, 2021, 7:28 PM), <https://www.sciencenews.org/article/human-driven-climate-change-pacific-northwest-heat-wave-temperatures> [<https://perma.cc/B55Q-MF2M>].

46. See *id.*

47. See SJOUKJE Y. PHILIP, SARAH F. KEW, GEERT JAN VAN OLDENBORGH, WENCHANG YANG, GABRIEL A. VECCHI, FARON S. ANSLOW, SIHAN LI, SONIA I. SENEVIRATNE, LINH N. LUU, JULIE ARRIGHI, ROOP SINGH, MAARTEN VAN AALST, MATHIAS HAUSER, DOMINIK L. SCHUMACHER,

weather, as increased temperatures result in drier conditions and more forest fires.⁴⁸ Furthermore, floods and landslides are more likely in the aftermath of a forest fire.⁴⁹ Unfortunately, the international system continues to drag its feet on addressing climate change.⁵⁰

When American sub-national actors face urgent issues that span international borders, national responses are often stymied by the slow-moving and fickle federal government.⁵¹ Three factors bog down federal responses: the complexity of the federal administrative state,⁵² partisan rancor and obstructionism in Congress,⁵³ and reversals of executive branch policy every four to eight years.⁵⁴ Against this backdrop, the federal government struggles to address the international problems that affect state and local governments.⁵⁵ Furthermore, macro-level federal interventions are often too broad and slow to address local issues alone.⁵⁶

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48. See Jessica E. Halofsky, David L. Peterson & Brian J. Harvey, *Changing Wildfire, Changing Forests: The Effects of Climate Change on Fire Regimes and Vegetation in the Pacific Northwest, USA*, 16 FIRE ECOLOGY, Jan. 27, 2020.

49. See Cal. Water Sci. Ctr., *Post-Fire Flooding and Debris Flow*, USGS (June 5, 2018), <https://www.usgs.gov/centers/california-water-science-center/science/post-fire-flooding-and-debris-flow#overview> [<https://perma.cc/W3FD-GW8B>]; see also Austen & Isai, *supra* note 43.

50. See Editorial, *World Leaders Are Failing Our Future Generations on Climate Change*, WASH. POST (Oct. 6, 2019, 5:59 PM), https://www.washingtonpost.com/opinions/world-leaders-are-failing-our-future-generations-on-climate-change/2019/10/06/625a92f8-e618-11e9-a331-2df12d56a80b_story.html [<https://perma.cc/23GY-YAP8>].

51. The whipsawing of administration priorities from the Obama Administration to the Trump Administration to the Biden Administration demonstrates the volatility in leadership and priorities. Cf. Philip A. Wallach & Justus Myers, *The Federal Government's Coronavirus Response—Public Health Timeline*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/> [<https://perma.cc/F4G2-F6TF>].

52. See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 157 (2016).

53. See Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FOREST J.L. & POL'Y 87, 88 (2017).

54. See Richard Haass, *Present at the Disruption: How Trump Unmade U.S. Foreign Policy*, 99 FOREIGN AFFS., Sept.–Oct. 2020, at 24, 34.

55. See Edward Sullivan & A. Dan Tarlock, *The Western Urban Landscape and Climate Change*, 49 ENV'T L. 931 (2019); THOMAS HALE, DAVID HELD & KEVIN YOUNG, GRIDLOCK: WHY GLOBAL COOPERATION IS FAILING WHEN WE NEED IT MOST (2013).

56. See Jeff Stein, *Trump's 2016 Campaign Pledges on Infrastructure Have Fallen Short, Creating Opening for Biden*, WASH. POST (Oct. 18, 2020, 11:32 AM), <https://www.washingtonpost.com/us-policy/2020/10/18/trump-biden-infrastructure-2020/> [<https://perma.cc/3BFG-WNJT>]; Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480 (2017); Swiney, *supra* note 6.

Enter the humble sub-national actor: the province, state, or city.⁵⁷ Where the federal government is too slow,⁵⁸ too distracted by domestic issues,⁵⁹ acting against local interests,⁶⁰ or uninterested in leading,⁶¹ sub-national actors may feel the need to act on behalf of their constituents.⁶²

However, American cities and states have historically been prevented from engaging in meaningful international relations.⁶³ American paradiplomacy faces legal hurdles and outright constitutional prohibitions.⁶⁴ Although the Constitution reserves to states all powers not specifically granted to the federal government,⁶⁵ it does grant the power to make treaties and compacts with other nations to the federal government.⁶⁶ Furthermore, the federal government carved out almost all other international relations powers through Supreme Court jurisprudence and federal preemption.⁶⁷ The Supreme Court distills these concepts into the One Voice Doctrine: state laws or actions that “prevent this Nation from ‘speaking with one voice’ in regulating foreign commerce” are unconstitutional.⁶⁸ Perhaps owing to the strength of the One Voice Doctrine and clarity of constitutional prohibitions, the literature and jurisprudence regarding sub-national actors in the United States forming agreements and compacts with other international sub-national actors is

57. See Swiney, *supra* note 6.

58. See David Cooper & Jaimie Worker, *The Coronavirus Pandemic Requires State and Local Policymakers to Act, in Addition to Demanding a Strong Federal Response*, ECON. POL’Y INST.: WORKING ECON. BLOG (Mar. 17, 2020, 11:41 AM), <https://www.epi.org/blog/the-coronavirus-pandemic-requires-state-and-local-policymakers-to-act-in-addition-to-demanding-a-strong-federal-response> [<https://perma.cc/TE52-H57M>].

59. See David Jackson, *Trump Says Impeachment ‘Probably’ Distracted Him from Fighting Coronavirus*, USA TODAY (Apr. 1, 2020, 5:50 PM), <https://www.usatoday.com/story/news/politics/2020/03/31/coronavirus-trump-says-impeachment-distracted-him-coronavirus/5100694002> [<https://perma.cc/J4NZ-4AFK>].

60. See Taryn Luna & Tony Barboza, *Gov. Gavin Newsom Blasts Trump at Climate Event: ‘I’m Absolutely Humiliated’*, L.A. TIMES (Sept. 23, 2019, 3:49 PM), <https://www.latimes.com/california/story/2019-09-23/gavin-newsom-un-climate-change-event-new-york> (last visited May 26, 2022).

61. See Brian Bennett, *COVID-19 Is Spiking—and Donald Trump Has Pulled a ‘Disappearance Act’*, TIME (Nov. 18, 2020, 9:25 AM), <https://time.com/5912675/donald-trump-president-covid-19> [<https://perma.cc/A32F-R59F>].

62. See Swiney, *supra* note 6.

63. See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 341–48 (1999).

64. See *infra* Part II.

65. See U.S. CONST. amend. X.

66. See *infra* Part II.A.

67. See *id.*

68. See *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 451 (1979).

sparse at best.⁶⁹

This Comment builds on the emerging legal literature on American paradiplomacy by focusing on the Cascadia megaregion in the Pacific Northwest. It shines a light into the less-explored corners of American foreign policy powers, searching for any remaining room for cities and states to occupy. The growing problems of megacities and megaregions within the United States highlight the impacts of climate change and decaying infrastructure. The Supreme Court's One Voice Doctrine should not mean that only a single voice can be heard but rather should allow the many voices of sub-national actors to sing in harmony. The federal government should endeavor to loosen the restrictions on sub-national actors and allow them to become the "happy incident"⁷⁰ laboratories for the country again.

Part I describes and places paradiplomacy in the context of the current international community and explores the challenges of addressing global issues at this level. Part II examines the constitutional restrictions on state and local involvement in international affairs. Part III examines past attempts and examples of American paradiplomacy. Part IV describes issues facing the Cascadia megaregion and historical examples of paradiplomacy in the region, and analyzes their respective successes and structures. Part V proposes that the federal government should embrace and encourage—rather than fighting or ignoring—American sub-national governments' efforts to engage their international counterparts to address issues.

I. SUB-NATIONAL ACTORS AND PARADIPLMACY

For nearly 400 years, international affairs has primarily been the province of nation states.⁷¹ However, urbanization is shifting the balance of power towards cities and states.⁷² Accordingly, paradiplomacy has "broaden[ed] the universe of international affairs, in which [nations] are no longer the sole actors."⁷³ The definition of paradiplomacy is both broad and flexible: it can refer to sub-national governments like cities or states,

69. This Comment focuses on the United States law and jurisprudence regarding sub-national actors engaging with their international peers. For an exploration of how Canadian law impacts such agreements, see David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 ENV'T L. REP. 10478, 10488–90 (2016).

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

71. See Gross, *supra* note 3, at 20.

72. See Schragger, *supra* note 6.

73. See Michael Keating, *Regions and International Affairs: Motives, Opportunities and Strategies*, in *PARADIPLMACY IN ACTION: THE FOREIGN RELATIONS OF SUBNATIONAL GOVERNMENTS* 1, 6 (Francisco Aldecoa & Michael Keating eds., 1999).

or non-state actors like international advocacy organizations.⁷⁴ However, for this Comment, the working definition of paradiplomacy is sub-national governments engaging in official international relations with actors outside of their national sovereign.⁷⁵

Paradiplomacy fills the widening gap created by nation states' dominance over international relations and their inability to manage an increasingly complex and interconnected world.⁷⁶ Nowhere is this more apparent than in the countless failed attempts to address climate change at the international level.⁷⁷ Addressing climate change requires nation states to put aside their self-interest for the greater good: they face the "free-rider" problem⁷⁸ without effective enforcement mechanisms.⁷⁹ Around the world, sub-national actors grow tired of gridlock and call for a reimagining of international affairs orthodoxy.⁸⁰ Some advocate for greater integration of sub-national actors into—or creation of new—regional⁸¹ or global⁸² supranational organizations.⁸³

Cities, states, and provinces must begin to assert themselves and define their own international role in the realms of economic development,

74. See ANDRÉ LECOURE, DISCUSSION PAPERS IN DIPLOMACY: POLITICAL ISSUES OF PARADIPLMACY: LESSONS FROM THE DEVELOPED WORLD 1, 2–3 (Virginie Duthoit & Ellen Huijgh eds., 2008).

75. This is, of course, a major simplification. For a more detailed and nuanced exploration of paradiplomacy, see RODRIGO TAVARES, PARADIPLMACY: CITIES AND STATES AS GLOBAL PLAYERS (2016).

76. See Richard Falk, *What Comes After Westphalia: The Democratic Challenge*, 13 WIDENER L. REV. 243, 244 (2007).

77. See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 190–94 (2005); see also Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN RELS. (Nov. 17, 2021, 2:30 PM), <https://www.cfr.org/background/paris-global-climate-change-agreements> [<https://perma.cc/TPX7-69QB>] (including the 1997 Kyoto Protocol and 2015 Paris Agreement as notable failures).

78. The free-rider problem is an economic theory where certain members of a group benefit from something without contributing to the creation of the benefit. In the global warming context, the benefit would be a habitable world and the contribution would be reducing green-house gas emissions. Some nations are reluctant to bear the cost of the reductions if others refuse to reduce yet enjoy the benefit of the reducing nations. Cf. Engel & Saleska, *supra* note 77, at 190–94.

79. See Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1, 3 (1984).

80. See *infra* Part III. The growth of paradiplomatic organizations, such as the United Cities and Local Governments, C40, and other international organizations comprised of sub-national governments.

