Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law

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TAKE THE LONG WAY HOME: SUB-FEDERAL INTEGRATION OF UNRATIFIED AND NON-SELF-EXECUTING TREATY LAW

Lesley Wexler*

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I. INTRODUCTION

Despite the oft-repeated adage that most countries comply with most international law most of the time, rational choice and realist scholars suggest that international law matters little to powerful countries able to opt out of its regimes. Conventional wisdom suggests the United States often prefers to go it alone rather than submit to the constraints of human rights and environmental treaties. For instance, the United States recently announced it would not ratify the Kyoto Protocol. Similarly, the United States has long abstained from many prominent human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Even when the United States does join multilateral environmental and human rights treaties, these treaties often languish in Congress without domestic implementing legislation. Given this trend, this Article suggests the focus on ratification ignores the significant ways in which unratified and unimplemented treaties influence social change in the United States.

Sub-federal entities such as states and cities provide a meaningful but under-theorized entryway for treaty norm integration and implementation. Currently, two views dominate the literature on the role of human
Take the Long Way Home

rights treaties in domestic law. The first, mostly embraced by treaty advocates, characterizes these treaties as duplicative of existing domestic protections and promotes them as a baseline for other countries to internalize. The second view, espoused mostly by international law skeptics, laments these treaties as substantively misguided or unwarranted intrusions upon existing constitutional arrangements. Both camps presume that less developed countries will accrue the vast majority of whatever treaty benefits exist. Similarly, most scholars and advocates presume that the technology transfer and knowledge distribution associated with environmental treaties flow in one direction—from more advanced to less advanced countries. This Article contests this understanding of treaties by investigating instances in which sub-federal actors in the United States act independently of treaty ratification or federal implementing legislation by directly incorporating international human rights and environmental treaties into domestic law.

Sub-federal entities can integrate treaty norms by passing legislation that self-consciously implements treaty provisions or by approving ordinances and resolutions that urge federal treaty ratification. For example, if the United States had declined to sign and ratify the Montreal Protocol on Substances That Deplete the Ozone Layer, California could still integrate the Montreal Protocol by restricting resident companies’ production of chlorofluorocarbons (CFCs) and funding CFC-friendly alternatives. California could learn from the experiences of treaty-compliant countries and also use the Montreal Protocol language itself to help draft its legislation. Rather than view the treaty as evidence of a binding obligation, as it might if the United States had ratified the treaty, California could rely on the existence of the treaty as evidence of an


international consensus on the seriousness of the depletion of the ozone layer and the need for immediate state-level legislative attention.

Similarly, California, Washington, and Oregon could draft a memorandum of understanding whereby each state committed to specified CFC phase-outs that were pegged to the Montreal Protocol reduction levels. They might also agree to uniform reporting requirements as developed within the regime and meet regularly to discuss progress and to brainstorm new ways to achieve future CFC reductions. In another scenario, which actually occurred, the United States eventually ratified the Montreal Protocol, but Congress delayed passing implementing legislation for a significant period of time. A parallel process of sub-federal integration occurred when the city of Denver chose to phase out CFCs in accordance with the treaty prior to the passage of federal implementing legislation.\(^{10}\)

In a second type of sub-federal integration, the city of Amherst, Massachusetts, could pass an ordinance calling on the United States to ratify the Convention on the Rights of the Child. Rather than implementing the treaty's substantive provisions, Amherst could simply express its solidarity with the international community and urge the United States to change its position on the treaty.\(^{11}\)

Finally, a city or state could simultaneously adopt both strategies of treaty integration. For example, the state of New York could urge federal ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families\(^{12}\) at the same time that it passes legislation providing immigrants with access to various social services guaranteed by that treaty. Such legislation might mimic legislation passed by a country that had ratified the Migrant Workers treaty as well as require enhanced data collection from relevant state agencies to develop a contextualized sense of migrant workers' day-to-day problems. In turn, the resulting data could be used to craft future legislation to help migrant workers and their families.

Treaties were once limited to seemingly external matters between countries,\(^{13}\) but now that they include internal matters such as individual human rights and domestic environmental regulation, sub-federal actors

\(^{10}\) Eight states and many cities, including Denver, actually adopted such policies. See Michael H. Shuman, Dateline Main Street: Courts v. Local Policies, 86 FOREIGN POL'Y 158, 175 (1992).

\(^{11}\) This symbolic action might make particular sense when a city lacks the resources to integrate a treaty, or a treaty creates obligations that only federal legislation can address.


play a greater role in treaty implementation. Existing literature already recognizes that sub-federal actors often help integrate treaty law into domestic law and act as the locus of transnational networks. This Article adds to that observation by contending that such integration does not always happen at the behest of the federal government. Rather, this Article examines several case studies in which sub-federal actors undertake this integrating role even as the federal government ignores or abandons a particular treaty.

Legal scholars tend to focus on ratification and related litigation as the relevant mechanism for treaty norm internalization. Norm-based theorists argue that the articulation of norms through treaties can help reframe human rights and environmental debates and subsequently shape domestic law. Conversely, rational choice scholars suggest that treaties do little work of their own in shaping domestic behavior and instead contend that, to the extent norms matter, they simultaneously drive both treaties and any domestic push for social change. Thus far, the debate about the effect of these treaties has generally been limited to an examination of ratifying countries. Yet, another strategy for achieving compliance with human rights and environmental treaty norms exists. Despite claims that treaty ratification is a necessary precondition for the consistent observance of international human rights and environmental standards, empirical evidence suggests social movements and government actors may encourage sub-federal actors to implement treaties in the face of federal apathy, ambivalence, or even hostility.

Part II of this Article introduces the longstanding treaty compliance debate and expands it to include the question of whether treaties influence sub-federal actors in nonratifying countries. This Part draws on norm theory to conclude that sub-federal actors may use treaties and treaty processes as: (a) a framework to understand the underlying substantive issue, (b) a way to reduce drafting costs, (c) a focal point to measure compliance, (d) evidence of an international consensus, (e) a mechanism to express or signal a cosmopolitan identity, or (f) a springboard to criticize the current administration.

15. Id.
Part III explores several case studies of sub-federal integration of human rights and environmental treaties—the Kyoto Protocol on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These case studies highlight the shortcomings of both norm-based and rational choice theories in explaining sub-federal integration. They also challenge the prevailing view that international norm internalization is a one-way process flowing from the United States and other developed countries to less developed and newly democratizing countries.

Part IV attempts to distill which treaty costs and benefits accrue only to a ratifying country and which can be fully captured through sub-federal action. This Part also identifies some of the limits on federal norm internalization by identifying procedural and political barriers to treaty ratification and the passage of federal implementing legislation. In addition, this Part suggests that the norm-based theorists' predictions about sub-federal action inducing ratification should be tempered by rational choice insights about national as opposed to local preferences.

Finally, Part V grapples with the constitutional and political constraints on sub-federal integration of treaties. Constitutional constraints include textual limitations, active preemption, and the dormant treaty power. Nevertheless, this Article posits that, notwithstanding an expansive view of federal preemption, sub-federal actors possess many options in bypassing federal unwillingness to ratify treaties or pass implementing legislation.

II. Fitting Sub-Federal Integration into the Treaty Compliance Debate

The debate surrounding whether and how treaties influence domestic practices has spawned a substantial subfield, but this literature says little about the role of sub-federal actors in countries that choose not to ratify or implement treaties. This oversight obscures the mechanisms through which sub-federal entities can “bring international law home.” This Part introduces competing compliance theories to help situate the practice of sub-federal integration. It also explains why the insights of norm-based models, with their focus on persuasion and treaty management, ought to be extended to treaty nonmembers. Similarly, this Part suggests why the insights of rational choice models, with their focus on

welfare maximization, also help illuminate some of the treaty nonmembers' practices.

A. Norm-Based Models

Norm-based models of international law suggest that ideas, constructed and transmitted through transnational interactions, influence government behavior above and beyond self-interest.\textsuperscript{19} Multilateral treaties frequently articulate, codify, and publicize these ideas. Norm-based models assume that countries then join these treaties because they care about both their direct welfare gains and their reputations as reliable members of the international community.\textsuperscript{20}

The managerial school is a prominent norm-based model. First articulated by Abram and Antonia Chayes, the managerial school maintains that countries comply with international law out of a combination of enlightened self-interest and effective reporting, verification, and monitoring requirements.\textsuperscript{21} The managerial approach assumes that most treaty regimes tolerate a "significant level of noncompliance or free riding,"\textsuperscript{22} but that willful treaty violations are only occasional. This view contends that most violations stem from (1) ambiguous and indeterminate treaty language;\textsuperscript{23} (2) limited economic or technical capacity to comply; and (3) unforeseen changes in circumstances.\textsuperscript{24}

The transnational legal process school, associated most closely with Harold Koh and Anne-Marie Slaughter, provides a complementary norm-based model.\textsuperscript{25} In addition to emphasizing the interactions where global norms are debated and interpreted (as stressed by the managerial school), proponents of this approach argue that legal scholars should also assess the manner in which domestic legal systems internalize treaty norms.\textsuperscript{26} The transnational legal process school focuses on the mechanisms by which a country can signal its internal acceptance of the

\textsuperscript{22} Id. at 150.
\textsuperscript{23} The focus on treaty language and rule indeterminacy draws from Thomas Franck's theory of compliance pull. He contends that treaties exert compliance pull through the fairness of the process that creates the treaty mandates as well as the fairness of the application of the rules. The determinacy of the rules, general application of the rules, and the rules' bases in equitable principles establishes the legitimacy of the treaty regime. \textit{THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS} (1995).
\textsuperscript{24} CHAYES & CHAYES, supra note 21, at 10.
\textsuperscript{25} See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
\textsuperscript{26} Koh, supra note 7, at 2602.
treaty’s dictates. Generally, this process of internalization begins with the transnational interactions that lead to the emergence of a global norm, which international law subsequently articulates and refines. Countries then “bring international law home” through domestic internalization of the global norm. Transnational legal process theorists suggest that this domestic internalization generally occurs at the federal level through the executive, legislative, or judiciary and then trickles down to sub-federal units. Ratification and domestic implementing legislation therefore kick-start the domestic internalization process. The last stage of internalization occurs when a country assumes an independent sense of obedience in following the norm.

