

Sub-federal Integration of Unratified and Non-self-executing Treaty Law  
Lesley Wexler  
Abstract

Sub-federal integration is the practice of cities and states promoting and implementing unratified and non-self-executing treaties. This article examines several instances of sub-federal integration in order to demonstrate the importance of treaties to even nonmember countries. The existence of sub-federal integration suggests that the existing focus on federal ratification and congressional implementation overlooks an important mechanism through which domestic integration of treaties can occur. Sub-federal integration provides a concrete example of how unratified and non-self-executing treaties can have real, albeit limited, impact on domestic practices.

No consensus exists within international law scholarship about whether and how treaties influence domestic practices and preferences. Norm-based theorists suggest that treaties can slowly change preferences over time through treaty management which includes repeated persuasive interactions as well as technical and financial assistance. This article uses sub-federal integration to propose an addition to norm-based theories by suggesting the mechanisms of treaty management may be extended to non-treaty members like cities and states. These changes in preferences and domestic practices are likely to be modest; sub-federal units will still favor noncompliance and breakout when the costs of compliance are too high.

This article also challenges the prediction that sub-federal integration will trigger norm cascades strong enough to change national preferences for federal ratification. While this article suggests sub-federal integration raises the possibility of modest social change, it acknowledges numerous procedural and political barriers to ratification. Instead, it suggests that ratification is just one of many ways to bring international law home.

#### 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 those 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 United Nations human rights regimes such as the Convention to Eliminate All Forms of Discrimination Against Women and the Convention on the Rights of the Child. Even when the United States joins multilateral environmental and human rights treaties, these treaties often languish in Congress without domestic implementing legislation. This article suggests the current focus on ratification ignores the manner in which unratified and unimplemented treaties influence social change in the United States.

Sub-federal entities like states and cities provide a meaningful, but under-theorized entryway for treaty norm integration and implementation. Currently, two views dominate the human rights treaty literature. The first view, mostly forwarded by treaty advocates, characterize these treaties as duplicative with existing domestic protections and promote them as a baseline for other countries to internalize. The second view, comprised mostly of international law skeptics, laments these treaties as substantively misguided or unwarranted intrusions upon existing constitutional arrangements. Both camps presume that whatever treaty benefits exist, the vast majority of them will accrue to less developed countries. Similarly, in the environmental context, most scholars and advocates presume that technology transfer and knowledge distribution flows in one direction from more advanced to less advanced countries. This article contests this understanding of treaties by investigating those instances in which sub-federal actors directly incorporate international human rights and environmental treaties into domestic law independent of treaty ratification and implementing legislation.

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, California could still integrate the Montreal Protocol by restricting resident companies' production of chlorofluorocarbons ("CFCs") and by providing funding to encourage CFC friendly alternatives. California could learn from the experiences of treaty compliant countries as well as use the Montreal Protocol language to help draft its legislation. Rather than using the treaty as evidence of a binding obligation, as it might do if the United States had ratified the treaty, California could rely on the existence of the treaty as evidence of an international consensus about the seriousness of ozone depletion 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. These states might agree to uniform reporting requirements as developed within the Montreal Protocol treaty regime and meet every few years to discuss their progress and new ways of achieving future CFC reductions. Even after federal ratification of the Montreal Protocol, Congress might wait a long time before it passes implementing legislation. In the interim, a city like Denver could choose to phase out CFCs in accordance with the treaty.

In a second type of sub-federal integration, the city of Amherst 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 express its solidarity with the international community and urge the United States to change its treaty stance.

Finally, a city or state could simultaneously adopt both strategies of treaty integration. So, for example, the state of New York might urge federal ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families at the same time that it passed legislation protecting migrant workers. This legislation might be modeled on treaty language and require enhanced data collection from relevant state agencies to get a 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.

In the early days of international law, treaties were limited to seemingly external matters between countries like territorial rights, cessation of conflict, and the division of shared resources. Now that treaties have expanded to include internal matters like individual human rights and environmental regulation of domestic activities, sub-federal actors play a greater role in treaty implementation. Existing literature recognizes that sub-federal actors often help integrate treaty law into domestic law and act as the locus of transnational networks. This article contends that such integration does not always happen at the behest of the federal government. Rather, this article examines several case studies where sub-federal actors undertake this integrating role even as the federal government abandons or ignores a particular treaty.

Legal scholars tend to focus on ratification and related litigation as the relevant site of 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 with the underlying norm driving both treaties and any push for social change. Thus far, this debate about the effect of these treaties has generally been limited to an examination of ratifying countries.