81. I.e., the European Union.

82. I.e., the United Nations.

83. See Falk, *supra* note 76, at 244 (discussing the “emergence of a different structure of world order that is sufficiently receptive to the emergence of supranational forms of regional and global governance, as well as exhibiting the agency of non-state actors, as to qualify as ‘post-Westphalian’”).

environmental issues, and regional community building.⁸⁴ The form and substance of these roles will be shaped and curbed by prevailing international and intranational systems and norms.⁸⁵ Beyond the basic structural limitations on their foreign relations powers, sub-national actors in the United States must contend with a polarized and often-gridlocked national government.⁸⁶

A. *Paradiplomacy's Parameters*

In its simplest iteration, paradiplomacy is sub-national actors engaging with the international community.⁸⁷ However, unpacking the “who,” “what,” and “how” reveals the complexity of paradiplomacy through the number of potential permutations.⁸⁸ Paradiplomatic actors can be any entity below the nation state level and do not need to be officially recognized units within the traditional governmental structure.⁸⁹ Further, the form of paradiplomacy varies greatly, from traditional diplomacy to coalition-building to economic agreements.⁹⁰ Modern examples of paradiplomacy are municipal or state government action on climate, trade, or civil society.⁹¹ These actions can be direct relations with another nation state or sub-national government, or indirect relations through

84. See Swiney, *supra* note 6, at 229–30.

85. See Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 INT'L & COMP. L.Q. 161, 162 (2005).

86. See Earl H. Fry, *The Role of U.S. State Governments in International Relations, 1980–2015*, 22 INT'L NEGOT. 205, 232 (2017).

87. See Swiney, *supra* note 6, at 227.

88. See Joana Setzer, *Testing the Boundaries of Subnational Diplomacy: The International Climate Action of Local and Regional Governments*, 4 TRANSNAT'L ENV'T L. 319 (2015).

89. See *id.* For an illuminating example, see the chart of government agencies involved in the implementation of a hypothetical autonomous vehicle lane between Vancouver and Seattle. Margot Young, Justin Choi, Kate Gotziaman, Hugh Spitzer, Greyson Blue & Dylan Olson, Cascadia L. Initiative, Comparison of British Columbia and Washington State City Powers 105–06 (2020) [hereinafter “CLI Paper”] (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3580956 [<https://perma.cc/8GV8-FMCG>].

90. See Setzer, *supra* note 88, at 319, 326 n.38 (summarizing seven forms of paradiplomacy: “(i) political representation abroad; (ii) treaty-making power; (iii) entering into agreements of a formalized nature (political declarations of intent and/or cooperation agreements, transnational contracts, and cultural agreements and partnerships); (iv) developing [programs] of assistance and sharing of know-how (bilateral or multilateral [programs], [programs] on cross boundary cooperation); (v) participating in multilateral frameworks and organizations (observing or participating in technical committees, becoming an associate member of multilateral organizations); (vi) participation in formal or informal networks; and (vii) developing a public diplomacy, both domestic and international” (citing David Crikemans, *Regional Sub-State Diplomacy from a Comparative Perspective: Quebec, Scotland, Bavaria, Catalonia, Wallonia and Flanders*, 5 HAGUE J. DIPL. 37, 37–46 (2010))).

91. See Fry, *supra* note 86, at 232; Swiney, *supra* note 6, at 229–30.

international communities and non-profit organizations.⁹² Examples of indirect paradiplomacy are informal cooperative networks furthering education or cultural ideas,⁹³ integration into supranational agendas,⁹⁴ formal networks mirroring nation state-based international coalitions,⁹⁵ and creating international local law where possible.⁹⁶ Paradiplomacy can even be a sub-national independence group (Kosovo⁹⁷ or South Sudan⁹⁸) establishing diplomatic ties with other members of the international community.⁹⁹

Paradiplomacy's breadth is primarily constrained and defined by the delegation of powers and sovereignty between a national government and sub-national actor.¹⁰⁰ Nation states vary in how they structure their international relations powers; the North American federal system of government is a distinct international minority.¹⁰¹ Interestingly, some nation states grant broader international powers to sub-national actors than they reserve for their national government, although this is by far the exception, not the rule.¹⁰² One example of this unique internal power

92. See Nina Hachigian, *Cities Will Determine the Future of Diplomacy*, FOREIGN POL'Y (Apr. 16, 2019, 9:21 AM), <https://foreignpolicy.com/2019/04/16/cities-will-determine-the-future-of-diplomacy> [<https://perma.cc/LC6A-G3YW>].

93. The United Cities and Local Government organization is a "global network of cities and local, regional, and metropolitan governments and their associations . . . committed to representing, defending, and amplifying the voices of local and regional governments to leave no-one and no place behind." *Who We Are*, UNITED CITIES & LOC. GOV'T, <https://www.uclg.org/en/organisation/about> [<https://perma.cc/XEA9-VFF2>]. The organization strives to improve and empower local governments to address global issues in the absence of cohesive international leadership. *What Is Our Global Agenda?*, UNITED CITIES & LOC. GOV'T, <https://www.uclg.org/en/agenda/global-agenda-of-local-regional-governments> [<https://perma.cc/8LXT-MAEF>].

94. The U.S. Climate Alliance is one example of sub-national actors (U.S. States, through their Governors) taking action in furtherance of the goals of the Paris Agreement in the absence of Federal leadership. See *Alliance Principles*, U.S. CLIMATE ALL., <http://www.usclimatealliance.org/alliance-principles> [<https://perma.cc/ZXN7-WNPW>].

95. The C40 organization is a collection of ninety-seven of the world's largest major international cities that are banding together. The mayors of the C40 cities represent more than 700 million citizens and one quarter of the global economy and are focused on delivering on the most ambitious goals of the Paris Agreement at the local level. *About C40*, C40 CITIES, <https://www.c40.org/about> [<https://perma.cc/3V9Q-JELC>].

96. See Swiney, *supra* note 6, at 229–30.

97. See Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779 (2009).

98. See Salman M.A. Salman, *South Sudan Road to Independence: Broken Promises and Lost Opportunities*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 343 (2013).

99. See Tierney, *supra* note 85, at 162 (citing Basque and Quebecois independence movements as examples of paradiplomatic efforts).

100. See *id.*

101. See Fry, *supra* note 86, at 210.

102. See LECOURS, *supra* note 74, at 7–8.

structure is that of Belgian provinces; they are constitutionally required to ratify international positions and are empowered to veto proposed treaties.¹⁰³ Although facets of paradiplomacy can be found throughout the international arena, modern American paradiplomacy has only recently emerged.¹⁰⁴

B. *Federal Failures*

American cities and states are finding solutions to global problems because the federal government too often fails to lead. Polarized politics in the U.S. is not new,¹⁰⁵ but the severity of its effects seem to be growing: a perpetually gridlocked Congress¹⁰⁶ and the bi-polarization of American foreign policy when the Oval Office changes parties.¹⁰⁷ An incumbent party loss can undo four to eight years of progress and policies.¹⁰⁸ The election of Donald Trump in 2016 was fueled, in large part, by antipathy to the Obama administration.¹⁰⁹ Trump's isolationist "America First" diplomacy reversed the neo-liberal international priorities and policies of the Obama administration.¹¹⁰ Trump's withdrawal from the 2015 Paris Climate Accords—and Biden's subsequent recommittal—proved that America's position on issues could shift dramatically every four years.¹¹¹ This instability underscores why American cities and states cannot count

103. *See id.*

104. *See* Swiney, *supra* note 6, at 229–30.

105. *See* David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 35 (2019).

106. *See* Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2117 (2013) (relating a personal anecdote about a Senator stating that his opposition to a bill was not about policy, but about simply blocking the bill); *see also* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2086 (2013) (suggesting that the polarization of Congress is reflective of a more polarized nation, such that gridlock is not a symptom of Congressional dysfunction, but American dysfunction).

107. *See* Haass, *supra* note 54, 27–28.

108. *See* Lisa Freidman, *Trump Wants to Repeal Obama's Climate Plan. The Next Fight: Its Replacement*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/climate/clean-power-plan.html> [<https://perma.cc/7B5P-KPEU>].

109. Of course, many political commentators and researchers also fault the rise in social media misinformation campaigns, among others. *See* Anthony Gaughan, *Explaining Donald Trump's Shock Election Win*, SCI. AM. (Nov. 9, 2016), <https://www.scientificamerican.com/article/explaining-donald-trump-s-shock-election-win> [<https://perma.cc/78L4-FGDE>].

110. *See* J. Timmons Roberts, *Undermining a Weak Agreement: Fossil Capitalism, Neoliberal Climate Governance, Paris and a Just Transition After Trump*, 33 CONN. J. INT'L L. 425 (2018). *See generally* *America First Foreign Policy*, WHITE HOUSE, <https://web.archive.org/web/20170224011956/https://www.whitehouse.gov/america-first-foreign-policy> (last visited Apr. 8, 2022).

111. *See Paris Climate Deal: Trump Pulls US out of 2015 Accord*, BBC NEWS (June 1, 2017), <https://www.bbc.com/news/world-us-canada-40127326> [<https://perma.cc/RXW3-NKL8>].

on the federal government to solve global problems.¹¹²

Two interrelated crises, climate change and urbanization, further illustrate the ineffectiveness of a fickle and slow federal government.¹¹³ Climate change is one of the most complex issues in modern international diplomacy; it requires political commitments for wholesale environmental regulatory reform and expensive infrastructure investments from all industrialized countries.¹¹⁴ Unfortunately, these required reforms face widespread apathy, skepticism, misinformation, and complacency.¹¹⁵ In the United States, congressional partisan gridlock continues to block meaningful federal greenhouse gas legislation, despite a majority of Americans agreeing on its importance.¹¹⁶

The federal government also does little to help cities and states by way of supplying infrastructure funding and mitigating the effects of urbanization and climate change.¹¹⁷ One result is that urbanization and climate change are hastening the decay of the already-crumbling infrastructure of the United States.¹¹⁸ Examples of America's decrepit infrastructure abound: the I-35W bridge collapse in Minneapolis,¹¹⁹ California's rolling blackouts and wildfires,¹²⁰ collapsed levees in New

112. See Freidman, *supra* note 108.

113. See Cobb & Braithwaite, *supra* note 16.

114. See Sander Chan, Clara Brandi & Steffen Bauer, *Aligning Transnational Climate Action with International Climate Governance: The Road from Paris*, 25 REV. EUR. COMP. & INT'L ENV'T L. 238, 238–39 (2016).

115. See Aaron M. McCright, *The Polarization of U.S. Public Opinion on Climate Change*, SCHOLARS STRATEGY NETWORK (Jan. 1, 2013), <https://scholars.org/contribution/polarization-us-public-opinion-climate-change> [<https://perma.cc/4FMB-32AN>]; see CARY FUNK & BRIAN KENNEDY, PEW RSCH. CTR. THE POLITICS OF CLIMATE (2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/10/PS_2016.10.04_Politics-of-Climate_FINAL.pdf [<https://perma.cc/V7AF-8Y2B>].

116. See Brian Kennedy, *Most Americans Say Climate Change Affects Their Local Community, Including 70% Living Near the Coast*, PEW RSCH. CTR. (June 29, 2020), <https://www.pewresearch.org/fact-tank/2020/06/29/most-americans-say-climate-change-impacts-their-community-but-effects-vary-by-region-2> [<https://perma.cc/E632-YBXX>].