Thus, norm-based theories predict that the best compliance rates accompany treaties that establish international bureaucracies to help resolve the indeterminacy in their treaty provisions and provide technical and financial assistance for their implementation. Managing compliance requires transparency in order to facilitate coordination of the treaty norms and provide reassurance of other members’ compliance. As a result, norm-based theorists argue that treaties should develop uniform self-reporting systems with standardized data collection, measurement, and analysis procedures. Reporting requirements should be specific and include preliminary assessments of future policies and programs to promote compliance. Countries should discuss and debate the content of reports. Treaty parties should also frequently conduct meetings and provide other forums that involve the discussion of thorny treaty issues and encourage compliance from reluctant treaty parties. Treaties need enough flexibility to account for significant economic, social, and political changes either through amendments or protocols. Finally, parties should use the treaty regime to help develop domestic enforcement schemes through technical and bureaucratic training.

The normative model is not without critics. For example, proponents of the enforcement model critique the managerialists’ reliance on persuasion and positive incentives to explain treaty compliance. Under the

27. *Id.* at 2641.
29. *See id.* at 646–54.
30. *Id.* at 679–80.
32. *Id.* at 135–53.
33. *Id.* at 154–73.
34. *Id.* at 167.
35. *Id.* at 228–49.
36. *Id.* at 225–27.
enforcement model, definitive dispute resolution options, combined with robust economic or military sanctions, drive treaty compliance. Countries comply with treaties for fear that their violations will be noticed and punished. The ideal treaty regime requires credible verification mechanisms and clear rules in order to detect cheaters. Such a regime also requires the political will to enforce sanctions. A more moderate version of this model suggests that sanctions may not be essential to treaty compliance, but notes that enforcement-backed international law is more likely to change behavior than international law without enforcement mechanisms.

Others criticize the failure of the managerial school to describe accurately the state practice associated with many human rights treaties. Many states only weakly implement treaties’ reporting requirements, much less their substantive requirements. In particular, the United States often shirks its reporting obligations by submitting late or cursory reports. Similarly, ratification-induced legislative changes stemming from human rights treaties seem to be quite limited in the United States. At best, litigation provides a limited supplement to the reporting functions. Moreover, the empirical studies on compliance with human rights treaties are fairly discouraging—they suggest ratification may discourage human rights protection in oppressive countries, although ratification in democratic countries with strong civil societies may

38. See id. at 386, 391–92
39. For a discussion of this approach, see Antonia Handler Chayes & Abram Chayes, From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance, 14 INT’L SECURITY, Spring 1990, at 147.
40. Downs et al., supra note 37, at 392 (discussing the WTO and the Maastricht Treaty as empirical support for the enforcement model, as the WTO automatically authorizes retaliation for trade violations and the Maastricht Treaty allows domestic law sanctions for violations).
41. Id. at 379. Hathaway, supra note 19, at 500–01. This is particularly true for countries that do not believe that international law creates an independent obligation.
42. Treaty bodies generally receive country reports once every four years and spend about six hours considering the report with little follow up. NGOs often lack ample time and notification to fully comment on the reports or attend the treaty proceedings. See Anne F. Bayefsky, The UN Human Rights Regime: Is It Effective?, 91 AM. SOC’Y INT’L L. PROC. 460, 467 (1997).
44. Id. (identifying the only concrete domestic legislative changes from the genocide convention as the establishment of civil and criminal liability for torture and the explicit prohibition on genocide).
improve human rights behavior.\(^{46}\) General compliance with environmental treaties is also quite weak,\(^{47}\) and U.S. compliance is best when its domestic legislation predates the treaty.\(^{48}\) Given these findings, some scholars are beginning to argue that domestic integration of treaty norms is substantially more important to treaty compliance than norm enforcement through treaty mechanisms.\(^{49}\)

**B. Rational Choice Models**

Rational choice models of international law, by contrast, assume "[s]tates engage in consequentialist means-end calculations, and state interests can be deduced from the state’s material characteristics and the objective conditions it faces."\(^{50}\) In addition, most rational choice scholars assume these preferences are "relatively stable across time and across issues."\(^{51}\) Rational choice literature generally focuses on the state as the relevant unit of analysis, while sub-state and nongovernmental actors tend to be peripheral.

Rational choice scholars dispute the presumed causal linkage between the adoption of treaties and compliance with them. While modern rational choice scholars have abandoned the early realist contention that treaties "exist and are enforced only when they serve the interests of the

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46. Four major empirical studies assess whether ratification of human rights treaties improves domestic behavior. See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005) (suggesting that ratification exacerbates human rights violations in countries with no civil society, but that the more democratic the society is and the stronger a country's civil society, the more beneficial the effects of ratification); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 111 Am. J. SOC. 1373 (2005) (finding ratification is often associated with a worse human rights record, but that citizen participation in international governmental organizations is associated with a better human rights record); Hathaway, *supra* note 16 (finding ratification is often associated with worse human rights performance, although the opposite is likely true for fully democratic states); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999) (concluding ICCPR ratification did not affect civil and political rights or personal integrity rights).


most powerful states," they do suggest that treaties generally reflect rather than shape interests, especially for those able to dictate the treaty terms. To these scholars, empirical evidence suggesting moderate to high levels of compliance is merely proof of strong preexisting underlying interests.

Jack Goldsmith and Eric Posner posit four possible explanations for treaty membership. First, some treaties reflect a coincidence of interests between the parties. Such treaties embody preexisting interests rather than attempts to change the behavior of any participating country. Second, coordination games may explain some instances of treaty membership: each country can best recognize its interests if a group of countries engages in identical actions. Third, treaties arise when cooperation yields long-term benefits. For example, two countries may forgo territorial gains in each of their short-term interests and instead agree to a border treaty with a framework to monitor violations that allows both countries to realize long-term gains from stability and provides a framework to monitor violations. Finally, treaties may also arise through coercion. A weak state might accede to a powerful state's demand that it join a treaty even if the weaker state prefers the status quo, because it realizes the powerful state has already decided to alter the political reality such that the status quo is no longer a viable option.

The rational choice model aptly explains high levels of noncompliance with human rights treaties and moderate compliance with environmental treaties. For example, rational choice scholars argue that

52. Hathaway, supra note 19, at 478. For a discussion of such early views, see id. n.19.
54. Id. at 11-13.
55. Under this rationale, a country acts in a particular manner to satisfy its own interests regardless of the actions of other countries. If two or more countries have the same interests, they will develop a treaty to reflect this coincidence of interests.
56. For example, rules of the road develop in such a manner. It does not matter if cars drive on the right or left side of the road; what matters is that all drivers decide to drive on the same side rather than leaving it to individual choice. See Gerald J. Postema, Coordination and Convention at the Foundations of Law, 11 J. Legal Stud. S165, S183–84 (1992).
58. For instance, a less powerful country might prefer to negotiate individual trade agreements, but the existence of the WTO changes the background against which all countries operate. If the United States, Europe, and Japan want to conduct trade through the WTO, smaller countries may join even though the treaty regime does not best facilitate their interests. See Lloyd Gruber, Ruling the World (2000).
the end of the Cold War, coordinated responses to abuses, and internal pressure explain existing levels of compliance for human rights treaties. Norm entrepreneurs can publicize violations of human rights abuses regardless of a country's treaty membership status. Likewise, treaties may be used to influence domestic politics or convey the seriousness of a state's desire to be bound, and yet they may exert no independent compliance pull.

Rational choice theories can also explain why powerful countries such as the United States might actively negotiate treaties without ultimately joining them. The United States may elect to remain outside the Kyoto Protocol because it imposes significant costs for a diffuse environmental benefit, which provides relative gains to other countries. The United States might also stay out of the treaty in order to maintain leverage over other noncompliant countries. Similarly, the United States has not joined human rights regimes such as the CEDAW because it objects to specific elements of the treaty regime and has seemingly little to gain from domestic implementation. The United States ratified the CERD, but as the treaty is non-self-executing, it imposes little cost at the national level without corresponding implementing legislation.

In addition to the implicit criticisms leveled at rational choice models by the prevailing assumptions of norm theorists, some have criticized rational choice models for treating states as unitary actors despite the presence of varied domestic actors and preferences. Others have criticized as unduly simplistic the notion that international law is purely interest maximizing. Similarly, rational choice models do a poor job of explaining how states' interests change or new problems are recognized in a world without a corresponding change in the distribution of material resources. In other words, rational choice has a difficult time accepting or explaining non-security interests.

C. How Do Treaties Influence Sub-Federal Action?

Neither norm-based nor rational choice models, as currently applied, fully explain the practice of sub-federal treaty integration. Treaty makers focus on ratification as essential to domestic integration. Yet even with-
out federal ratification or implementing legislation, treaties can influence nonmembers through sub-federal action. Treaties precipitate sub-federal action by producing a fully articulated framework by which to understand the problem underlying the treaty; reducing drafting costs for welfare-maximizing legislation; providing focal points that cities and states can use to measure compliance; offering evidence of an international consensus on the existence of, and approach to, a problem; and presenting an instrument to express and signal a cosmopolitan self-identity.

First, treaties provide a framework in which to conceptualize and comprehensively understand an underlying problem as well as delineate specific rights and obligations. In many ways, treaties are the "international articulation of [their underlying] norms." They are a highly visible compilation of the underlying substantive goals and values. They may encourage government actors to see a problem in a particular way and pass legislation that goes beyond the treaty’s mandates. Moreover, treaties can offer the conceptual framework through which social movements engender change. While the early civil rights movement was mostly home-grown in the United States, international law and international social movements have informed second- and third-generation human rights movements. The end of World War II sparked international interest in human rights protections and culminated in numerous multilateral human rights treaties. Similarly, the burgeoning environmental movement turned to treaties as a mechanism for effecting change. Treaties provide an umbrella under which to organize domestic litigation and legislation. This framework development theory fits more easily with norm-based approaches than with rational choice accounts, which have a difficult time explaining the emergence of social movements or what makes such movements effective beyond material considerations.

Second, treaties and subsequent implementing legislation can provide off-the-rack legislative solutions to cities and states. Rather than invest in developing their own legislation, sub-federal actors can copy from preexisting legislation. Sub-federal integration demonstrates that cities and states now include material derived from treaties when they make legislative decisions. Treaties can also help spawn best practices from which sub-federal actors can choose. Of course, cities and states will not always elect approaches from among existing treaty options.

63. When social change is desired, movements need to have a conceptual framework. For example, while the civil rights movement used both litigation and legislation, larger principles of equality and justice unified the movement’s actions. Their conceptions of these principles informed all of their strategies.
Rather, sub-federal integration simply demonstrates that treaties can have an effect beyond treaty parties. This perspective is consistent with rational choice accounts: once cities or states decide that they face a particular problem, they can assess the costs and benefits of existing legislative approaches to that problem. They can piggyback their efforts on the copious amounts of research and debate that go into drafting a treaty. Still, mere welfare maximization fails to explain why some cities and states emphasize the international aspect of the legislation. They could easily pass legislation that mimics a treaty without calling attention to the legislation's origin.