117. I acknowledge that President Biden and the Democrats were able to pass an infrastructure bill, although several crucial climate change provisions were left out. See Jim Tankersley, *How Biden Got the Infrastructure Deal Trump Couldn't*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/07/29/business/economy/biden-infrastructure-deal.html> [<https://perma.cc/YT6U-GVJX>].

118. See Rosenbloom, *supra* note 40; Cobb & Braithwaite, *supra* note 16, at 45.

119. See David Schaper, *10 Years After Bridge Collapse, America Is Still Crumbling*, NPR (Aug. 1, 2017, 9:52 AM), <https://www.npr.org/2017/08/01/540669701/10-years-after-bridge-collapse-america-is-still-crumbling> [<https://perma.cc/2T3R-VAAR>].

120. See Sammy Roth, *What Caused California's Rolling Blackouts? Climate Change and Poor Planning*, L.A. TIMES (Oct. 6, 2020, 7:03 PM), <https://www.latimes.com/environment/story/2020-10-06/california-rolling-blackouts-climate-change-poor-planning> (last visited May 26, 2022).

Orleans during Hurricane Katrina,¹²¹ and the Flint water crisis.¹²²

America's decaying infrastructure reflects both national and local neglect.¹²³ The American Society of Civil Engineers (ASCE) grades the infrastructure of the United States every four years.¹²⁴ Akin to climate change, the United States has consistently failed to address the infrastructure issue, earning a D+ in both 2013 and 2017.¹²⁵ In 2019, Oregon earned a C- and Washington fared only slightly better with a C.¹²⁶ The 2021 national report card marks the first time since ASCE began issuing report cards that the United States has received higher than a D, earning a C-.¹²⁷

A warmer and more urban future awaits the Cascadia megaregion.¹²⁸ History shows that the international order and federal government are unreliable partners for cities and states facing extreme weather and crumbling infrastructure.¹²⁹ Unfortunately for the cities and states who would like to reach beyond the borders of the U.S., they are silenced by

121. See Adrienne LaFrance, *A Brief History of Levees*, ATLANTIC (Aug. 31, 2015), <https://www.theatlantic.com/technology/archive/2015/08/a-brief-history-of-levees/402119> [<https://perma.cc/32A4-WECA>].

122. See Joseph W. Kane & Robert Puentes, *Flint's Water Crisis Highlights Need for Infrastructure Investment and Innovation*, BROOKINGS: THE AVENUE (Jan. 13, 2016), <https://www.brookings.edu/blog/the-avenue/2016/01/13/flints-water-crisis-highlights-need-for-infrastructure-investment-and-innovation> [<https://perma.cc/E8D2-HMAT>].

123. See Kevin Longley, *ASCE 2021 Infrastructure Report Card Gives U.S. 'C-' Grade*, ASCE (Mar. 4, 2021), <https://infrastructurereportcard.org/asce-2021-infrastructure-report-card-gives-u-s-c-grade> [<https://perma.cc/Y6Z7-KSVQ>].

124. See Pamela Engel, *10 Signs That US Infrastructure Is a Disaster*, BUS. INSIDER (July 30, 2013, 3:33 PM), <https://www.businessinsider.com/10-signs-that-us-infrastructure-is-a-disaster-2013-7> [<https://perma.cc/U8KN-DJA9>]; Tim Hornyak, *Crisis in America: A Crumbling Infrastructure*, CNBC (Apr. 11, 2018, 11:08 AM), <https://www.cnbc.com/2013/11/21/crisis-in-america-a-crumbling-infrastructure.html> [<https://perma.cc/BD2S-4N5Y>]; *Hearing on Our Nation's Crumbling Infrastructure and the Need for Immediate Action Before the H. Comm. on Ways and Means*, 116th Cong. 1 (2019) (statement of Gregory DiLoreto, Am. Soc'y of Civ. Eng'rs).

125. See AM. SOC'Y OF CIVIL ENG'RS, 2017 INFRASTRUCTURE REPORT CARD (2018), <https://2017.infrastructurereportcard.org> [<https://perma.cc/E78V-TWBH>]; AM. SOC'Y OF CIVIL ENG'RS, 2013 INFRASTRUCTURE REPORT CARD (2014), <https://2013.infrastructurereportcard.org> [<https://perma.cc/YMC2-7HVM>].

126. See AM. SOC'Y OF CIVIL ENG'RS, 2019 WASHINGTON INFRASTRUCTURE REPORT CARD, <https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/2019-WA-Infrastructure-Report-Card.pdf> [<https://perma.cc/W7CS-5FZ7>]; AM. SOC'Y OF CIVIL ENG'RS, 2019 OREGON INFRASTRUCTURE REPORT CARD, https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/FullReport-OR_2019.pdf [<https://perma.cc/PK4S-UWP2>].

127. See Longley, *supra* note 123.

128. See, e.g., James Brasuell, *Cascadia Expects Millions of New Residents. Should It Build New Cities or New Density?*, PLANETIZEN (Nov. 30, 2020, 9:00 AM), <https://www.planetizen.com/news/2020/11/111373-cascadia-expects-millions-new-residents-should-it-build-new-cities-or-new> [<https://perma.cc/A8BB-EVUN>].

129. See generally Cobb & Braithwaite, *supra* note 16, at 45.

the federal government's supremacy over international relations and the One Voice Doctrine.

II. THE ONE VOICE DOCTRINE

In the United States, paradiplomacy faces several constitutional hurdles, chief among them being the notion that the nation must speak with “one voice” in foreign affairs.¹³⁰ The principle of the federal government as the sole arbiter of international relations extends back to the founding of the country.¹³¹ Through the Supremacy Clause,¹³² legislation, and landmark court cases over the years, the unenumerated foreign relations powers have been captured by the federal government.¹³³

The U.S. Supreme Court aided in this capture by creating the One Voice Doctrine, which “maintains that in its external relations the United States must be able to speak with one voice in order to achieve its interests and avoid negative responses from other nations.”¹³⁴ The One Voice Doctrine has roots that extend back to 1832.¹³⁵ The Doctrine itself is a collection of Supreme Court jurisprudence that prohibits sub-national actors from engaging in foreign affairs based on the Court's interpretations of—and the explicit restraints in—the Treaty and Compact Clauses of the U.S. Constitution,¹³⁶ as well as the implicit restraints of the Foreign Commerce and Dormant Foreign Affairs Clauses.¹³⁷

130. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

131. See THE FEDERALIST NO. 80 (Alexander Hamilton) (“[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”).

132. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land”)

133. For an examination of unenumerated foreign relations powers and their capture, see Louis Henkin, “*A More Effective System*” for *Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 751, 752–54 (1975) and Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 WASH. INT’L L.J. 395 (2019).

134. See David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954 (2014).

135. See Sarah H. Cleveland, *Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 980 (2001) (citing *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) as one of the first cases invalidating state laws in foreign affairs).

136. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”); *id.* cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power”).

137. See U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1230–31 (1999) (discussing the history of the Dormant Foreign Affairs power).

A. *Explicit Restraints: The Treaty Clause and Compact Clause*

The power to enter into, and approve, legally binding agreements with other international actors is clearly granted to the federal government through the text of the Treaty and Compact Clauses of the U.S. Constitution.¹³⁸ The Treaty Clause states that “[n]o State shall enter into any Treaty, Alliance, or Confederation.”¹³⁹ The Compact Clause similarly states that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”¹⁴⁰ The language of “[n]o State shall” found in both clauses is unambiguous in its prohibition of states entering into agreements with a “foreign Power.”¹⁴¹

The Treaty Clause has been the subject of very few legal challenges—scholars have suggested that this “thin” case law may be due to the clause’s “relative clarity.”¹⁴² Most Treaty Clause challenges are nearly a century old.¹⁴³ For the few cases it has seen, the Supreme Court has been decisive in keeping the ability to enter into treaties solely a federal power.¹⁴⁴

The most impactful case in asserting the “independent and exclusive

138. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”); *id.* cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power”).

139. See *id.* cl. 1.

140. See *id.* cl. 3.

141. See *id.* cl. 1; *id.* cl. 3.

142. See David V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 ENV'T L. REP. 10478, 10487–88 (2016). For a critique of the federal hegemony over the treaty power see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1138 (2000), but compare with J. MERVYN JONES, *FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE* 57 (1946) (“Yet no American court has defined a treaty [as a state agreement with an international actor]. There appears to be a vicious circle: treaties must be ratified by the President by and with the advice and consent of the Senate. If we ask what is a treaty, for this purpose, the answer is: any agreement which has been so ratified.”).

143. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (quoting *Burnet v. Brooks*, 288 U.S. 378 (1933) (“As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.”)); *United States v. Belmont*, 301 U.S. 324 (1937); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (finding that only treaties “of a political character” are subject to Article I).

144. See *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (“When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] it cannot negotiate an emissions treaty with China or India”). *But see* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. 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 was forbidden to make.”).

[federal] foreign affairs power”¹⁴⁵ is *United States v. Curtiss-Wright Export Corp.*¹⁴⁶ Despite revolving around a constitutional delegation-of-power issue between the executive and legislative branches, the dicta in *Curtiss-Wright* have served to exclude states from engaging in international relations.¹⁴⁷ The Court’s holding sourced the exclusivity of the federal government’s treaty-making power in the very nature of sovereignty, not just the U.S. Constitution.¹⁴⁸ This expansive reading of federal authority over the treaty power has stood unchanged.

The Compact Clause draws more notice and attention owing to its less absolute language.¹⁴⁹ The Supreme Court first contemplated the Compact Clause in *Holmes v. Jennison*.¹⁵⁰ Chief Justice Taney’s plurality decision required congressional consent for “every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.”¹⁵¹ Although never expressly overruled, “Taney’s absolutist vision of the Compact Clause”¹⁵² has been replaced with Justice Field’s test from *Virginia v. Tennessee*.¹⁵³ Field’s opinion was that the Compact Clause only applied to agreements that threatened the balance of federalism by “increas[ing] . . . political power in the states” at the expense of federal supremacy.¹⁵⁴ The Court’s modern jurisprudence favors Field’s “federal supremacy test,” which also holds that because not every agreement will threaten federal supremacy, not every agreement or compact requires congressional approval.¹⁵⁵ Importantly, the Court’s Compact Clause jurisdiction has focused on domestic compacts between

145. See Edward A. Purcell Jr., *Understanding Curtiss-Wright*, 31 LAW & HIST. REV. 653, 653 (2013).

146. 299 U.S. 304 (1936).

147. *Id.* at 311.

148. *Id.* at 318 (“[T]he powers of external sovereignty did not depend upon the affirmative grants of the Constitution . . . but in the law of nations.”).

149. See Thomas Liefke Eaton, *Reanimating the Foreign Compacts Clause*, 45 WM. & MARY ENV’T L. & POL’Y REV. 29, 30–31 (2020).

150. 39 U.S. (14 Pet.) 540, 571–72 (1840) (“[S]tates are forbidden to enter into any ‘agreement’ or ‘compact’ with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word ‘treaty.’ They evidently mean something more, and were designed to make the prohibition more comprehensive.”).