Third, treaties can provide a focal point by which cities and states match their regulatory behavior with the international community. Focal points can help facilitate the resolution of both cooperation and coordination games. For instance, a treaty that sets up a system for measuring pollution reduction may influence nonmembers to adopt the same measuring system so that all can compare reductions using the same baseline. Cities and states need not think the measuring system is the best option, nor must they think they will be sanctioned for using a different system. Rather, the treaty provides them the opportunity to coordinate their behavior with other actors without creating a separate binding agreement. Admittedly, private individuals and institutions can also provide focal points, but the binding nature of treaties makes them a more public and visible focal point than many other possibilities. Both rational choice and norm-based models can accommodate the idea of focal points. Rational choice models certainly recognize the importance of both coordination and cooperation, while norm-based models help articulate why the treaty law may appear a more natural and salient focal point than other options.

Fourth, the very existence of treaties in force provides proof of an international consensus on the existence of, and approach to, a problem. While sub-federal actors are not bound by a treaty or the norms it articulates, they can use the treaty's widespread acceptance as a justification for adoption through an appeal to consensus and acquired knowledge. A significant number of ratifications can add to the persuasiveness of a treaty's provisions by highlighting the broad agreement of the international community to undertake binding obligations. States may not ultimately fulfill these obligations, but treaties conceptually differ from purely aspirational or hortatory soft law in that states precommit to par-

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65. Id. at 1654, 1668–69.
66. Albeit, such consensus may be limited.
ticular behavior. Moreover, treaties that emerge from preexisting soft law indicate a growing and deepening consensus about the validity of the treaty norms. Norm-based models do a much better job than rational choice accounts of acknowledging this aspect of treaty influence because they focus more on the importance of persuasion to compliance with international law.

Sub-federal actors may also support treaties to express or signal a cosmopolitan identity. Cosmopolitanism suggests individuals ought to identify themselves as members of the world community prior to or in addition to identifying themselves through national or local allegiances. Given individuals’ difficulties in actualizing cosmopolitan motivations, governments might be better suited to undertake cosmopolitan obligations. This identity can be encouraged through adoption of human rights treaties, which, in emphasizing the intrinsic value of all humans, are inherently cosmopolitan. Cosmopolitan ends can also be achieved through self-consciously identifying domestic legislation with a treaty, which asserts membership in the global community when more formal mechanisms such as treaty ratification are unavailable. City or state governments may do so to satisfy a domestic constituency or to signal membership in transnational society to the rest of the world. Rational choice models have a difficult time grappling with cosmopolitanism because they presume states and other actors seek to maximize their own welfare rather than the welfare of others. They also have difficulty explaining the attractiveness of sub-federal integration to states or other governmental actors that have not experienced any change in their material interests.

Finally, sub-federal integration, particularly that which merely calls for federal ratification, may be a way to cheaply and visibly criticize the presidential administration or Congress. Urging ratification of a rejected treaty places the sub-federal actor in stark contrast to the relevant federal actor without assuming the costs of implementing the treaty’s substantive provisions or the burdens of accepting the treaty’s procedural processes.


III. CASE STUDIES

This Part develops four case studies to explore the various aspects of and reasons for sub-federal integration of treaty law. These case studies stem from human rights and environmental treaties because prospects for federal ratification and implementing legislation are limited in these areas (unlike trade), and sub-federal actors enjoy wide latitude to act in these areas (unlike security). This Part examines two unratified environmental treaties—the Kyoto Protocol and the Stockholm Convention on Persistent Organic Pollutants—along with one non-self-executing human rights treaty—the Convention on the Elimination of All Forms of Racial Discrimination—and one unratified human rights treaty—the Convention on the Elimination of All Forms of Discrimination against Women. Each case study includes a brief discussion of the federal negotiating position and the ensuing sub-federal attempts at integration. This Part concludes with an assessment of how these case studies fit within the norm-based and rational choice models and identifies the benefits described above, such as reduced drafting costs or focal points for coordinating progress, that drive the sub-federal integration process.

A. The Kyoto Protocol

1. Background

In the last ten years, the specter of global warming has increasingly occupied the public consciousness. As a result of growing concern, countries negotiated the Kyoto Protocol, which commits developed countries already at a high level of greenhouse gas emissions to reduce overall emissions to five percent below 1990 levels by 2012. It encourages national policies to enhance energy efficiency, protect carbon sinks, and reduce greenhouse gas emissions. Developed countries may jointly meet their commitments through the use of tradable permits. The Protocol currently imposes no reduction requirements on developing countries such as China and India.

The United States actively participated in the Kyoto Protocol negotiations, securing significant objectives such as flexible timetables for emission reductions, the inclusion of all greenhouse gases, and the al-

72. Id. art. 2.1(a).
73. Id. art. 4.1.
lowance for a cap-and-trade permit system. In particular, the tradable permit mechanism drew heavily from the United States' domestic experiences with such systems.

Despite early enthusiasm from the Clinton administration, the U.S. Senate vociferously opposed the Kyoto Protocol. In July 1997, the Senate issued Resolution 98, which declared the United States should not sign the Kyoto Protocol if (a) it was likely to cause serious harm to the U.S. economy, or (b) it did not expand to commit developing countries to future reductions. Congress also added restrictive language to appropriations bills prohibiting the use of federal funds to implement the Kyoto Protocol prior to ratification. President Clinton signed the Kyoto Protocol, but fearing defeat, he declined to submit the treaty to the Senate for ratification. President George W. Bush, on the other hand, openly stated his opposition to the Protocol and criticized the treaty for excluding "80 percent of the world." The Bush administration also worried about the treaty's significant compliance costs. Given these concerns, the United States seems unlikely to join the Kyoto Protocol any time in the near future.

2. Sub-Federal Action

Many cities and states criticized President Bush for creating a regulatory void on greenhouse gases. The explicit disavowal of the Kyoto Protocol spawned multiple sub-federal efforts. For instance, the U.S. Mayors Climate Protection Agreement, passed in 2006, "urge[s] the federal government and state governments to enact policies and programs to meet or beat the Kyoto Protocol target of reducing global warming pollution levels to 7% below 1990 levels by 2012." The agreement also encouraged Congress to pass the Climate Stewardship Act, which would create a national tradable permit regime. Signatory cities also made a voluntary commitment "to meet or exceed Kyoto Protocol targets" themselves. So far, 418 mayors have joined the agreement.

The International Council for Local Environmental Initiatives (ICLEI) will monitor implementation of the Mayors Agreement as part of the Cities for Climate Protection program. The Cities for Climate Protection, which includes more than 500 cities in thirty countries, includes enough municipalities to account for "more than eight percent of anthropogenic greenhouse gas emissions." The program seeks to

82. In addition to the examples discussed in the text, Berkeley and Santa Cruz both endorsed the Kyoto Protocol. KyotoUSA, http://www.kyotousa.org.
84. This language has since been removed and the agreement now urges general national legislation on the matter.
85. Id.
87. INT’L COUNCIL FOR LOCAL ENVTL. INITIATIVES, LOCAL GOVERNMENTS FOR SUSTAINABILITY (n.d.), available at http://www.iclei.org/documents/Global/brochures/ICLEI_BrochureText_ENG.pdf. In 1993, the ICLEI began the Cities for Climate Protection campaign to build a worldwide movement of local governments who adopt policies and implement measures that achieve measurable reductions in local greenhouse gas emissions, improve air quality, and enhance urban livability and sustainability. Id.
integrate the Mayors Agreement into the Kyoto Protocol by acting as a broker for private business and household reductions.\footnote{Int'l Council for Local Envtl. Initiatives, Carbon Trading and Local Government (1999) (on file with author).}

The Cities for Climate Protection program also promotes city-to-city cooperative opportunities. For example, four U.S. cities and three Japanese cities are comparing climate protection strategies and sharing available research.\footnote{Int'l Council for Local Envtl. Initiatives, Cities Partner for Climate Action (n.d.) (on file with author).} Fort Collins, Colorado, and Cebu City in the Philippines have completed a climate-related agreement to exchange technical and practical know-how in the waste management field.\footnote{Int'l City/County Mgmt. Ass'n, Global Problems . . . Local Solutions: 2001 Annual Report 5 (2001), available at http://www.makingcitieswork.org/files/pdf/ResourceCities/RCAnnualReport01.pdf.} Similarly, Miami-Dade County is working with local Mexican authorities to jointly implement their Cities for Climate Protection initiatives.\footnote{Int'l Council for Local Envtl. Initiatives, Miami-Dade County to Work with Mexico, (n.d.) (on file with author).} Meanwhile, other cooperative opportunities are emerging.

ICLEI also maintains a database of best practices and encourages conferences and seminars to facilitate information exchanges.\footnote{Otto-Zimmermann & Alebon, supra note 88, at 4.} It is currently developing a multilingual database to allow cities to share "emission inventories, reduction targets, and mitigation action plans."\footnote{Id.} Along with the international interactions, ICLEI also promotes extensive domestic communication through numerous workshops and a leadership council dedicated to informing member cities of new scientific developments and emerging policies, as well as "actively engag[ing] local elected officials in promoting the benefits of local climate protection strategies."\footnote{Otto-Zimmermann & Alebon, supra note 88, at 5.}

The Regional Greenhouse Gas Initiative (RGGI), a cap-and-trade system for nine Atlantic states, is another example of a sub-federal initiative developed in response to federal reluctance to ratify the Kyoto Protocol. Initiated by New York governor George Pataki in 2003, the RGGI created a regional carbon market for power plant emissions, with aspirations of creating a model for future national policy.\footnote{Reg'I Greenhouse Gas Initiative, About RGGI, http://www.rggi.org/about.htm.} The RGGI contemplates the possibility of inviting other countries to join or work within existing international frameworks—discussions of links to
European carbon trading systems are already underway. In addition, Maine and Connecticut have both begun to implement RGGI by passing legislation formally adopting the regional goals of RGGI.

The RGGI acts as a governmental information and regulatory network. State officials share past experiences with greenhouse gas regulation, listen to expert briefings, and attempt to harmonize relevant regulations. The RGGI website serves as a repository for much of the shared information. The RGGI also engages in data gathering and technical analysis to help develop model rules for other states. In addition, RGGI states are creating a greenhouse gas registry that could be integrated with other pollution registry efforts.

In many ways, the RGGI emerged in the shadow of the Kyoto Protocol. For instance, the emission reductions are pegged to 1990 levels—a self-conscious effort to mimic the Kyoto Protocol. The ongoing efforts to design the cap-and-trade system draw from other countries’ experiences under Kyoto.

So far, the Bush administration and Congress have not directly responded to either the Mayors Agreement or the RGGI. While Congress has not passed preemptive legislation and no federal actors have initiated litigation, the federal government has stopped short of endorsing the programs.

B. The Stockholm Convention on Persistent Organic Pollutants

1. Background

Longstanding concern about agricultural and industrial chemicals culminated in the 2001 Stockholm Convention on Persistent Organic

106. Instead, the executive branch has developed a variety of voluntary international programs and the Clear Skies Initiative to deal with global warming. For example, the Asia-Pacific Partnership on Clean Development, Energy Security, and Climate Change created a nonbinding agreement to focus on the development of energy efficient technology. See Press Release, The White House, Fact Sheet: President Bush and the Asia-Pacific Partnership on Clean Development (July 27, 2005), http://www.state.gov/g/oes/rls/fs/50314.htm.
Pollutants. The Stockholm Convention bans the production and use of the so-called "dirty dozen" chemicals, minimizes the permissible use of certain chemicals in Annex C, and provides for a precautionary approach to the future regulation of still other chemicals. The convention also requires ratifying states to participate in information exchanges, public education campaigns, and research, development, and monitoring on persistent organic pollutants (POPs).

As with many environmental treaties, the United States played an important role in negotiating the Stockholm Convention. In May 2001, the United States signed the convention and President Bush has been aggressively promoting ratification. Despite such support, the treaty has languished after having been submitted to the Senate for advice and consent. Congress has only recently begun to address the necessary precursor legislation for ratification. Even if the Senate ratifies the treaty, it is likely to reject the Stockholm Convention's mechanism for adding new chemicals outside the dirty dozen.

2. Sub-Federal Action

While many domestic actors have taken action on POPs prior to the Stockholm Convention, a few states seem to have responded directly to the treaty. For instance, Maine's 2001 legislation on dioxin takes language directly from the treaty in articulating the state's policy "to reduce the total release of dioxin and mercury to the environment with the goal of its continued minimization and, where feasible, ultimate elimination." Similarly, Washington state's draft rule on persistent

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108. Id. art. 3.
109. Id. art. 5.
110. Id. art. 8.
111. Id. art. 9.
112. Id. art. 10.
113. Id. art. 11.
115. Id.
bioaccumulative toxics (PBTs) also uses language from the Stockholm Convention in stating that a "lack of full scientific consensus should not be used as a justification for delaying reasonable measures to prevent or minimize harm to human health or the environment."\(^{120}\)

Moreover, California's ban on lindane has provided it with an opportunity to influence additions to the Stockholm Convention. Lindane is considered one of the most likely pollutants to be included in the Stockholm Convention's future bans.\(^{121}\) NGOs have made submissions to treaty bodies emphasizing the success of the California lindane ban.\(^{122}\) California's ban has encouraged New York, Washington, Maine, and Michigan to adopt similar bans.\(^{123}\) The EPA has also announced a ban, but the FDA still permits its use.\(^{124}\)

Cities have also taken action on persistent organic pollutants. In 2002, Seattle passed a resolution to "phase out the purchase of products that contribute to persistent toxic pollution."\(^{125}\) Buffalo, Boston, San Francisco, and Oakland all have taken action to eliminate or reduce PBTs.\(^{126}\)

The federal government has been relatively quiet about these subfederal actions. The EPA supported California's ban on bromated flame retardants and lindane despite its clear authority to preempt such legislation.\(^{127}\) The Bush administration, however, is now pursuing legislation that would preempt sub-federal actors from "establish[ing] or continu[ing]... any requirement that is applicable to a POPs [sic] chemical substance or mixture."\(^{128}\) In addition, as mentioned above, current Stockholm Convention implementing legislation would not require the EPA to

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123. Schafer, supra note 121, at 12.
act on chemicals added to the treaty after the United States completes ratification.\textsuperscript{129}

\textbf{C. Convention on the Elimination of All Forms of Discrimination against Women}

1. Background

In 1946, the United Nations established the Commission on the Status of Women. Subsequent efforts culminated in the Convention on the Elimination of All Forms of Discrimination against Women,\textsuperscript{130} which applied the recent advances in the human rights field to “develop[] appropriate human rights language for women.”\textsuperscript{131} The CEDAW obligates states to use constitutional, legislative, and judicial measures to prohibit, eliminate, and ameliorate all discrimination against women.\textsuperscript{132} The United States actively participated in the drafting of the CEDAW.\textsuperscript{133} To date, 185 countries have ratified the treaty.\textsuperscript{134}

Like most human rights treaties, the CEDAW uses transparency mechanisms rather than enforcement provisions to facilitate compliance. For instance, the convention requires countries to submit progress reports every four years.\textsuperscript{135} These reports focus on the legislative, judicial, and administrative measures taken to comply with the CEDAW. The Optional Protocol to the CEDAW, which has a much less substantial membership than the CEDAW itself, allows individuals to file complaints directly before an international committee that may issue a ruling that binds the domestic courts of the individual’s country.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{129} Lois R. Ember et al., \textit{Congressional Outlook 2006}, 84 CHEM. & ENG’G NEWS 13, 18 (Jan. 23, 2006).
  \item \textsuperscript{130} Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1978, 1249 U.N.T.S. 13 [hereinafter CEDAW].
  \item \textsuperscript{132} CEDAW, supra note 130, art. 2.
  \item \textsuperscript{133} See Lars Adam Rehof, \textit{Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women} (1993). United States involvement included pushing for language prohibiting “discrimination based on sex” rather than the more narrow final language which focuses on “discrimination against women,” as well as temporary, rather than permanent, special standards to promote the equality of women. Id. at 55, 69.
  \item \textsuperscript{135} CEDAW, supra note 130, arts. 18, 20.
\end{itemize}
The evidence on international compliance with the CEDAW is mixed. Some signatories seem only nominally committed to the treaty. Many countries have failed to meet their reporting requirements and they rarely provide judicial or legislative remedies for individual violations. On the other hand, activists credit the CEDAW with discrete victories such as the development of women’s citizenship rights in Botswana and Japan, inheritance rights in Tanzania, and property rights in Costa Rica. Similarly, the Brazilian and Ugandan constitutions draw directly from CEDAW provisions.

The United States, however, is a notable holdout. President Carter, sparking optimism about the treaty’s prospects, signed the CEDAW shortly after it was opened for signature in 1980. Although Carter submitted the treaty for advice and consent that year, the Senate Foreign Relations Committee did not hold its first hearings until 1988. Years later, President Clinton recommended ratification of the CEDAW with reservations, understandings, and declarations on issues such as federalism, women in combat, and paid maternity leave. But the Senate did not act. Even if ratified, the CEDAW is not self-executing, and the treaty expressly allows for any reservations, understandings, and declarations that are not fundamentally incompatible with the treaty’s purposes.

2. Sub-Federal Action

Numerous cities and states have urged federal ratification of the CEDAW—nine states have passed ratification resolutions. In 1998, twenty years after President Carter signed the CEDAW, San Francisco passed a local ordinance implementing its principles. The nonprofit group promoting the ordinance wanted both to demonstrate the benefits of CEDAW ratification and implementation to elected officials and to

137. For instance, Laos and Zaire have never submitted reports. See Rehof, supra note 133, at 359–61.
139. CEDAW Working Group, supra note 131, at 6.
140. Id. at 37.
142. See CEDAW: Treaty for the Rights of Women, http://www.womenstreaty.org/facts_history.htm (observing that the Senate held hearings again as recently as 2002, but has not yet provided advice and consent).
"bring the weight of international human rights into our communities and provide[] us with mechanisms to adopt international success strategies and best practices here in the United States."

San Francisco’s local integration of the CEDAW focuses on data collection. So far, San Francisco has completed CEDAW-mandated gender analyses of six city departments using a “framework to evaluate and address any differential impact of service delivery, employment practices, and budget allocation.” These analyses prompted the city to institute changes in order to better allocate resources to female offenders in juvenile probation; increase and improve collection of gender-disaggregated data; change placements of streetlights and sidewalk cuts; expand sexual harassment training; improve flexibility in meeting vendor requirements for women; and encourage appointments of women to revenue-creating commissions. While these changes may seem minimal given the scope of the CEDAW’s protections, San Francisco is already largely in compliance with the CEDAW.

Influenced by San Francisco, other cities and states are promoting similar initiatives. Activists interested in starting CEDAW campaigns hold workshops and public hearings and draft resolutions urging both ratification and local implementation. More developed campaigns promote specific policy changes and the collection of disaggregated data. For instance, a research coalition in Massachusetts is pushing for a review of state laws and regulations in order to determine their compliance with the CEDAW, educating legislators on the value of CEDAW ratifi-
cation, and drafting model CEDAW resolutions and ordinances. Chicago, Los Angeles, and Atlanta have undertaken similar campaigns.

D. Convention on the Elimination of All Forms of Racial Discrimination

1. Background

In the early 1960s, highly visible anti-Semitic events such as swastika painting and the horrors of apartheid inspired the global community to address racial discrimination comprehensively. The CERD entered into force in 1969 and has since been ratified by 155 countries. The convention commits state parties to ending racial discrimination by: (1) reviewing government policies that create or perpetuate discrimination; (2) prohibiting racial discrimination by persons, groups, or organizations; and (3) undertaking "special and concrete measures to ensure the adequate development and protection of certain racial groups." It also bans racial segregation and apartheid, criminalizes the dissemination of racist propaganda, and encourages tolerance measures in the fields of education, culture, and information.

The United States enthusiastically participated in the CERD's drafting and quickly signed the completed treaty. In order to address constitutional constraints, a statement precluding any domestic legislation inconsistent with constitutional guarantees such as the right to free speech accompanied the U.S. signature. The Senate, however, did not ratify the CERD until 1994. Even then, the treaty was deemed non-self-executing and Congress never enacted implementing legislation.

154. LERNER, supra note 61, at 40–43.
156. Id. art. 2.
157. Id. art. 3.
158. Id. art. 4.
159. Id. art. 7.
160. LERNER, supra note 61, at 200.
163. Id.
2. Sub-Federal Action

Several states and localities have directly incorporated the CERD into legislation and city ordinances. For example, in 1986, Burlington, Iowa, incorporated some provisions of the CERD into Human Rights Ordinance 2807. More controversially, in 2003, the Black Faculty Association used the CERD’s definition of discrimination to draft a bill defining preferential treatment under Article 31 of California’s state constitution as permissible. This bill, which became Section 8315, allowed affirmative action in some contexts. Numerous parties brought legal challenges against Section 8315 for violating the state constitution, and in C & C Construction v. Sacramento Municipal Utility District, a California appeals court determined that Section 8315 was an unconstitutional amendment.