151. See *id.* at 572.

152. See Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1086 (2008).

153. 148 U.S. 503 (1893).

154. See *id.* at 519.

155. See *id.* at 518 (finding “[t]here are many matters upon which different states may agree that can in no respect concern the United States”); see also *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459–60 (1978) (dismissing the idea that the Compact Clause is an absolute prohibition on states entering into agreements.).

states.¹⁵⁶ In the foreign relations realm, the Court’s evolved “federal supremacy” test has never been applied.¹⁵⁷

The Court has crafted two related tests to determine whether an agreement reaches the level of a compact, and if so, whether the compact infringes on federal supremacy. The first is a four-part test regarding the “classic indicia of a compact.”¹⁵⁸ To find whether an agreement is a compact under the Compact Clause, courts look at whether the agreement (a) sets up a regulatory organization or body; (b) conditions action on corresponding actions of other participants; (c) restricts a participant’s ability to modify or repeal its own laws; and (d) reciprocates constraints on each state’s regulations.¹⁵⁹ The second test expanded on Field’s original test for whether a compact actually violates “federal supremacy” by examining if the “compact (a) authorized member states to do things they could not do in the compact’s absence; (b) delegated sovereign powers to an institution established by the Compact; or (c) restricted the ability of states to exit the compact.”¹⁶⁰ The crucial takeaway for states is that “[w]ithout legally binding conditions or deep organizational structures . . . no compact exists.”¹⁶¹

The states’ ability to engage in binding international agreements is severely and explicitly restricted because the One Voice Doctrine is rooted in the Treaty and Compact Clauses. However, states have seized upon the fact that, while there may be a degree of distinction between a treaty and compact, any such distinction is not legally binding—therefore giving states a hook to engage with international actors.¹⁶²

B. Implicit Restraints: Foreign Commerce Clause and Dormant Foreign Affairs Preemption

Although commonly understood as a foundational maxim of United States foreign policy, the Constitution never explicitly grants the federal government exclusivity in every aspect of foreign relations.¹⁶³ Where the

156. See Eaton, *supra* note 149, at 30–31 (noting “parallel construction” of the Compact Clause creating both “the more developed interstate Compacts Clause and the less well-defined ‘Foreign’ Compacts Clause”).

157. See Hollis, *supra* note 152, at 1088.

158. See *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159, 175–76 (1985).

159. See Hollis, *supra* note 152, at 1087–88.

160. See *id.* at 1086–87 (summarizing the Court’s reasoning in *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472–73 (1978)).

161. See *id.* at 1088.

162. See *id.* at 1074–76.

163. See U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Ramsey, *supra* note 63, at 346.

Constitution expressly restricts state foreign agreements through the Treaty and Compact Clauses,¹⁶⁴ the full extent of federal capture of foreign affairs is murky, having only been inferred or implied through the Supreme Court's constitutional jurisprudence.¹⁶⁵ These implied and unenumerated powers are often referred to as "dormant preemption" powers, generally accepted but not explicitly stated.¹⁶⁶ Dormant preemption includes both Dormant Foreign Affairs powers and Dormant Commerce Clause powers.¹⁶⁷

The Court has found that state laws that conflict with these powers may be regarded as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."¹⁶⁸ Additionally, state laws that "prevent this Nation from 'speaking with one voice' in regulating foreign commerce" may violate the Foreign Commerce Clause.¹⁶⁹ As such, federal exclusivity, or the primacy of "one voice," in international affairs has been a common thread throughout numerous Supreme Court cases.¹⁷⁰

The One Voice Doctrine's power lies in the Supremacy Clause, which states that "[the] Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding."¹⁷¹ The Supremacy Clause therefore allows Congress to overrule or preempt a state law through federal legislation.¹⁷² For foreign relations powers, the Supreme Court has advanced notions of both conflict preemption (invalidating directly conflicting state laws) and field preemption (exclusively reserving an entire area of law to Congress).¹⁷³ In the last half-century, the Court has

164. See *supra* section II.A.

165. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958) ("Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.").

166. See David Sloss, *California's Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507 (2017).

167. *Id.*

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

169. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979).

170. See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575–76 (1840); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[T]he external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear.").

171. See U.S. CONST. art. VI, cl. 2.

172. See *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77 (2015) ("Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action.").

173. See *Zschernig*, 389 U.S. at 432–34; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 & n.11 (2003).

started to further flesh out the general principle of federal foreign affairs preemption.¹⁷⁴

The Court's current iteration of the One Voice Doctrine began with the 1968 case *Zschernig v. Miller*.¹⁷⁵ In *Zschernig*, the Court used field preemption to invalidate an Oregon statute that placed restrictions on foreign citizens' ability to make probate claims.¹⁷⁶ The statute contained restrictions that precluded "legatees residing in Communist countries" from inheritances.¹⁷⁷ While the Court generally deferred regulation of trusts and estate distribution to the states, it held that where those laws interfere with "the effective exercise of the Nation's foreign policy . . . they must bow."¹⁷⁸ Despite no federal provisions on point and a U.S. Department of Justice amicus brief¹⁷⁹ explicitly stating that the Oregon statute did not "unduly interfere[] with" international relations,¹⁸⁰ the Court ruled that the influence of the Oregon statute had a "persistent and subtle" effect on international relations that was enough to require its demise.¹⁸¹ Although the Court narrowly confined its holding to the realm of state probate statutes, the Court's dicta are clearly hostile to the idea of state laws antagonistic to United States foreign policy.¹⁸²

That interpretation of federal preemption remained unchanged for thirty years, until the Court held in *Crosby v. National Foreign Trade Council*¹⁸³ that a state law cannot restrict which countries its own agencies can engage in trade with.¹⁸⁴ In 1996, Massachusetts passed the Massachusetts Burma Law¹⁸⁵ forbidding state agencies from purchasing

174. See *Zschernig*, 389 U.S. at 429.

175. 389 U.S. 429 (1968).

176. See *id.* at 429.

177. See *id.* at 440.

178. See *id.* at 440–41.

179. An amicus curiae (Latin for "friend of the court") brief is a legal brief submitted by an entity who is not a party to the case. *Cato at the Supreme Court*, CATO INST., <https://www.cato.org/about/cato-amicus-program> [<https://perma.cc/4KVC-RKZF>]. In *Zschernig*, the U.S. Department of Justice was not directly involved in the dispute but was an interested third party who had a stake in the outcome of the ruling. 389 U.S. at 432.

180. See *Zschernig*, 389 U.S. at 434 (quoting the Department of Justice's amicus curiae brief).

181. See *id.* at 440.

182. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsberg, J., dissenting) (suggesting that the type of international preemption in *Zschernig* "resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments and involve[s] 'sitting in judgment' on them'" (alteration in original) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 164 (2d ed. 1996))).

183. 530 U.S. 363 (2000).

184. *Id.* at 363–65.

185. See MASS. GEN. LAWS ch. 7, §§ 22G–M (1997), *invalidated by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

goods or services from companies that do business with the country of Myanmar (formerly known as Burma).¹⁸⁶ Shortly after the statute passed, Congress passed a law granting the president the authority to enact such measures. The Court reasoned that under the Supremacy Clause, the Massachusetts law was invalidated by conflict preemption.¹⁸⁷ Importantly, the Court's opinion focused solely on the fact that the congressional statute empowering the president preempted the state's sanctions.¹⁸⁸ The Court held that the state sanctions directly contradicted the federal act's purpose—by impeding the president's ability to “speak for the Nation with one voice in dealing with other governments”—thus the law was preempted.¹⁸⁹

Three years later, in *American Insurance Ass'n v. Garamendi*,¹⁹⁰ the Court expanded its reasoning in *Crosby* to include executive branch agreements.¹⁹¹ The issue in *Garamendi* was a California law that required any insurance company operating in California to publicly disclose whether it had historical ties to Nazi Germany.¹⁹² This requirement conflicted with an executive agreement with Germany aimed at encouraging voluntary settlements of Holocaust claims.¹⁹³ The Court struck down the California law on the grounds that the law interfered with the “[e]xecutive's responsibility for foreign affairs.”¹⁹⁴

However, the federal capture and dominance of foreign relations is not absolute. U.S. sub-national actors continue to explore and push the boundaries of their international powers.¹⁹⁵

C. *Daylight for American Paradiplomacy?*

Despite its strong hold over Supreme Court jurisprudence, not everyone is convinced of the validity or premise of the One Voice Doctrine.¹⁹⁶ Critiques of the Doctrine include questioning its very

186. See *Crosby*, 530 U.S. at 363.

187. See *id.* at 373.

188. See *id.* at 379.

189. See *id.* at 381, 386.

190. 539 U.S. 396 (2003).

191. See *id.* at 396–400.

192. See *id.* at 401, 408–10.

193. See *id.* at 421.

194. See *id.* at 420, 423.

195. See *infra* section II.C.

196. See Cleveland, *supra* note 135, at 975.

premise,¹⁹⁷ how it is enforced,¹⁹⁸ and its lack of functionality in a complex and interconnected world.¹⁹⁹ Furthermore, as the global paradiplomatic movement grows, there will be increasing pressure on the federal government to create space for sub-national actors to bolster American foreign affairs.²⁰⁰

One example of states putting pressure on the federal government to act was California's push for international climate change policies.²⁰¹ California created a state cap-and-trade program to incentivize companies to reduce greenhouse gas emissions.²⁰² The program sets an allowable amount of greenhouse gas emissions and creates a market that allows companies to buy and trade allowances and offsets.²⁰³ California's system extends across international borders through a formal linkage with Quebec's cap-and-trade program.²⁰⁴

In *United States v. California*,²⁰⁵ the Trump Department of Justice filed a complaint against the state of California for "unlawfully entering a cap and trade agreement with the Canadian province of Quebec."²⁰⁶ The Department of Justice alleged the agreement violated "the Constitution by complicating and burdening the United States' task of regulating foreign

197. *Id.* ("It finds little support in the constitutional framework, which divides the foreign relations powers among the three federal branches, and even less in the actual practice of the government.")

198. See Paul B. Stephan, *One Voice in Foreign Relations and Federal Common Law*, 60 VA. J. INT'L L. 1, 4 (2019) ("Although a harmonious national voice might be the best way to conduct foreign relations, it does not follow that the federal judiciary is the best choirmaster.")

199. See Moore, *supra* note 134, at 1044–45 ("Not only is the doctrine inconsistent with constitutional text, structure, and history, as well as actual practice, but the doctrine applies along various dimensions that present divergent questions, masks different theories of constitutional interpretation, and ignores functional reasons for other or multiple voices in foreign affairs.")

200. See, e.g., Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2410–14 (2006) (noting the complexities of the international system are sometimes best suited to be addressed by sub-national actors, not the federal government or its court system).

201. See *United States v. California*, No. 19-CV-02142, 2020 WL 4043034, at *5 (E.D. Cal. July 17, 2020), *appeal dismissed per stipulation*, No. 20-16789, 2021 WL 4240403 (9th Cir. Apr. 22, 2021).

202. See *Cap-and-Trade Program: About*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/about> [<https://perma.cc/RRB6-GACX>].

203. An allowance is one metric ton of permissible greenhouse gas emissions. See CAL. AIR RES. BD., CAP-AND-TRADE REGULATION INSTRUCTIONAL GUIDANCE 12 (2012), <https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/guidance/chapter1.pdf> [<https://perma.cc/2EZ6-PSFQ>].