In a separate effort, New York City has recently debated legislation designed to implement the CERD. If passed, this legislation would require city agencies to undertake data collection, analysis, and dissemination with the object of proactively addressing racial and gender discrimination in all aspects of government, including employment, service provision, contract work, and policing strategies. The legislative proposal is premised on the notion that more and better data will demonstrate evidence of widespread discrimination.

Although this Article focuses on a few discrete examples, further instances of sub-federal integration are on the horizon. While it is beyond the scope of this Article to suggest a theory as to which human rights and environmental treaties are likely to be subject to sub-federal integration,
some obvious candidates stand out. Human rights treaties are extremely visible to civil society and government actors. Moreover, of the seven UN-based human rights treaties, the United States has signed but not ratified the Convention on the Rights of the Child (CRC),\textsuperscript{171} the International Covenant on Economic, Social, and Cultural Rights,\textsuperscript{172} and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family. In particular, the CRC is ripe for state implementation, as state law governs the bulk of the treaty provisions.\textsuperscript{173} Preliminary evidence suggests the beginning of just such a strategy.\textsuperscript{174} Other countries with federalist governance structures may also engage in similar behavior.

\section*{E. Assessing Sub-Federal Integration Through Compliance Theory}

Both rational choice and norm-based theories provide valuable insights about sub-federal integration, but neither provides a full account of existing practices. Rational choice has little to say about why sub-federal actors choose to integrate treaties. Perhaps cities and states have run cost-benefit analyses and determined greenhouse gas reductions were in their interests, despite prevailing beliefs at the federal level that the Kyoto Protocol is contrary to the national interest. Yet rational choice struggles to explain why cities and states invoke the Kyoto Protocol in order to reduce greenhouse gases. Similarly, rational choice adequately identifies the limitations of sub-federal integration of human rights treaties, but it lacks explanatory force as to why sub-federal entities chose these human rights projects or their degree of ongoing compliance. Rational choice would probably rightly predict that sub-federal integration is unlikely in places that reject identification with the international community—San Francisco, Berkeley, and New York are more likely candidates than Topeka, Peoria, or Jackson. Even so, rational choice might not predict the practice of sub-federal integration at all. Cities and states choose among various mechanisms for helping their citizens, and

\begin{itemize}
\item \textsuperscript{171} The United States, however, has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
\item \textsuperscript{173} For instance, both juvenile justice and family law are clearly in the states' province. Notable exceptions include the prohibition on recruiting persons before they turn eighteen and arguably, the right to life.
\item \textsuperscript{174} For instance, the "expansion of child specific refugee determination" was influenced by the invocation of the CRC. Jacqueline Bhabha, \textit{More than Their Share of Sorrows: International Migration Law and the Rights of Children}, 22 ST. LOUIS U. PUB. L. REV. 253, 269 (2003).
\end{itemize}
rational choice does not provide a basis for understanding why cities and states would find treaties particularly useful.

In contrast, many aspects of the norm-based theories, particularly the managerial school, help make sense of the ways in which sub-federal actors implement treaty law. The managerial school emphasizes the importance of data collection to determine state performance and encourage conversation about improved future compliance. The managerial school also focuses on the importance of the treaty regime in developing domestic capacity. While states and localities receive no foreign funds to accomplish the treaty’s goals, they can learn from treaty members through training, research, and education. More broadly, the managerial school relies on the use of argument and persuasion to influence state behavior, and it would therefore predict that sub-federal actors would use other countries’ experiences under the treaty as evidence of the possibility and the benefits of compliance.\footnote{175. Often treaty frameworks result in an accompanying body of case law interpreting the language. This occurs both through the treaty’s committee that evaluates the state’s interpretations in addition to the variety of domestic courts in different countries that will interpret the treaty. While a nonratifying sub-federal unit would not be bound, this case law provides valuable guidance and insight to help resolve ambiguities and difficult cases.}

While many sub-federal initiatives are in their preliminary stages, their current level of development suggests the possibility of extending treaty regime management to nonratifying sub-federal units. In other words, many of the mechanisms thought by norm-based theorists to be essential to encouraging the compliance of treaty parties can and are being extended to nonratifying sub-federal actors. For instance, the emphasis in compliance theory on data collection and self-reporting strongly informs sub-federal practices in this area. Both the ICLEI and the RGGI utilize information sharing to distill best practices. Many mayors plan to attend the Conference of Parties to the UN Framework on Climate Change, during which state parties will be discussing how to improve Kyoto Protocol compliance.\footnote{176. Seattle Office of the Mayor, International Talks on Global Warming FAQ (2005), http://www.seattle.gov/mayor/climate/pdf/MontrealFAQ.pdf.} The mayors can garner some of the benefits of those countries’ experiences even though they cannot formally join the treaty. Similarly, those implementing the San Francisco CEDAW and promoting the New York CERD view information gathering as the foundation for other policy changes. All four programs presume that governmental and private actors want to provide the requested data, and none of these sub-federal initiatives relies on sanctions or other punitive enforcement mechanisms.

As expected under the managerial theory, many of the sub-federal initiatives contemplate national and international cooperation to help
build compliance capacity. The climate initiatives draw on international experiences in implementing the Kyoto Protocol to help design and implement the permitting schemes. The San Francisco CEDAW has emulated countries with legislative experience implementing particular treaty provisions. In turn, San Francisco shares its experiences with other state and city CEDAW projects.

If the managerial theory's focus on capacity building to foster compliance and data collection to identify otherwise invisible problems is correct, it provides a reason to be optimistic about compliance with the New York CERD initiative and a corresponding reason to be pessimistic about compliance with the California CERD initiative. The New York CERD relies on data collection and networks of human rights advocates. CERD advocates actively draw from the experiences of the San Francisco CEDAW. By contrast, the California CERD implemented international human rights principles without linking them to any transnational networks, requesting treaty management resources, or drawing on national efforts to implement the CEDAW or the CERD, and it thus seems less likely to succeed.

All the sub-federal initiatives rely on the underlying treaties as a framework in which to conceptualize and understand rights and obligations. The climate initiatives rely on the cause and effect relationships well articulated first in the UN Framework on Climate Change and later in the Kyoto Protocol. Similarly, advocates suggest the human rights paradigm presents a framework different from existing U.S. legal approaches in that it "recognize[s] the interconnectedness of rights," "account[s] for unintentional [discriminatory] impacts," and obligates the government to take gradual and progressive steps to address inequality, whether caused by governmental or private actors.177 The New York CERD information-gathering scheme also reflects the human rights methodology of "promoting change by reporting facts."178 The arguments in favor of this bill advocate shifting from a litigation-based, civil rights framework to a human rights-based, proactive legislation framework.179

In sum, the case studies suggest the salience of the managerial school's insights about data collection and cooperation. While the case studies do not help predict which principles and ideas will ultimately succeed at reframing domestic debates, they do demonstrate the viability of using treaties as frames. Norm entrepreneurs can use treaties to extend

these mechanisms informally to nonmembers. The implementation of sub-federal efforts also demonstrates that cities and states can use powerful underlying treaty norms and ideas to bypass federal unwillingness to internalize international rules.\textsuperscript{180}

In addition to utilizing treaties as new frameworks to approach a substantive problem, all four case studies provide some support for the notion that sub-federal integration of treaties reduces drafting costs and enhances learning opportunities for sub-federal units. Both the RGGI and the Mayors Climate Protection Agreement draw from treaty language and look at implementing legislation in other countries. Domestic CEDAW advocates worked with NGOs and states involved in international CEDAW implementation to help develop San Francisco’s legislation. New York’s CERD draft legislation uses a combination of San Francisco’s language and CERD language from abroad. The Mayors Climate Protection Agreement self-consciously uses the Kyoto Protocol as a focal point for measuring compliance.\textsuperscript{181} This action facilitates comparisons to international initiatives and a more seamless integration into the Kyoto tradable permit regime. For instance, the RGGI intends to allow offsets to include EU Emission Trading allowances and Clean Development Mechanism credits.\textsuperscript{182} Using the same baseline reductions makes integration of those allowances and credits easier.

Finally, the case studies also demonstrate the use of an international consensus as a means for actively pursuing a cosmopolitan identity. The Mayors Climate Protection Agreement uses the Inter-Governmental Panel on Climate Change as evidence of international consensus on the existence of a warming problem and the U.S. absence from the Kyoto Protocol as the impetus for city action.\textsuperscript{183} Yet crafting a sub-federal initiative as a cosmopolitan policy can cut in both directions. The policy integrating the CERD into California’s state constitutional interpretation drew fire as an unwarranted international intrusion into the domestic

\begin{itemize}
\item \textsuperscript{180} Hathaway, \textit{supra} note 19, at 500 (adding to the argument that one only need to look to treaty terms and domestic institutions to make predictions about the internalization of international rules).
\item \textsuperscript{181} Seattle Office of the Mayor, What is the US Mayors Climate Protection Agreement?, http://www.ci.seattle.wa.us/mayor/climate/ (declaring that participating cities commit to “strive to meet or beat the Kyoto Protocol targets” and urging other governmental actors to “meet or beat the greenhouse gas emission reduction target suggested for the United States in the Kyoto Protocol.”).
\item \textsuperscript{183} U.S. Conference of Mayors, Endorsing the U.S. Mayors Climate Protection Agreement (June 13, 2005), http://www.ci.seattle.wa.us/mayor/climate/PDF/Resolution_FinalLanguage_06-13-05.pdf.
\end{itemize}
process. Similarly, some resistance to RGGI as an international policy has emerged. In 2003, Representative Joy introduced a bill in the Maine legislature to prohibit “[a] state department or agency [from] expend[ing] or award[ing] funds to implement, in whole or in part, an international treaty that the United States Senate has not ratified.”

IV. COMPARING SUB-FEDERAL INTEGRATION AND RATIFICATION

Although sub-federal actors cannot ratify treaties nor participate in their negotiation, they can integrate treaty law into domestic law by expressing support for ratification or implementing the treaty’s substantive provisions. Yet such integration does not perfectly mirror the federal ratification and implementation process. This Part describes how sub-federal integration fails to capture many of the benefits—and avoids some of the burdens—associated with treaty ratification and membership. This Part also contests the prediction that sub-federal integration itself will spark treaty ratification. Rather, while the existence of a treaty can help shape local preferences and change local practices through sub-federal integration, this Article suggests that such integration is unlikely to change federal practice with regard to ratification.

A. Distinguishing Treaty Ratification and Sub-Federal Integration

1. Benefits

Treaty membership provides benefits to a country at both the international and domestic levels. These benefits include reputational gains, influence over the treaty’s governance structure, realignment of governmental powers, and interest maximization. First, one potential international benefit is the ability to develop or strengthen a reputation for international compliance. For countries trying to establish themselves as good neighbors in the global community, joining a treaty may provide such a signal, which may be bolstered by remaining a member in good standing. Empirical evidence suggests the importance of this signal to

184. The complaint argued, “[r]ather than interpreting constitutional terms according to the intent of the voters, Government Code section 8315 provides statutory definitions according to an international treaty that has nothing to do with the law of this state or voter intent in adopting the constitutional amendment.” Complaint at 7, Connerly v. Davis, No. 03AS05154 (Cal. Super. Ct. May 26, 2005).

new states and those that have recently experienced a dramatic change in governance.\textsuperscript{186} For example, a country like Cambodia might benefit from ratifying a regional or international human rights treaty by signaling its desire to be an active part of the international community and suggesting it is a stable place for future investment. For countries already seen as good neighbors, treaty membership might be necessary to exercise issuespecific leadership. For example, the transnational legal process school suggests the United States cannot lead on human rights and environmental issues while it stays outside relevant treaties.\textsuperscript{187}

Rational choice scholars, however, persuasively dispute the significance of such reputational gains. They argue that if a powerful country like the United States wants to lead on a given issue, it can do so through increased funding, tied aid, or economic sanctions. So, for example, although the United States stayed outside the Landmine Ban Treaty, it exercised issue leadership in the area through massive increases in demining funding.\textsuperscript{188} In addition, countries often maintain multiple reputations in discrete issue areas, so breaching or refusing to join one treaty may have no influence on their reputation for an unrelated treaty. Rather, the best metric to gauge a country’s reliability is its treaty behavior in similar issue areas.\textsuperscript{189} For instance, in order to determine the likelihood that Cambodia will abide by an environmental agreement, countries should look to its participation in other environmental treaties, rather than its ratification of human rights treaties. More relevantly, according to rational choice theorists, the power of the United States and its membership in other treaties render the possible reputational gains from individual treaty membership quite small.

Countries may also benefit from participation in a treaty's governance structure.\textsuperscript{190} Membership means some involvement in the future interpretation of the treaty language and the adjudication of treaty-related disputes. Treaty parties determine how to spend the regime’s

\begin{itemize}
\item \textsuperscript{186} See Downs & Jones, supra note 20, at 5108.
\item \textsuperscript{187} See CEDAW Working Group, supra note 131, at 7 ("As long as it remains one of the few nations that have failed to ratify CEDAW, the United States compromises its credibility as a world leader in human rights.").
\item \textsuperscript{189} Downs & Jones, supra note 20, at 597.
\item \textsuperscript{190} For instance, EPA Administrator Stephen Johnson urged the U.S. to ratify the Stockholm Convention, as “only by ratifying the Stockholm Convention could the United States ensure its economic, environmental and public health interests are represented this fall, when treaty parties are set to consider new POP listings, regulation of asbestos and nominees for expert scientific panels.” Lauren Morello, Chemicals: Second House POPS Bill Sent to the Floor, Env't & Energy Daily, July 28, 2006.
\end{itemize}
political and fiscal resources. For treaty regimes with sanctioning powers, members determine when and how to deploy those measures. Treaty members also reap the diplomatic benefits of repeated interactions over time and have access to information that may not be released to non-members. Finally, treaty membership may be a prerequisite for some other desired benefit such as foreign assistance or membership in a different organization.

Yet these benefits may seem rather minor to a country like the United States. As discussed above, the United States often has great influence on the original treaty structure and substance. Even if its refusal to join prevents it from exercising inside influence as the treaty goes forward, it may still attempt to persuade individual treaty members through other means. Nor need the United States worry about memberships in other treaties or the availability of financial assistance—it is generally in the position of linking benefits or blocking access to treaties for less developed countries.

At the domestic level, treaties can provide a variety of other benefits. Conventional wisdom holds that countries join treaties because the cost of compliance is lower than the expected gains. While any country may have individual losers, presumably the winners will win more than the losers will lose. At the very least, the treaty regime likely satisfies the country's preferences to a greater degree than remaining outside the treaty. Subsets of government actors may also gain from joining a treaty, as some treaties shift decisionmaking away from one branch of government to another or from one level of government to another. For example, in the United States, treaties may allow the executive branch to make decisions normally left to the Congress, although advice and consent guarantees that Congress still has some influence.

Countries might also join treaties that are internationally welfare-enhancing even though their constituents will be net losers. In such cases, institutions in wealthy countries could perceive themselves as bearing cosmopolitan duties to benefit people and countries outside their own communities even if it is contrary to the material national interest. For instance, many may believe the United States should join the Kyoto Protocol even if most benefits would accrue to poor and less developed

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191. See Slaughter, supra note 25, at 131–34.
192. See Gruber, supra note 58.
193. Similarly, binding enforcement mechanisms may shift power from one branch to another. For instance, the presence of binding dispute mechanisms in the WTO may maximize executive power at the expense of legislative power. See Rachel Brewster, Rule-Based Dispute Resolution in International Trade Law, 92 Va. L. Rev. 251 (2006).
194. See Nussbaum, supra note 68, at 13–14, 133 (discussing moral obligations to the world community as a relevant constraint on personal and political decisionmaking).
countries, because these countries would gain more than the United States would lose. Sub-federal integration without ratification likely garners none of these national benefits. It reflects local, rather than national preferences, and other countries may be unlikely to take note of sub-federal policies. As increasing numbers of cities and states coordinate their efforts, sub-federal integration may draw some international attention, but even then, other countries seem unlikely to perceive these actions as reliable indicators of future federal policy. Thus, sub-federal integration cannot restore national issue-specific leadership. Similarly, sub-federal agents cannot realize many of the treaty membership benefits, as only federal actors are allowed to participate in the treaty governance regime. Individual cities and states cannot directly influence treaty interpretation or serve on treaty regime bodies. They cannot vote on substantive or procedural components of the treaty or provide judges to an adjudicative body, nor are they eligible to receive resource transfers under the treaty.

Sub-federal units can, however, capture many of the domestic treaty benefits. In particular, the main benefits of human rights treaties accrue to the individuals and societies affected by domestic change regardless of whether other countries participate. For example, the benefit from addressing sex discrimination flows to individuals and the society in which those individuals live, regardless of whether other countries also comply with their treaty obligations. So the San Francisco CEDAW produces concrete benefits for women, such as more streetlamps and policies adapted to gender-disaggregated data, even if the international treaty regime is poorly implemented, or not implemented at all, elsewhere.

Measuring the domestic benefits of environmental treaties is more complicated. Treaty members often need high levels of international compliance to receive significant benefits. Even so, compliance by a single country often results in some benefit, regardless of whether other countries comply. For example, if the United States reduced greenhouse gas emissions in order to comply with its hypothetical Kyoto Protocol obligations, net global emissions would still be reduced and the problem the Protocol seeks to address would be partially ameliorated, regardless of whether European and Asian countries also comply with their

195. Rational choice scholars are skeptical that countries are capable of acting in a cosmopolitan manner, since most societies "[do] not consist of self-selected members with relatively homogenous and intense cosmopolitan sentiments." Goldsmith, supra note 69, at 1676.

Similarly, if multiple states band together to implement their own greenhouse emissions scheme, they will also reduce net emissions. Environmental treaties pose additional complexity in that a compliant actor does not necessarily benefit commensurately with its obligations. For instance, holding unintended consequences constant, while all countries receive an absolute gain from a reduction in greenhouse emissions, an individual country that reduces emissions may receive less of a relative gain than another country that does nothing. No country can fully internalize all the benefits of its reduced emissions.

Sub-federal units that share policy preferences with ratifying countries can also benefit on an administrative level from implementing legislation similar to that of the ratifying countries. This mimicry allows sub-federal units to reduce their legislative drafting costs and learn from the experiences of other states. For individual cities, the ability to copy legislation on a complex human rights or environmental problem rather than draft its own may save significant resources. In addition, the treaty provides a framework from which to sell the legislation to the public. Rather than forcing each city and state to come up with a comprehensive rhetorical and policy package to describe the desired changes, it can rely on the hard work of drafting countries and NGOs in formulating a treaty. The treaty text also provides focal points and uniform benchmarks against which to measure the success of the implementation of the legislation. Cities and states can easily compare their gains both domestically and internationally when they share treaty measurements.

2. Costs and Burdens

While sub-federal integration forgoes many of the international gains of federal ratification, it may also avoid the costs of joining multilateral treaty regimes. First, many multilateral human rights and environmental treaties create potentially problematic governance structures. Rather than encouraging individual countries to determine for themselves what the language of the treaty means and what constitutes a violation, many treaties delegate that authority to a supranational body. In many instances, the U.S. government and individual states and cities may prefer to interpret the language for themselves. Sub-federal implementation also preserves sovereignty by allowing total domestic control over future administrative decisions and resource allocation. As a major power, the United States wields much influence in international organi-

197. Another country could decide to increase its emissions in relation to compliant states’ reductions, but the incentives do not seem to work in that direction.

izations, but coalitions and voting rules may thwart its desired outcomes. Sub-federal integration can also better serve the related democratic concern of transparency, as the decisionmaking of some treaty bodies is inaccessible and opaque.\footnote{See generally The Market or the Public Domain? Global Governance and the Asymmetry of Power (Daniel Drache ed., 1991).}

In addition, wealthy countries often bear the brunt of financing these governance structures. While the United States has occasionally avoided some of these costs by refusing to pay its UN dues,\footnote{For instance, the United States once owed one billion dollars in assessed dues. Washington Publicly Chastised for Reneging on U.N. Payments, HOUS. CHRON., Sept. 28, 1995, at A23.} most administrations feel compelled to pay for those structures in which they participate. At the very least, the United States incurs the diplomatic costs of free riding when it chooses not to contribute to treaty governance structures. Similarly, environmental treaties sometimes obligate wealthy countries to subsidize technology and other transfers to less wealthy states to facilitate compliance.\footnote{See William Onzivu, International Environmental Law, the Public Health, and Domestic Environmental Governance in Developing Countries, 21 AM. U. INT'L L. REV. 597, 636 (2006).} For those who support the underlying policy, such transfer of resources may be unobjectionable, but staying outside the treaty gives the United States the flexibility to make a case-by-case determination of whether and how it transfers resources. The United States may prefer to reward allies with such transfers or condition aid on unrelated goals. Similarly, the absence of a supranational structure may allow for greater flexibility and speed of implementation because sub-federal actors would be guided, but not bound, by the treaty's structures.