204. See *Cap-and-Trade Program: Program Linkage*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/program-linkage> [<https://perma.cc/Y262-5AJS>].

205. No. 19-CV-02142, 2020 WL 4043034 (E.D. Cal. July 17, 2020).

206. See Press Release, Off. of Pub. Affs., U.S. Dep't of Just., *United States Files Lawsuit Against State of California for Unlawful Cap and Trade Agreement with the Canadian Province of Quebec* (Oct. 23, 2019), <https://www.justice.gov/opa/pr/united-states-files-lawsuit-against-state-california-unlawful-cap-and-trade-agreement> [<https://perma.cc/B4HW-R6CB>].

commerce and negotiating competitive international agreements.”²⁰⁷

The Trump administration advanced four causes of action predicated upon the Treaty Clause, Compact Clause, Foreign Affairs Preemption, and Foreign Commerce Preemption.²⁰⁸ The arguments included a straightforward violation (Treaty Clause), not receiving congressional approval for the Agreement (Compact Clause), citing *Garamendi* to support that California interfered with foreign policy (Foreign Affairs Preemption), and that the cap-and-trade scheme infringed on Congress’ foreign commerce powers (Foreign Commerce Preemption).²⁰⁹ The district court sided with California that the cap-and-trade agreement was not a treaty,²¹⁰ nor did it violate the Compact Clause²¹¹ or trigger federal preemption,²¹² because the agreement did not impede the president’s foreign policy “voice.”²¹³ The Department of Justice filed notice of an appeal, but it is unclear if the new Biden administration will pursue it.²¹⁴

The lack of case law or consensus by scholars on whether states may enter into agreements with other international governments leaves room for U.S. states to experiment and test the bounds of their paradiplomatic powers.²¹⁵ Importantly, the *Crosby* and *Zschernig* holdings are premised on American states engaging with nation states, not foreign sub-national actors.²¹⁶ The *United States v. California* case is one of only two cases that involve an agreement between an American sub-national government and foreign sub-national government.²¹⁷ The other, *Freeman v.*

207. See Complaint at 13, *California*, No. 19-CV-02142, 2020 WL 4043034.

208. See *id.* at 14–16.

209. See *id.*

210. See *United States v. California*, 444 F. Supp. 3d 1181, 1193 (E.D. Cal. 2020).

211. *Id.* at 1198.

212. *California*, No. 19-CV-02142, 2020 WL 4043034, at *7–10.

213. “The United States has failed to show that California’s program impermissibly intrudes on the federal government’s foreign affairs power.” *Id.* at *12; see also Ellen M. Gilmer, *Trump’s Legal Attack Fails on California-Quebec Climate Pact (1)*, BLOOMBERG L. (July 17, 2020, 3:03 PM), <https://news.bloomberglaw.com/environment-and-energy/trumps-legal-attack-on-california-quebec-climate-pact-fails> [<https://perma.cc/4J8F-6VMK>].

214. See Ellen M. Gilmer, *California Seeks to Slow Down Climate Case Ahead of Biden Term*, BLOOMBERG L. (Dec. 31, 2020, 12:57 PM), <https://news.bloomberglaw.com/environment-and-energy/california-seeks-to-slow-down-climate-case-ahead-of-biden-term> [<https://perma.cc/3VDP-A535>].

215. See Jeremy Lawrence, Note, *The Western Climate Initiative: Cross-Border Collaboration and Constitutional Structure in the United States and Canada*, 82 S. CAL. L. REV. 1225, 1258–59 (2009).

216. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380–82 (2000) (“Finally, the state Act is at odds with the President’s intended authority to speak for the United States among the world’s nations . . .”); *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968) (holding that the effect of a state law improperly affected residents of communist countries).

217. See Lawrence, *supra* note 215, at 1286 n.387.

Trimble,²¹⁸ involved an agreement between North Dakota and a Canadian municipality on how to deal with surface water drainage.²¹⁹ Although confined to North Dakota jurisprudence, the agreement survived challenges on both Treaty and Compact Clause grounds.²²⁰

Because there are so few cases involving agreements between American states and international nation states, and no federal precedent between sub-national actors, the ruling in *United States v. California* represents an opening for American paradiplomacy. As noted by the Court in *Garamendi*, there is a distinction between field preemption and conflict preemption; without a “clear conflict between the policies adopted,” the Court may not find conflict preemption.²²¹

Despite hostile Supreme Court dicta regarding paradiplomacy,²²² it remains a gray area for cities and states to explore. Many U.S. sub-national actors are already experimenting with informal agreements and associations, and much of it goes unnoticed.²²³

III. TYPOLOGIES OF AMERICAN PARADIPLMACY

Although the federal system of government in the United States is predisposed to disfavor official attempts at sub-national diplomacy, many examples exist.²²⁴ American paradiplomacy can be categorized into roughly two camps: “sanctioned” and “unsanctioned.”²²⁵ “Sanctioned” paradiplomacy is where a state enters into an agreement with another sub-national entity, either another U.S. state or foreign government, and receives explicit approval from Congress.²²⁶ “Unsanctioned”

218. 129 N.W. 83 (N.D. 1910); *see also* *McHenry County v. Brady*, 163 N.W. 540 (N.D. 1917) (upholding *Freeman*).

219. *See* 129 N.W. at 84–85.

220. *See Brady*, 163 N.W. at 544 (distinguishing the holding in *Holmes v. Jenninsen* as between national interest (extradition) and non-national interest (local water drainage)).

221. *See* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003).

222. *See* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570–71 (1840); *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159, 174 (1985); *Zschernig v. Miller*, 389 U.S. 429, 437–38 (1968).

223. *See infra* section III.A.

224. *See* *Ku*, *supra* note 200, at 2385–97 (providing examples of “gubernatorial” foreign policy, a corollary for state paradiplomacy).

225. Use of these terms is not intended to imply any normative value on either type, but rather to denote whether the agreement is the type that has, can, or should receive congressional approval. *See* James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 787 (2019) (noting the existence of “Common Law Compacts” that do not require congressional approval and “Constitutional Compacts” that require congressional approval).

226. *See* *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (holding that approval from Congress “transforms an interstate compact . . . into a law of the United States”).

paradiplomacy is the more common form, where agreements are structured to specifically disclaim any binding effects so as to skirt the constitutional issue.²²⁷ “Unsanctioned” paradiplomacy is further segmented by the formality and structure of the agreements into memoranda of understanding, membership in non-state actor organizations, and self-imposed declarations.²²⁸

Recalling the two tests the Court has devised for state compacts, the crucial takeaway for states is that “[w]ithout legally binding conditions or deep organizational structures . . . no compact exists” to be struck down.²²⁹ The result of this is that while the substance and purpose of paradiplomatic efforts loosely resemble treaties and compacts, they often explicitly disclaim legal effect so as not to be considered a treaty or compact.²³⁰ Unfortunately, disclaiming binding effects means that agreements lack the force of law and cannot be legally enforced either by internal or external actors.²³¹

A. “Sanctioned” Compacts: Foreign State Agreements

The Foreign State Agreement (FSA) is the original paradiplomatic vehicle in the United States.²³² Functioning akin to—and based on the same constitutional premise as—an interstate compact, FSAs are agreements between an American sub-national government (city or state) and a foreign sub-national government.²³³ Whereas the Treaty Clause provides an absolute bar to states entering treaties, the language of the Compact Clause allows states to enter into compacts and agreements, pending congressional approval.²³⁴

While the interstate compact has a longer and richer history, with roughly two hundred examples to draw from,²³⁵ its international counterpart is relatively obscure.²³⁶ Although the Compact Clause does

227. See Wright, *supra* note 69, at 10487–88.

228. See Aaron Messing, Note, *Nonbinding Subnational International Agreements: A Landscape Defined*, 30 GEO. ENV'T L. REV. 173, 185–86 (2017).

229. See Hollis, *supra* note 152, at 1088.

230. See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 743–44 (2010).

231. See Messing, *supra* note 228, at 184–85 (discussing the lack of international court access for sub-national actors).

232. See Hollis, *supra* note 230, at 742; Hollis, *supra* note 152, at 1072 (noting that the FSA is simply a variant of the Compact Clause).

233. See Hollis, *supra* note 152, at 1071–74 (describing a brief history of “Foreign Compacts,” which are the same as a Foreign State Agreement).

234. See *infra* section II.A.

235. See Hollis, *supra* note 152, at 1074–75 n.16.

236. *Id.* at 1075.

not expressly limit the substance of any compacts, Congress has approved only a few FSAs, primarily between U.S. border states and their international neighbors for the purposes of “coordinating activities . . . [regarding] (a) bridges; (b) fire fighting; (c) highways; and (d) emergency management.”²³⁷ Congressional consent may be explicit through the passage of a joint resolution or legislation.²³⁸ Or it may be implied by “[a]n inference clear and satisfactory that Congress . . . intended to consent.”²³⁹

Congress has not approved every FSA though, with one estimate that states have entered “hundreds” of agreements with international actors.²⁴⁰ One suggestion for why FSAs are not approved by Congress has less to do with congressional hostility and has more to do with states “simply [not submitting] their arrangements with foreign powers to Congress for approval.”²⁴¹ One example of this dynamic was an agreement between Missouri and Manitoba that would have escaped federal notice except for a single U.S. Senator who requested the State Department look into it.²⁴² Some scholars have noted that the monitoring and enforcement of FSAs is nonexistent and operates on what is essentially the honor system.²⁴³

Congress has only ever refused to grant its consent to an FSA once: the 1968 Great Lakes Basin Compact (GLBC).²⁴⁴ The GLBC sought to establish a commission of states and provinces to study and make legislative recommendations.²⁴⁵ However, the GLBC ran into preemption issues due to the 1909 passage of the Boundary Waters Treaty between the U.S. and Canada.²⁴⁶ While Congress did grant consent to a version of the Great Lakes Basin Compact,²⁴⁷ it explicitly limited participation to U.S. states, effectively denying the FSA and converting it into an

237. *Id.* at 1076.

238. *See* *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991) (“Congress must exercise [its Compact Clause approval power] in conformity with the bicameralism and presentment requirements of Art. I, § 7.”).

239. *See* *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 60 (1870).

240. *See* Hollis, *supra* note 152, at 1074–75, 1079.

241. *See id.* at 1078–79.

242. *See id.* at 1071–74. The Article further explores the relationship between the Legislative and Executive branches, which exceeds the scope of this Comment.

243. *See* Eaton, *supra* note 149, at 35; Hollis, *supra* note 230, at 741–46.

244. *See* Hollis, *supra* note 152, at 1078.

245. *See* Lauren Petrash, Comment, *Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water “Products” Industry*, 39 U. MIA. INTER-AM. L. REV. 145, 153–54 (2007).

246. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Gr. Brit.-U.S., Jan. 11, 1909, 36 Stat. 2448.

247. Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414.

interstate compact.²⁴⁸ The GLBC was resurrected in 2005 as two distinct mechanisms: the Great Lakes-St. Lawrence River Basin Water Resources Agreement (Agreement) and the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact).²⁴⁹ The Agreement includes both U.S. states and Canadian provinces and reflects the lessons of the GLBC by explicitly disclaiming any effects on federal laws and treaties.²⁵⁰ On the other hand, the Compact comprising only the American states gained Congress' approval in 2008.²⁵¹ The Compact also reflects the lessons of the GLBC by excluding the Canadian provinces in order to implement a binding legal requirement to comply with the Compact's standards.²⁵² The exclusion of the Canadian provinces from the GLBC and 2005 Compact shows that when Congress does pay attention, there is not always a Federal appetite for entertaining international state compacts.²⁵³ The decades-long saga of the GLBC, which culminated in a less-than-ideal solution of the Agreement, highlights the danger FSAs face if they seek congressional approval.

Adjacent to the FSA is the 1972 International Bridge Act (IBA).²⁵⁴ Although not itself an FSA, the IBA was a delegation of Congress' Compact Clause approval authority to the State Department. Specifically, the IBA created a very narrow method for states along the U.S. border to enter into binding agreements (FSAs) with their foreign counterparts.²⁵⁵ These agreements were very narrowly cabined; they could only relate to the creation, operation, and maintenance of bridges and tunnels that span international borders.²⁵⁶ Finally, each IBA FSA required the approval of the president, which was ultimately granted through "approval by the Secretary of State."²⁵⁷

B. "Unsanctioned" Agreements: MOUs, NGOs, and Declarations

The other category of American paradiplomacy is the unsanctioned, or

248. See Hollis, *supra* note 152, at 1078 n.33.

249. See Petrash, *supra* note 245, at 156.

250. See Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Can.-U.S., Arts. 700-03, Dec. 13, 2005.

251. See Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, § 7.3(2)(a)-(b), 122 Stat. 3739, 3761 (2008).

252. See *id.* § 1.3.

253. See Hollis, *supra* note 152, at 1094.

254. Act of Sept. 26, 1972, Pub. L. No. 92-434, § 3, 86 Stat. 731, 731 (codified at 33 U.S.C. § 535a).

255. 33 U.S.C. § 535a.

256. *Id.*

257. *Id.*

non-binding, agreement. This is the most popular form of paradiplomacy because these agreements are structured in such a way as to avoid constitutional issues.²⁵⁸ By avoiding language that creates legal or political obligations, these agreements do not trigger federal action.²⁵⁹ There are three sub-types of non-binding agreements: memoranda of understanding (MOU), third-party representations, and unilateral declarations.²⁶⁰

1. *Memoranda of Understandings*

Memoranda of Understanding are international agreements whereby sub-national actors create a public document of shared values and commit to adhering to guiding principles.²⁶¹ These agreements are less a contract of cooperation between sub-national actors and more of a public commitment to shared principles and self-contained behavior.²⁶² These commitments are made by the sub-national governments and therefore carry political weight, although they are not binding.²⁶³

An example of a current MOU agreement is the Under2 Coalition, an international agreement to reduce greenhouse gasses.²⁶⁴ California worked directly with Baden-Wurtemberg, a German sub-national state, to spearhead this initiative, which was originally called the Under2MOU.²⁶⁵ Improving the original framework of the Under2MOU by “working together and building on [international] agreements . . . subnational governments, together with interested nations, can help to accelerate the world’s response to climate change and provide a model for broader international cooperation among nations.”²⁶⁶

258. See Hollis, *supra* note 152, at 1089; see also *infra* Part II for an examination of the constitutional issues.

259. *Id.* at 1089–90.

260. See Messing, *supra* note 228, at 185. Messing includes a fourth subtype, near-binding arrangements, which I combine with FSAs in *supra* section III.B.

261. See *id.* at 188.

262. See *id.*

263. See *id.*

264. See CLIMATE GRP., GLOBAL CLIMATE LEADERSHIP: UNDER2 MEMORANDUM OF UNDERSTANDING, https://www.theclimategroup.org/sites/default/files/2021-10/Under2%20MOU_English_2021.pdf [<https://perma.cc/3TRZ-Q9G8>].

265. See *Under 2 MOU—Inspiring Regional Leadership on Climate Change*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Sept. 1, 2015) [hereinafter *Under2MOU*], <https://unfccc.int/news/under-2-mou-inspiring-regional-leadership-on-climate-change> [<https://perma.cc/GQ92-4EGP>].

266. See CLIMATE GRP., GLOBAL CLIMATE LEADERSHIP MEMORANDUM OF UNDERSTANDING (MOU) 1, <https://www.theclimategroup.org/sites/default/files/2020-09/under2-mou-with-addendum-english-a4.pdf> [<https://perma.cc/2QRN-6MEZ>].

The Under2 Coalition includes over 500 private organizations and over 260 governments at all levels.²⁶⁷ The Under2 Coalition specifically disclaims the ability to legally bind, calling its members mere “signatories.”²⁶⁸

2. *Third Party Representation*

Third-party representation is best understood as sub-national actors becoming members in a non-governmental club, whereby they commit to the requirements of membership.²⁶⁹ Often the “club” is a non-governmental organization (NGO) that serves as a resource for information, collaboration, and coordination.²⁷⁰ The primary benefit of this form is that the administrative costs of organizing and governing the group are outsourced to the NGO.²⁷¹

The Western Compact Initiative (WCI) is a prototypical example of this type of non-binding agreement.²⁷² The WCI was originally an MOU, where the founding states signed the memorandum to adopt state policies and regulations to encourage zero-emission vehicles and lower climate pollutants.²⁷³ The original iteration of WCI folded when a number of members dropped out of the MOU due to the unwillingness or inability to pass actual legislation.²⁷⁴ The new third-party organization, WCI, Inc., is a non-profit corporation that provides technical services and manages the relationship between the remaining members of California, Quebec, and Nova Scotia.²⁷⁵

3. *Unilateral Declarations*

Unilateral declarations are more than mere statements; they are policy positions or self-policing regulations enacted by a sub-national actor.²⁷⁶ These declarations are often aimed at influencing other actors to adopt

267. See *About Us*, CLIMATE GRP., <https://www.theclimategroup.org/about-us> [<https://perma.cc/J7YC-USEA>].

268. See CLIMATE GRP., *supra* note 266, at 11.

269. See Messing, *supra* note 228, at 190.

270. See *id.*

271. See *id.* at 192.

272. See Lawrence, *supra* note 215, at 1227–28.

273. See *Under2MOU*, *supra* note 265.

274. See Sonja Klinsky, *Bottom-Up Policy Lessons Emerging from the Western Climate Initiative's Development Challenges*, 13 CLIMATE POL'Y 143, 152–56 (2013).

275. See *Homepage*, WCI, INC., <http://www.wci-inc.org> [<https://perma.cc/3NFP-D6LY>].

276. See Messing, *supra* note 228, at 192.

similar positions.²⁷⁷ More than mere performance, these unilateral declarations can have significant international impacts. In the late 1970s and early 1980s, a number of American cities and states enacted anti-Apartheid sanctions against enterprises doing business with the government of South Africa.²⁷⁸ When Massachusetts barred its state agencies from engaging with companies that did business with Myanmar, it unilaterally declared sanctions on Myanmar.²⁷⁹

C. *Legitimacy and Authority Deficits*

The status quo of U.S. sub-national actors tiptoeing around federal preemption or hoping the federal government simply ignores their foreign relations efforts is untenable in an increasingly interconnected world with increasingly complex issues. In the absence of federal leadership on crucial issues, sub-national actors are pushing the bounds of “foreign affairs federalism”²⁸⁰ and entering into transborder agreements that often blur the line between binding contracts and “handshake” agreements.²⁸¹ However, due to the explicit non-binding nature of these agreements, the requirements and obligations negotiated between the parties are unenforceable.²⁸²

The unenforceable nature of these agreements removes the incentive to comply with the obligations.²⁸³ Consider the climate change free-rider dilemma: when nations or sub-national actors enter into international agreements that require each party to ratchet down their emissions in order to combat climate change, the program works best (and all benefit) when each actually follows through and reduces emissions.²⁸⁴ Often there is a cost associated with reducing emissions that is borne by each party.²⁸⁵ But if one party decides it does not want to bear that cost, it can still benefit

277. *See id.*

278. *See* Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1035 (2001).

279. *See* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383–84 (2000).

280. Sharmila L. Murthy, *The Constitutionality of State and Local “Norm Sustaining” Actions on Global Climate Change: The Foreign Affairs Federalism Grey Zone*, 5 U. PA. J.L. & PUB. AFFS. 447, 451 (2020).

281. Fabien Gélinas, *The Constitution of Agreement: A Brief Look at Sub-Federal Cross-Border Cooperation*, 2006 MICH. ST. L. REV. 1179, 1180–84.

282. *Id.*

283. *Id.* at 1189.

284. Natalie M. Roy, Comment, *Climate Change's Free Rider Problem: Why We Must Relinquish Freedom to Become Free*, 45 WM. & MARY ENV'T L. & POL'Y REV. 821, 837–39 (2021).

285. *Id.*

from the other parties reducing their emissions.²⁸⁶

As most paradiplomatic agreements explicitly disclaim legally binding effects, there is no legal carrot or stick to force the free-riding party to require the free-riding party to fulfill its obligations.²⁸⁷ Some scholars suggest that “shame” is a particularly effective enforcement mechanism, even in the absence of binding legal effects.²⁸⁸ For the more pessimistic, or those living in the post-“alternative facts”²⁸⁹ world, shame seems to be losing its utility as a political tool.²⁹⁰ Furthermore, as the *United States v. California* case highlights, sub-national actors may face a hostile federal government if their paradiplomatic efforts are considered politically unpalatable by the current presidential administration.²⁹¹ The waning effectiveness of political commitments and reputational enforcement, coupled with the looming threat of legal action from an opposition-party administration, highlights the need for reform on the paradiplomatic front.

IV. PARADIPLOMACY IN THE CASCADIA MEGAREGION

The Cascadia megaregion of North America is home to three major metropolitan areas with a combined population of almost ten million in 2016.²⁹² That number has likely grown substantially as Vancouver, Seattle, and Portland experienced huge influxes of urban migration over the past decade.²⁹³ The region expects another 30% increase in population

286. *Id.*

287. See Messing, *supra* note 228, at 198.

288. See *id.* (suggesting that the political shame associated with pulling out of nonbinding international agreements makes them “politically binding”).

289. Connor O’Brien, *Conway: Spicer Presented ‘Alternative Facts’ on Inauguration Crowds*, POLITICO (Jan. 22, 2017, 12:04 PM), <https://www.politico.com/story/2017/01/alternative-facts-kellyanne-conway-233998> [<https://perma.cc/QHG3-HKZC>].

290. Cf. Jack Holmes, *The Death of Shame, or the Rise of Shamelessness?*, ESQUIRE (Jan. 31, 2018), <https://www.esquire.com/news-politics/a15940835/trump-shame-shamelessness/> [<https://perma.cc/376L-F36A>].

291. Richard Frank, *Court Rejects Trump Administration’s Cap-and-Trade Lawsuit Against California*, LEGALPLANET (Mar. 24, 2020), <https://legal-planet.org/2020/03/24/court-rejects-trump-administrations-cap-and-trade-lawsuit-against-california/> [<https://perma.cc/2FT8-KR9V>].