The costs of reversing course are also higher for those parties bound by a treaty. Most treaties have a defined waiting period for withdrawal, if they allow it at all,\footnote{See Laurence R. Helfer, Exiting Treaties, 91 VA. L. REV. 1579 (2005).} whereas sub-federal policies can be repealed through normal legislative means. In theory, the United States could ignore a treaty's limitations on withdrawal, but in practice it generally abides by the exit language.\footnote{Id.} Moreover, treaty withdrawal seems likely to engender a greater degree of international hostility than changes in domestic policy, even if both changes were directed at the same underlying policy shift.

In sum, treaty ratification facilitates international reputational benefits along with diplomatic and other benefits from participation in the treaty regime. Yet treaty ratification also risks participation in a regime that deviates from national interests and can commit the state to unwanted resource expenditures. Sub-federal integration can capture many
of the domestic benefits of integrating the treaty's substantive norms, but it forgoes the benefits and burdens of treaty membership itself.

B. Will Sub-Federal Integration Influence Federal Ratification?

The transnational legal process school suggests legal norm internalization will "set[] the stage for eventual ratification of these treaties by the abstaining nations on the ground that de facto internalization has already become a fait accompli." Relatively, by acting as the "laboratories of democracy," sub-federal units may demonstrate the benefits of the treaty's policy preferences and underlying norms. For example, Catherine Powell urges the national government to act as a clearinghouse for the coordination of sub-federal efforts to integrate international law and distill these efforts into best practices. Powell suggests that such national involvement would facilitate a norm cascade in favor of treaty ratification. Similarly, other norm theorists might hypothesize that sub-federal integration would direct positive attention to the treaty, help reframe the policy debate, demonstrate popular support, and generally strengthen the forces urging ratification.

This Article, however, suggests numerous reasons to be hesitant about the prospect that sub-federal integration will hasten federal treaty ratification. Admittedly, successful sub-federal integration provides evidence of the domestic benefits of treaty implementation. For instance, San Francisco's CEDAW ordinance may persuade the federal government of the need for national legislation to address the treatment of women, and it may demonstrate the effectiveness of such legislation. Yet such evidence may not convince domestic constituents to help provide those benefits internationally—much empirical evidence suggests altruism declines as the beneficiaries become more distant in location and cultural affiliation. Even cosmopolitan cities and states feel substantially greater attachment to their own citizens than to the abstract global community. In addition, sub-federal integration fails to shed any light on the costs and benefits of joining the treaty regime itself. As discussed

205. Powell, supra note 6, at 273 (contending that "co-opetition" between sub-federal agents and the federal government will provide states incentive to ratchet their standards upward through cooperative pressures).
206. Powell overstates the necessity of national involvement in sub-federal integration. In a brief paragraph, Powell acknowledges that national, state, and local networks could fill in when the federal government was unwilling. Id. at 271–72. Rather than waiting for federal coordination, states have already developed their own mechanisms to share information. The federal government does not seem to possess unique expertise in determining or distilling best practices. For instance, states often draft model legislation.
207. See Goldsmith, supra note 69, at 1677.
above, the United States may be wary of binding dispute resolution, un-
anticipated regime developments, and the influence of other countries on
the interpretation of state duties and burdens. Finally, successful sub-
federal integration may simply convince the federal government that
domestic experimentation is best, and that it can capture the treaty's sub-
stantive benefits without imposing the burdens of treaty membership.

Similarly, Powell's contention that the federal government's role as a
clearinghouse will increase the chances of federal treaty ratification ig-
nores a significant political will problem. Although federal coordination
might promote national norm internalization, a government hostile to a
treaty seems unlikely to muster the political will to coordinate state ef-
forts to promote the treaty. While the project for ratification and the
project for domestic integration are theoretically separable, the political
linkage of the two projects for most sub-federal integration suggests that
the federal government would shy away from supporting such efforts.
For example, the federal government seems profoundly unlikely to coor-
dinate best practices and support efforts to ratify the Kyoto Protocol,
since the Senate has already forbidden the spending of federal money on
Kyoto compliance.209

Finally, the potential for a norm cascade may be more limited than
 treaty supporters acknowledge. While empirical evidence suggests some
tentative enthusiasm for sub-federal integration's potential to snowball,
the spread of human rights legislation has generally been limited to cos-
mopolitan areas—liberal cities such as San Francisco and New York, or
college towns like Amherst and Berkeley. This quick but limited spread
of legislation is reminiscent of the nuclear weapons-free zones, which
garnered much support in places like Tacoma Park and Berkeley, but not
Peoria, Illinois, or Tyler, Texas. National oversight seems unlikely to
make a human rights framework more salient in those parts of America
actively hostile to or simply apathetic towards cosmopolitanism.

Sub-federal integration of environmental treaties, however, may be
more expansive. For instance, many of the cities supporting the Kyoto
Protocol, such as Macon, Georgia, are not traditionally liberal.210 The
states taking part in the Regional Greenhouse Gas Initiative are also po-
litically, demographically, and economically diverse. The RGGI is not
actively promoting federal ratification, but environmental issues (espe-
cially when framed in terms of self-interest) may sometimes be more
bipartisan than human rights issues.

209. See supra Section III.A.
210. See Seattle Office of the Mayor, US Mayors Climate Protection Agreement,
http://www.ci.seattle.wa.us/mayor/climate/default.htm#who.
Thus far, limited empirical evidence suggests ratification does not quickly follow sub-federal implementation. Despite early efforts, no real progress has been made on the CEDAW’s or the Kyoto Protocol’s ratification, nor on the CERD’s implementing legislation. The Stockholm Convention has only a slightly better chance of short-term ratification. Still, it may be too early to discount entirely the possibility that these initiatives will trigger a norm cascade in support of treaty ratification.

Even if sub-federal integration increases domestic support for ratification over time, passage of multilateral human rights and environmental treaties in the United States presents an institutional difficulty. Some scholars suggest that a unique American rights culture keeps the United States out of treaty regimes.211 These scholars contend that Americans are reluctant to override existing constitutional understandings and protections by subordinating them to treaties. Other scholars point to a combination of relative geopolitical strength, stable domestic institutions, “the extreme conservatism of a vocal minority in the political system,” and “the extreme decentralization of [the United States’] political institutions” in explaining U.S. reluctance to join some treaties.212 Either way, as an empirical matter, the Senate ratifies few multilateral human rights treaties, even when they have significant domestic support.213 Multilateral environmental treaties fare only slightly better.214

Numerous procedural hurdles also block many treaties.215 First, the Senate may only ratify treaties the executive branch chooses to submit. Once submitted, Senate rules allow the head of the Senate Foreign Relations Committee to prevent the treaty from ever reaching the floor by establishing the committee’s agenda.216 Even if the treaty escapes the committee, a single senator may still anonymously block the bill, or a group of senators may filibuster the treaty. Once the treaty reaches the full Senate, the two-thirds requirement for passing treaties often proves substantially more difficult to overcome than the majority requirement for passing domestic legislation. Thus, even treaties with widespread public support may not be ratified.217

212. Id. at 196–97.
213. See supra Introduction.
214. Moravcsik, supra note 211, at 184–86.
217. Moravcsik, supra note 211, at 188.
In addition to the ratification vote, most treaties are subject to a host of reservations, understandings, and declarations (RUDs). RUDs include substantive objections, interpretive issues, federalism concerns, preclusion of the International Court of Justice's jurisdiction, and declarations that treaties are non-self-executing. In the case of human rights, RUDs work not only to prevent the treaty from weakening existing rights, but often also to preclude requirements that are more rigorous than preexisting law. Moreover, the Senate generally designates these treaties as non-self-executing, which leaves citizens unable to invoke the treaty as a binding obligation in domestic courts. Similarly, mere treaty ratification does not ensure the United States' consent to allowing individual complaints to be heard by treaty adjudicative bodies.

Thus, while sub-federal integration may trigger a norm cascade in like-minded states and cities to adopt similar propositions, it seems unlikely to spur treaty ratification. Sub-federal integration lacks a compelling mechanism for demonstrating the benefits of the treaty regime itself as distinguished from the benefits of sub-federal implementation. Even with widespread support, the institutional hurdles to ratification are very difficult to overcome.

In sum, the focus on ratification overestimates the benefits of treaty membership in a country where doctrines of non-self-execution and RUDs substantially limit the treaty's domestic impact. The focus on ratification also overlooks the possibility of adopting national legislation embodying the treaty norm without ratifying the treaty.

V. LIMITS ON STATE AND LOCAL POWER

This Part briefly investigates constitutional constraints on the scope and breadth of sub-federal integration in the United States. For instance, the Constitution restricts the authority of states to conclude treaties or

219. Roth, supra note 43, at 347. In fairness, sometimes these are one and the same. The United States precludes a greater obligation on one front in order to protect rights in a different front—for example, speech protections. On the other hand, something like a prohibition on the federal death penalty is not inconsistent with existing constitutional protections; it just is not compelled by them.
221. Roth, supra note 43, at 349.
222. This Section has focused on the United States.
223. For instance, the Mayors Climate Protection Agreement calls for national legislation apart from Kyoto ratification and implementation. See supra Section III.A.2.
agreements with other powers. Sub-federal integration also implicates a longstanding foreign relations debate concerning sub-federal actors criticizing or seeking concessions from foreign governments. This debate pits revisionists, who prefer to allow state action unless the federal government expressly acts in the area and enunciates a clear national policy, against one-voice nationalists, who believe all matters with a direct impact on foreign relations are reserved for the federal government. This Part attempts to expand this debate by investigating instances in which sub-federal integration either implicitly or explicitly criticizes a domestic treaty position.

A. Textual Limitations

The Constitution explicitly contemplates a division of powers in foreign affairs. Article I, Section 10 dictates that “[no] State shall enter into any Treaty, Alliance or Confederation... No State shall, without the Consent of Congress,... enter into any Agreement or Compact with another State, or with a foreign Power.” In 1837, Justice Taney suggested in Holmes v. Jennison that states could not make any arrangement with foreign powers that includes those subjects that “had usually been made subjects of negotiation and treaty.” States were allowed, however, to make agreements or compacts with other states involving boundary settlements and attendant regulatory issues even without express congressional consent. Over time, the Compact Clause has been narrowed to “inherently political” agreements and compacts. In other words, states only need congressional approval for arrangements that increase a state’s political power or encroach on the nation’s power.


226. 39 U.S. 540, 569 (1840) (holding that states lack the power to conclude either a formal written treaty or negotiations with a foreign state to extradite a fugitive from justice).


228. This distinction comes from Union Branch Rail Road Co. v. East Tennessee & Georgia Railroad Co., 14 Ga. 327, 339–41 (1853).