292. See CITY OF VANCOUVER SOC. POL’Y & PROJECTS, VANCOUVER CITY SOCIAL INDICATORS PROFILE 2020, at 7 (2020), <https://vancouver.ca/files/cov/social-indicators-profile-city-of-vancouver.pdf> [<https://perma.cc/ZBT2-EGAK>] (approximately 2.5 million); *Seattle-Tacoma-Bellevue, WA Metro Area*, CENSUS REP. (2020), <https://censusreporter.org/profiles/31000US42660-seattle-tacoma-bellevue-wa-metro-area> [<https://perma.cc/5394-DTTN>] (approximately 4 million); *Portland-Vancouver-Hillsboro, OR-WA Metro Area*, CENSUS REP. (2020), <https://censusreporter.org/profiles/31000US38900-portland-vancouver-hillsboro-or-wa-metro-area> [<https://perma.cc/628Z-MAP3>] (approximately 2.5 million).

293. See Kenneth Chan, *Metro Vancouver Is the 12th Fastest Growing Region in North America*, DAILY HIVE (June 12, 2020, 9:42 PM), <https://dailyhive.com/vancouver/metro-vancouver->

by 2050.²⁹⁴ This population boom created a massive infrastructure deficit, both in terms of housing and transportation.²⁹⁵ Cascadia's population increase also coincides with a warming climate and its attendant issues, many of which are not adequately being addressed.²⁹⁶

The Cascadia megaregion, perhaps owing to the entrepreneurial spirit of its residents,²⁹⁷ is no stranger to paradiplomacy.²⁹⁸ The sub-national actors in the Pacific Northwest have come together to address these issues, often in the absence of their respective national governments.²⁹⁹ The primary focus of Cascadian paradiplomatic efforts have been aimed at environmental and climate issues, but newer efforts are expanding that sphere to include regional governance and economic coordination.³⁰⁰

population-growth-2019 [<https://perma.cc/J46T-LFY3>]; *Report: Seattle Is One of the Fastest-Growing Large US Cities*, PUGET SOUND BUS. J. (Sept. 2, 2020, 11:10 AM), <https://www.bizjournals.com/seattle/news/2020/09/02/report-seattle-among-fastest-growing-large-cities.html#:~:text=The%20study%20found%20Seattle%20had,during%20that%20time%20was%202.38%25> [<https://perma.cc/GA95-X7NE>]; Elise Herron, *Oregon Gained More than 400,000 Residents in the Last Decade, a New Portland State University Population Study Shows*, WILLAMETTE WK. (Nov. 16, 2019, 5:35 AM), <https://www.wweek.com/news/2019/11/16/oregon-gained-over-400000-residents-in-the-last-decade-a-new-portland-state-university-population-study-shows> [<https://perma.cc/SMN6-6AKG>].

294. See CASCADIA INNOVATION CORRIDOR, CASCADIA VISION 2050: HOW THE CASCADIA INNOVATION CORRIDOR CAN SERVE AS A GLOBAL MODEL FOR SUSTAINABLE GROWTH 3 (2020), https://connectcascadia.com/wp-content/uploads/2020/09/Cascadia-Vision-2050_Published.pdf [<https://perma.cc/LP3B-B6YV>].

295. See *id.* at 4.

296. See Peter Fairley, *How Cascadia Can Prevent Another "Lost Decade" in the Fight Against Climate Change*, JEFFERSON PUB. RADIO (Dec. 11, 2021, 11:01 AM), <https://www.ijpr.org/environment-energy-and-transportation/2021-12-11/how-cascadia-can-prevent-another-lost-decade-in-the-fight-against-climate-change> [<https://perma.cc/8LQZ-8ZDE>].

297. Seattle is the home of Amazon, Boeing, Costco, Microsoft, Nordstrom, Starbucks, REI, and Weyerhaeuser. *About Seattle*, SEATTLE CHAMBER OF COM., <https://www.seattlechamber.com/pages/aboutseattle/> [<https://perma.cc/NX4S-7AN4>].

298. For example: Washington State has the Governor's Office of International Relations, *Office of International Relations*, WASH. OFF. OF THE GOVERNOR, <https://www.governor.wa.gov/office-governor/office/office-international-relations> [<https://perma.cc/5XMT-98W3>]; Seattle has an Office of Intergovernmental Affairs, *International Affairs*, CITY OF SEATTLE, <http://www.seattle.gov/oir/international-affairs> [<https://perma.cc/ZXY7-NM46>]; Oregon does not have a statewide office for international relations, but Portland has an International Relations program, *International Relations*, CITY OF PORTLAND, <https://www.portlandoregon.gov/ogr/65019> [<https://perma.cc/MSD6-W93T>]; British Columbia has the Intergovernmental Relations Secretariat, *Intergovernmental Relations Secretariat*, BRITISH COLUMBIA, <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/office-of-the-premier/intergovernmental-relations-secretariat> (last visited May 29, 2022); and Vancouver has an External Relations Department, *External Relations Department*, METRO VANCOUVER, <http://www.metrovancouver.org/about/departments/external-relations/Pages/default.aspx> [<https://perma.cc/4YWR-8QEY>].

299. See Dan Fumano, *Cascadia Leaders to 'Swing for the Fences' on Problems Facing Region, World*, VANCOUVER SUN (Oct. 2, 2019), <https://vancouversun.com/news/local-news/cascadia-leaders-to-swing-for-the-fences-on-problems-facing-region-world> [<https://perma.cc/UT65-S3RH>].

300. See *infra* notes 301, 312, 319 and accompanying text.

A. *Climate Change Paradiplomacy in Cascadia*

One of the first major international paradiplomatic efforts by American sub-national actors on the West Coast, the Western Climate Initiative (WCI) promotes a general goal of reducing greenhouse gas emissions among western states.³⁰¹ Originally two separate agreements between western³⁰² and southwestern³⁰³ states, the initiatives merged in 2007.³⁰⁴ Over the next two years, four Canadian provinces and two more states joined, and in 2010, WCI published its plans for collaborating to reduce greenhouse emissions throughout its member jurisdictions.³⁰⁵ Importantly, the agreements each jurisdiction drafted and signed onto were specifically designed to circumvent the Compact Clause requirements and the federal government.³⁰⁶ By designing the WCI as a voluntary and—more importantly—non-binding agreement,³⁰⁷ the drafters of the agreement were likely able to move more quickly and more freely as they did not require federal blessing. Furthermore, the voluntariness avoided paradiplomatic issues when British Columbia (and subsequent Canadian provinces) joined.³⁰⁸

Unfortunately, many of the states dropped out of the WCI in 2011 when the actual implementation of cap-and-trade policies failed to gain traction in the various statehouses due to the global recession that began in 2008.³⁰⁹ The fundamental structure of the WCI shifted from an “unsanctioned” compact to third-party representation with the formation of the Western Climate Initiative, Inc. (“WCI, Inc.”), a non-profit tasked with organizing the cap-and-trade markets of the three remaining jurisdictions.³¹⁰ WCI, Inc. was one of the named defendants in the Trump DOJ lawsuit against California’s participation in the California-Quebec

301. See Lawrence, *supra* note 215, at 1225–26.

302. California, Oregon, and Washington created the West Coast Global Warming Initiative in 2003. *History*, W. CLIMATE INITIATIVE, http://westernclimateinitiative.org/index.php?option=com_content&view=article&id=29&Itemid=44 [https://perma.cc/U3RE-HXEZ].

303. Arizona and New Mexico created the Southwest Climate Change Initiative in 2006. See *id.*

304. See *id.*

305. See W. CLIMATE INITIATIVE, DESIGN FOR THE WCI REGIONAL PROGRAM (2010), <https://wcitestbucket.s3.us-east-2.amazonaws.com/amazon-s3-bucket/documents/en/wci-program-design-archive/WCI-ProgramDesign-20100727-EN.pdf> [https://perma.cc/E6ZD-266R].

306. See Lawrence, *supra* note 215, at 1229, 1276–78.

307. See *id.* at 1276–78.

308. See *id.* at 1269 (noting that the structure of the WCI avoids constitutional problems).

309. See Geoffrey Craig, *Six US States Leave the Western Climate Initiative*, S&P GLOB. (Nov. 18, 2011), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/111811-six-us-states-leave-the-western-climate-initiative> [https://perma.cc/86AE-EGWR].

310. See *Program Design and Implementation*, WCI INC., <https://wci-inc.org/our-work/program-design-and-implementation> [https://perma.cc/EZ5H-AK2V].

cap-and-trade program.³¹¹

Similarly, the Pacific Coast Collaborative (PCC)³¹² is a multi-level organization representing two countries, four states,³¹³ and six major cities along the Pacific coast.³¹⁴ The stated vision of the organization is to “[d]ramatically reduce greenhouse gas emissions and create a vibrant, low carbon regional economy by transforming energy systems, buildings, transportation, and food waste management.”³¹⁵ It accomplishes these goals by providing a forum for the discussion and dissemination of technical guidance, expertise, and assistance to its member jurisdictions.³¹⁶ Notably, from a cross-border perspective, it stated that “[w]here possible, California, British Columbia, Oregon and Washington will link programs for consistency and predictability and to expand opportunities to grow the region’s low-carbon economy.”³¹⁷

The ambition and pledges in the PCC agreement are tempered by the closing provision that “[t]his Action Plan shall have no legal effect; impose no legally binding obligation enforceable in any court of law or other tribunal of any sort, nor create any funding expectation; nor shall our jurisdictions be responsible for the actions of third parties or associates.”³¹⁸

B. *Economic and Social Responsibility Paradiplomacy*

The Cascadia Innovation Corridor (CIC) exemplifies the complexity of many paradiplomatic initiatives. The CIC is a public-private partnership

311. See *United States v. California*, No. 19-CV-02142, 2020 WL 4043034 (E.D. Cal. July 17, 2020), *appeal dismissed per stipulation*, No. 20-16789, 2021 WL 4240403 (9th Cir. Apr. 22, 2021).

312. See MEMORANDUM TO ESTABLISH THE PACIFIC COAST COLLABORATIVE (June 30, 2008), https://46h83069gmc37jdhm425hbh3-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/Memorandum-PCC_2008.pdf [<https://perma.cc/C8J8-D38L>].

313. Three U.S. states and the Canadian Province of British Columbia. *About*, PAC. COAST COLLABORATIVE, <https://pacificcoastcollaborative.org/about/> [<https://perma.cc/Y6UZ-J7FU>].

314. United States and Canada; British Columbia, Washington, Oregon, and California; Vancouver, Seattle, Portland, San Francisco, Oakland, and Los Angeles. *Id.*

315. *Governor Brown Joins Oregon, Washington, British Columbia Leaders to Combat Climate Change*, OFF. OF GOVERNOR EDMUND G. BROWN JR. (Oct. 28, 2013) [hereinafter *Governor Brown Joins*], <https://www.ca.gov/archive/gov39/2013/10/28/news18284/index.html> [<https://perma.cc/R8VH-WWEJ>].

316. See PAC. COAST COLLABORATIVE, PACIFIC COAST COLLABORATIVE CLIMATE AND ENERGY ACTION PLAN TECHNICAL ASSISTANCE (2013), https://www.energy.ca.gov/sites/default/files/2019-12/pacific_coast_ada.pdf [<https://perma.cc/MF8L-LQSP>].