229. See Cuyler v. Adams, 449 U.S. 433, 438–442 (1981); Andrew A. Bruce, The Compacts and Agreements of States with One Another and with Foreign Powers, 2 Minn. L. Rev. 500, 514 (1918).
The Treaty Clause and the Compact Clause impose real limits on the sub-federal integration of treaty law. Any sub-federal legislation that involves negotiations, bargaining, or contracts with other sub-federal or foreign governments may require congressional and executive approval. Thus, sub-federal actors and foreign governments cannot bypass the U.S. government if they seek to create binding commitments. States, and by extension cities, must find some other way to signal their intent to be bound for agreements with foreign countries. For instance, they can draft model, nonbinding legislation that can serve as a template for legislation across sub-federal jurisdictions. They can also use memoranda of understanding and other nonbinding pacts to signal their intentions. The RGGI’s structure may reflect a concern about the Treaty and Compact Clauses in this respect. Rather than using an interstate compact, the governors signed a “memorandum of understanding in which each state will agree to adopt regulations spelled out in the complex regional trading scheme.”

Similarly, under the RGGI, representatives from various Canadian provinces observed the process, but they undertook no binding obligations.

The Treaty Clause also precludes sub-federal actors from joining a multilateral treaty regime or participating in its governance. These limits probably matter more for environmental agreements, which involve shared resources, while many human rights agreements govern seemingly purely internal matters. A given state may be free to reduce greenhouse gases through a permit scheme, but it has no influence over the details of the international permit scheme as developed through the Kyoto Protocol. If the state wants to interact with the Kyoto framework by selling permits to European entities, the contract for the sale of permits may pose a constitutional question. As these sub-federal efforts grow increasingly sophisticated and wide ranging, groups may pursue litigation to resolve some of these questions.

B. Preemption and Dormant Powers

In addition to the Constitution’s textual limits on sub-federal action, the federal government retains the power to preempt sub-federal initiatives. Courts have recognized the following varieties of preemption: (1) express preemption, in which a federal statute clearly expresses the desire of Congress to exclude state activity; (2) obstacle preemption, in which a state statute stands as an obstacle to the accomplishment of the

231. Reg’l Greenhouse Gas Initiative, supra note 98. New England governors and Eastern Canadian premiers had already issued a climate change action plan in August 2001. The RGGI is designed to help these states meet the goals designated in the action plan. Id.
purposes and objectives of a federal statute; (3) conflict preemption, in which a state statute makes it impossible to comply with federal law; and (4) field preemption, in which the federal government has acted so definitively in a field that there is “no room for the states to supplement it,” or the federal interest in controlling the subject is strong enough to presume federal law precludes state action. Thus, Congress may pass a statute to preempt a particular act of sub-federal integration or it may rely on courts to enforce its preferences. That being said, preemption case law is very complex and the permissible limits of state action are quite murky.

As this issue has been discussed at great length elsewhere, this Part only briefly touches on a few relevant cases. In *Crosby v. National Foreign Trade Council*, a recent statutory preemption case, the Supreme Court struck down a Massachusetts law banning state procurement from companies doing business in Burma. The Court concluded that the state law implicitly interfered with a federal act which also sanctioned Burma. Despite the lack of an explicit preemption clause in the federal legislation, the Court found that the state ban interfered with the more calibrated federal sanctions policy.

The Supreme Court has also found preemption on the basis of dormant federal powers. For instance, in *Zschernig v. Miller*, the Supreme Court invalidated an Oregon probate statute that allowed nonresidents to inherit property only if the alien could show his home country would not confiscate the property, and that his home country afforded Americans reciprocal rights of inheritance. Despite the State Department’s determination that the state statute did not unduly interfere with U.S. foreign relations, the Court struck down the law. *Zschernig* suggested any state laws with “more than some incidental or indirect effect” on foreign affairs would be invalid, regardless of any showing of direct conflict with federal actions or even any affirmative federal activity in the subject area.

235. Some have interpreted this decision narrowly as allowing state action when the federal government has not already implemented a sanctions regime and as emphasizing the importance of congressional, as opposed to executive, action. Brannon P. Denning & Jack H. McCull, International Decisions: Crosby v. National Foreign Trade Council, 94 Am. J. Int’l L. 750, 754–57 (2000).
238. *Id.* at 434–435.
Zschernig languished until 2003 without any subsequent Supreme Court treatment, and most academics took it to be an aberration. But in American Insurance Association v. Garamendi, the Supreme Court may have reinvigorated the foreign affairs preemption doctrine. The Court held that executive branch agreements with foreign countries to settle insurance claims arising out of World War II preempted a California law forcing information disclosure on insurance companies operating during World War II. While the executive branch agreements did not expressly preempt state laws or even address all the countries covered by the California law, the state policy of forcing broad disclosure was found to undermine the executive policy of encouraging voluntary establishment of settlement funds and limiting disclosure of insurance policy information. Garamendi renders the future reach of preemption doctrine uncertain by raising the possibility of independent executive branch pre-emption authority. Sub-federal integration deepens this uncertainty by raising the question of when treaty rejection or treaty avoidance constitutes a policy sufficient to preempt sub-federal action.

In a novel theoretical turn, Edward Swaine contends that these and other foreign affairs cases could be better explained under a dormant treaty power. Such a power allows courts to preempt “state authority even in the absence of any ratified treaty” and proscribes foreign affairs activities that involve “direct or indirect negotiating ... with foreign powers on matters of national concern.” Under such an interpretation of the Treaty Clause, a state may “engage in ordinary contractual relations with foreign corporations ... [and] denounce foreign governments in the strongest terms, regardless of the effects,” but it “cannot negotiate with a foreign power in order to secure concessions.” Swaine argues that such a treaty power flows from the president's authority over treaty negotiation. State-level defiance of the president’s power (which is

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239. For example, in Barclay’s Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994), a case about the dormant commerce clause, the Supreme Court suggested the courts were ill-suited to adjudicate claims about the need for one voice in foreign relations.
241. Justice Breyer suggested that Garamendi stands for the proposition that the “President has a degree of independent authority to pre-empt state law.” Medellin v. Dretke, 544 U.S. 660, 694 (2005) (Breyer, J., dissenting).
243. Swaine, supra note 233, at 1138.
244. Id.
245. Id.
246. Id. at 1140.
sometimes informed by Congress on the front end) should be understood as a "threat to the successful negotiation—as well as avoidance—of pre-emptive federal treaties."\(^{247}\)

Although many instances of sub-federal treaty implementation easily withstand existing preemption doctrine and theoretical dormant treaty powers challenges,\(^{248}\) some constitutional concerns linger. Under an expansive interpretation of *Garamendi*, sub-federal integration that explicitly (or even implicitly) criticizes the U.S. treaty position may fall prey to an executive branch preemption argument based on the executive’s position in opposition to the treaty. For example, a city’s initiative urging the federal government to ratify the Kyoto Protocol might interfere with the federal government’s ability to speak with one voice on the Kyoto Protocol or on future treaty issues.\(^{249}\) To take the argument further, the knowledge that Texas, California, and other large state emitters are integrating the Kyoto Protocol may undermine the U.S. government’s ability to pressure other countries to make desired concessions.

Yet such a broad reading of *Garamendi* may run afoul of First Amendment protections allowing sub-federal entities to express their views about U.S. foreign policy, treaties, and international relations.\(^{250}\) Moreover, these sub-federal policies do not attempt to secure benefits for individual cities or states from other countries or change how other countries act in Kyoto Protocol negotiations. Texas and California would not be able to join the treaty negotiations, and Congress could still preempt their policies if uniformity were at a premium. These resolutions can be distinguished from the state actions in *Crosby* and *Garamendi*, which both criticized foreign governments and attempted to limit interactions with those countries in order to change their behavior. Thus, under Swaine’s interpretation of the dormant treaty power, resolutions criticizing U.S. treaty positions ought to be unproblematic.

Ultimately, whatever constitutional limits exist will constrain action only to the extent that sub-federal actors believe the federal government

\(^{247}\) Id. at 1193.

\(^{248}\) For instance, sub-federal integration of ratified but unimplemented treaties is relatively unproblematic.

\(^{249}\) This argument would likely fail as the executive is explicitly supportive of state and local initiatives on global warming as in the nation’s interests. David R. Hodas, *State Law Responses to Global Warming: Is it Constitutional to Think Globally and Act Locally?*, 21 PACER ENVTL. L. REV. 53, 79–80 (2003) (also concluding that state and local greenhouse initiatives are “directed solely at local activities” and are thus constitutionally inoffensive).

will enforce them. In many prior instances of sub-federal activism, the federal government has been reluctant to intervene. Despite the broad language in *Holmes*, states have concluded numerous covenants with foreign entities, including environmental pacts, without seeking congressional approval. 251 Neither Congress nor the courts have spoken on these covenants. 252 In addition, Congress and the executive branch have never acted to preempt city ordinances declaring nonbinding nuclear weapons-free zones; 253 city policies divesting stock from firms doing business in South Africa; city policies restricting procurement of goods and services where the bidder for a city contract did business in South Africa; 254 and state legislation divesting from Northern Ireland. 255 The federal government tolerated these policies despite the fact that they actively targeted the practices of other countries and risked foreign relations disputes. 256 Sub-federal integration may be even less objectionable as it is sympathetic to the practices of the international community and unlikely to risk a rift with another country.

On the other hand, Congress did expressly preempt state anti-boycott laws, which prohibited state residents from conducting certain transactions with Arab states. 257 Similarly, the Justice Department filed suit and defeated an Oakland ordinance that banned firms from doing weapons manufacturing work and restricted the transportation of nuclear materials through the city’s jurisdiction. 258 Both *Crosby* and *Garamendi* suggest the federal courts may be embracing a more expansive preemption policy, which may in turn encourage more challenges. This Article raises some of these questions and suggests some possible answers, but ultimately sub-federal actors will have to see how these challenges play out in the courts.


253. Shuman, supra note 251, at 158.


257. Fenton, supra note 255, at 567.

VI. Conclusion

The current focus on treaty ratification overlooks an important mechanism for international norm internalization. Despite some constitutional limitations, unratiﬁed and unimplemented treaties can enter the domestic system through states and localities. As evidenced by the environmental and human rights contexts, government actors and nongovernmental organizations can help integrate treaties into domestic law in the face of federal lethargy or intransigence.

Sub-federal integration of treaties adds complexity to the compliance debate between rational choice and norm-based theorists. Sub-federal integration suggests norm-based theories offer some valuable insights about the potential of treaties to infiltrate a variety of contexts, and the managerial school helps illuminate the ways in which treaties influence the development of sub-federal interests. Still, although sub-federal integration may slowly change sub-federal interests, rational choice models suggest that treaty advocates and legal scholars should be skeptical of its ability to bring about federal ratification.