317. See *West Coast Governments Agree to Cooperate on Climate Change, Environment, Trade and Overdose Crisis*, WASH. GOVERNOR JAY INSLEE (Mar. 16, 2018), <https://www.governor.wa.gov/news-media/west-coast-governments-agree-cooperate-climate-change-environment-trade-and-overdose> [<https://perma.cc/8P55-UPX8>].

318. *Governor Brown Joins*, *supra* note 315.

aimed at harmonizing efforts to build a modern and socially responsible megaregion.³¹⁹ The cumulative vision of the CIC is summarized by its Cascadia Vision 2050 platform, which “proposes a bold approach to sustainable growth by building hub cities on underdeveloped lands and connecting them to the larger centers via high-speed transit.”³²⁰

The coordination required to effectively plan and implement activities and initiatives contemplated by the CIC involves a dizzying number of local, regional, state, federal, and international governmental bodies.³²¹ At the national level, diplomatic relations between the United States and Canada would involve a number of federal agencies.³²² At the state/province level, Washington and B.C. legislatures and administrative agencies become involved, not just with their international counterparts, but their national governments as well.³²³ Regional and local governments add in approximately twenty-five more individual units of government and their coordination.³²⁴

One example of paradiplomacy-adjacent cross-border collaboration is the Cascadia Urban Analytics Cooperative (CUAC), a research collaboration between Microsoft, the University of Washington (UW), and the University of British Columbia (UBC).³²⁵ A sub-unit of the CUAC is the Cascadia Law Initiative (CLI), a cooperative venture of faculty and students at UW and UBC law schools.³²⁶

The CLI analyzed the legal barriers to a CIC-proposed project: an autonomous car lane or high-speed train line between Vancouver and Seattle.³²⁷ This proposed autonomous-car lane is not only a massive “engineering, technological, construction and management undertaking,” but would also “involve multiple levels and types of government bodies in both countries.”³²⁸ Such an undertaking is one that is best handled by state officials and regional actors with broader political support and local

319. See CASCADIA INNOVATION CORRIDOR, “CASCADIA VISION 2050” OFFERS PATH TO SUSTAINABLE GROWTH IN THE CASCADIA MEGA-REGION (2020), https://connectcascadia.com/wp-content/uploads/2020/09/Cascadia-Release_2020-Report_Final.pdf [<https://perma.cc/3X4C-BV47>].

320. *Id.* at 1.

321. See CLI Paper, *supra* note 89.

322. See *id.*

323. See *id.*

324. See *id.*

325. See Emily Keller, *CUAC Releases Program Report Highlighting Collaborative Research Across Cascadia*, URBAN@UW (Mar. 31, 2020), <https://urban.uw.edu/news/cuac-releases-program-report-highlighting-collaborative-research-across-cascadia/> [<https://perma.cc/C9LD-ZWKF>].

326. See CLI Paper, *supra* note 89, at 1, 3.

327. See *id.* at 4, 104.

328. See *id.* at 104.

knowledge or expertise.³²⁹ The federal oversight of every paradiplomatic effort is neither possible nor desirable, as most efforts are inherently local issues.³³⁰ Paradiplomacy should be encouraged at the federal level as a collaborative, not combative, undertaking.

V. EMBRACING AMERICAN PARADIPLOMACY

For too long the federal government has been the only voice allowed to speak for United States foreign policy. The federal government will, and should, remain the main voice of United States foreign policy; however, it should allow the states to become the backup singers.³³¹ To belabor the metaphor, allowing sub-national actors to find their own foreign policy voices, so long as they are not dissonant to federal foreign policy, presents a richer and more powerful voice to address global issues. This would, hopefully, promote and advance American foreign policy and strengthen the ties between the federal government and sub-national actors.

For American sub-national actors to better contribute to American foreign policy, this Comment suggests Congress authorize the creation of a State Department office to recognize, embrace, and formalize FSAs and paradiplomacy at the federal level. The near-complete absence of case law on the Compact Clause and continued congressional silence on FSAs³³² suggests that there may be room within American foreign policy for states and cities to play active roles. Where the federal government cannot, or chooses not to, act on its own, cities and states can experiment with different international arrangements, carbon cap-and-trade markets, and trans-border urban planning that carry with them binding obligations.

A. *Create a State Department Office for FSAs*

The federal government should allow the states to harmonize with “one voice” by entering into their own agreements with the approval of the State Department. Owing to the gridlock and its inability to pass even the

329. See Swiney, *supra* note 6, at 227–28.

330. However, the federal government should remain keenly interested in certain types of paradiplomatic efforts, specifically around sensitive topics like national security. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936); cf. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

331. See Julia Spiegel, *Embracing Foreign Affairs Federalism in a Post-Trump Era*, LAWFARE (Mar. 3, 2021, 8:01 AM), <https://www.lawfareblog.com/embracing-foreign-affairs-federalism-post-trump-era> [<https://perma.cc/7UKM-D4RT>] (“[T]he U.S. should embrace the role that states and localities play as force multipliers and divisors of solutions to the foreign policy dilemmas the global community faces.”).

332. See Eaton, *supra* note 149, at 33.

most important bills,³³³ Congress should embrace the power of paradiplomacy and delegate the authority to approve foreign state agreements to the executive branch.³³⁴

Congress has the ability to grant its authority through the creation of executive agencies, and has done so since the beginning of the nation.³³⁵ Delegating the authority to approve FSAs would fall squarely in the “intelligible principle”³³⁶ that Congress does not have the capacity to review and approve each FSA.³³⁷ Interestingly, this has already been done on a small scale with the International Bridge Act.³³⁸

The State Department’s career civil servants have the capacity and institutional competence to work with states to craft FSAs that do not run afoul of federal supremacy or the foreign policy goals of the administration. Congress and, by delegation, the State Department can create standardized language and administrative processes for approval and facilitate the integration of FSAs into a broader foreign policy platform. The State Department could serve as technical advisor and provide advice and counsel to states and cities. This would enhance the sophistication of U.S. paradiplomacy and better ensure American interests are furthered through these agreements. Furthermore, this arrangement would comport with Supreme Court precedent focusing foreign relations power in the hands of the executive branch.³³⁹ This alignment would also dramatically reduce the likelihood of an executive branch suing a state

333. See Gus Wezerek, *20 Years of Congress’s Budget Procrastination, in One Chart*, FIVETHIRTYEIGHT (Feb. 7, 2018, 5:45 PM), <https://fivethirtyeight.com/features/20-years-of-congress-budget-procrastination-in-one-chart> [<https://perma.cc/CWZ5-KPG5>].

334. This suggestion is similar to a proposal to create an “office of subnational diplomacy within the State Department” suggested by a Brookings Institute report. See Anthony F. Pipa & Max Bouchet, *Partnership Among Cities, States, and the Federal Government: Creating an Office of Subnational Diplomacy at the US Department of State*, BROOKINGS (Feb. 17, 2021), <https://www.brookings.edu/research/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state/> [<https://perma.cc/SG8D-8NME>]; cf. *Office of Treaty Affairs*, U.S. DEP’T OF STATE, <https://www.state.gov/bureaus-offices/treaty-affairs/#tab-5> [<https://perma.cc/L9ZF-8H2P>] (the stated mission of the Office of Treaty Affairs is to “provide[] advice and support on matters involving U.S. and international treaty law and practice”).

335. See 1 ANNALS OF CONG. 383 (1789) (statement of Rep. Elias Boudinot) (noting that the Constitution allows Congress to create “departments of an executive nature in aid of the President”).

336. The “intelligible principle” test is derived from *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [to act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

337. *Id.* at 407 (“If Congress were to be required to [approve everything], it would be impossible to exercise the power at all.”).

338. See *supra* section III.A; see also 33 U.S.C. § 535a.

339. Cf. Hollis, *supra* note 152, at 1101–02.

over an approved FSA by removing the basis of nearly all of the charges in *United States v. California*.³⁴⁰

Admittedly, integrating the FSA approval process into the executive branch runs into some of the same problems that prompted sub-national actors to seek out the FSA in the first place. Chief among these issues is how the executive branch can change parties every four years. Because FSAs are often the result of years of careful paradiplomacy and can be extremely technical and nuanced,³⁴¹ the vacillations of presidential priorities may inhibit this system. One potential solution for this problem is for congress to structure the enabling act of this agency to insulate approved agreements from these forces. This could be done through the Appointments Clause³⁴² and carefully structuring the agency leadership as a multi-member commission³⁴³ or establishing statutory qualifications.³⁴⁴

FSAs can become an official vehicle for American paradiplomacy, which could be regulated and tracked with much greater fidelity than the current system.³⁴⁵ By placing the authority to approve FSAs in the executive branch, it would not only improve efficiency, but it would also ensure that approved FSAs would be in harmony with the “one voice”³⁴⁶ of the executive. Delegating the power to approve compacts to the State Department would revive the FSA as an official paradiplomatic tool in the American foreign policy arsenal.

B. *The Future of Cascadian Paradiplomacy*

The Cascadia region has long been considered a hub of innovation and home to people with great ambitions and the gumption to match it. Home to a number of the largest technology companies, one of the largest international non-profits, world-class research organizations,

340. See *United States v. California*, No. 19-CV-02142, 2020 WL 4043034 (E.D. Cal. July 17, 2020), *appeal dismissed per stipulation*, No. 20-16789, 2021 WL 4240403 (9th Cir. Apr. 22, 2021).

341. For example, the Great Lakes-St. Lawrence River Basin Water Resources Compact was the result of decades of negotiation starting in 1968, was signed without Canadian members in 2005, and was ratified by Congress in 2008. See Petrash, *supra* note 245, at 152–57.

342. U.S. CONST. art. II, § 2, cl. 2.

343. See 15 U.S.C. § 78d(a) (where Congress created the “Securities and Exchange Commission . . . composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate”).

344. For example, Congress enacted statutory requirements that Federal Election Commission members must serve six-year terms and no more than three may be from the same political party. See 52 U.S.C. § 30106(a)(1)–(2).

345. See Hollis, *supra* note 230, at 744 (“The states have concluded more than two hundred FSAs in the last ten years alone. And these numbers certainly undercount the actual practice, since no formal mechanisms exist for collecting or monitoring FSAs.” (emphasis omitted)).

346. See *supra* Part II.

internationally acclaimed universities, and a reputation for finding solutions to difficult problems, the Cascadia region is perfect for becoming a laboratory to explore the future of sub-national relations. The strong regional identity, close cross-border ties, and long history of sub-national cooperation make Cascadia an ideal testing ground for the future of North American paradiplomacy.

The long-term survival of the Cascadian megaregion will depend on the ability of the sub-national actors of the region—the cities, counties, and states—to come together and create a regional plan. Building on the Cascadia Innovation Corridor's efforts,³⁴⁷ this regional plan should emphasize combatting climate change and infrastructure decay, as well as promoting sustainable growth. In order for this regional plan to be effective, it should be formalized through a binding legal agreement in the form of an FSA.

VI. CONCLUSION

The era of the federal government being the sole voice in American international relations should end. This Comment does not suggest a wholesale constitutional regime change where states become the primary focal point of international relations. Instead, the federal government needs to modernize its conception of international relations to allow states to innovate and address local and global issues. By loosening its grip on international relations, the federal government may enhance American foreign relations and allow for greater flexibility for megaregions like Cascadia to effectively address issues.

347. See CASCADIA INNOVATION CORRIDOR, *supra* note 294.