Yet another strategy to achieve compliance with human rights and environmental treaties' norms exists. Despite claims that treaty ratification is a necessary precondition to consistent observance of international human rights and environmental standards, empirical evidence suggests social movements and government entrepreneurs may encourage sub-federal actors to implement treaties in the face of federal apathy, ambivalence, or even hostility. Part I introduces the treaty compliance debate and then expands it to include the question of whether treaties influence sub-federal actors in non-ratifying countries. This section draws on norm-based theories of compliance, which rely on persuasion, data collection, and technology transfer, but also suggests that sub-federal actors use treaties as frameworks for change; a way to reduce drafting costs, evidence of international consensus, and a cheap mechanism to express or signal a cosmopolitan identity rather than simply as evidence of binding legal obligations.

Part II explores several case studies of sub-federal integration of human rights and environmental treaties. First, it examines the United States' role in the development and ultimate rejection of the Kyoto Protocol on climate change. The article then looks at the ensuing attempts by states and cities to reduce greenhouse gasses and create tradable emission schemes. Part II also explores the Stockholm Convention on Persistent Organic Pollutants and subfederal efforts that presage or mirror the treaty. Turning to human rights treaties, the article investigates efforts to implement the Convention to Eliminate All Forms of Racial Discrimination and to ratify the Convention to Eliminate Discrimination Against Women. This section uses the case studies to highlight the shortcomings of both norm-based and rational choice theories in explaining sub-federal integration. These case studies challenge the prevailing view that international norm internalization is a one way process flowing from the United States and other developed countries to lesser developed and newly democratizing countries.

Part III attempts to distill which treaty costs and benefits only accrue to a ratifying country and which can be captured by sub-federal action. While sub-federal integration forgoes some of the benefits associated with a treaty regime, this section 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. This section suggests

that the norm-based theories predictions about sub-federal action inducing ratification should be tempered by rational choice insights about national as opposed to local preferences.

Finally, Part IV grapples with the constitutional and political constraints placed on sub-federal integration of treaties. The constitutional constraints include textual limitations, active preemption, and dormant powers. Given recent Supreme Court pronouncements in the foreign affairs realm, the contours of permissible sub-federal action need to be fleshed out. This article contends that notwithstanding an expansive view of federal preemption, sub-federal actors have many options to circumvent the federal unwillingness to ratify treaties or pass implementing legislation.

#### I. Fitting sub-federal integration into the treaty compliance debate

The debate about 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 section introduces competing compliance theories in order to explain the practice of sub-federal integration. The insights of norm-based models, with their focus on persuasion and treaty management, ought to be extended to non-treaty members. Similarly, the insights of rational choice models, with their focus on welfare maximization, also help illuminate some of the practices of non-treaty members.

##### 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. Multilateral treaties frequently articulate, codify, and publicize these ideas. Norm-based models assume that countries then join these treaties both because they care about their direct welfare gains along with their reputations as reliable partners and members of the international community.

The managerial school, first articulated by Abram and Antonia Chayes, is a prominent norm-based model. The managerial school suggests that countries comply with international law out of a combination of enlightened self interest and reporting, verification, and monitoring requirements. The managerial approach assumes that most treaty regimes tolerate a “significant level of noncompliance or free riding.” This school concedes the occasional occurrence of willful treaty violations, but contends that most violations stem from (1) ambiguous and indeterminate treaty language; (2) limited economic or technical capacity to comply; and (3) unforeseen changes in circumstances.

Transnational Legal Process, associated most strongly with Harold Koh and Anne Marie Slaughter, provides a complementary norm-based model. Under this account, in addition to emphasizing the interactions where global norms are debated and interpreted (as stressed by the managerial school), legal scholars should also assess as the manner in which domestic legal systems internalize these treaty norms. The transnational legal process focuses on the mechanisms by which a country can signal its internal acceptance of the treaty’s dictates. Generally, this process of internalization begins with transnational interactions which lead to the emergence of a global norm. In turn, international law articulates and refines this global norm. Then, countries bring international law home through domestic internalization of the global norm. Transnational Legal Process suggests this domestic internalization generally occurs at the federal level through the executive, legislative, or judiciary and then trickles down to sub-federal units. So, for treaties, ratification and domestic implementing legislation kick-start the domestic internalization process. The last stage of internalization occurs when a country experiences a sense of obedience in following the norm.

Thus, norm-based theories predict that the best compliance rates accompany those treaties that set up international bureaucracies to help resolve the indeterminacy of norms and provide technical and financial assistance. Parties should use the treaty regime to help develop domestic enforcement schemes through technical and bureaucratic training. Managing compliance requires transparency in order to facilitate coordination on the treaty norms and provide reassurance about other members’ compliance. In general then, treaties should develop a uniform self-reporting system with standardized data collection, measurement and analysis procedures. Reporting requirements should be specific and might also include preliminary assessments of future policies and programs to promote compliance. Countries should discuss and debate the content of the reports. Treaty parties should also frequently conduct meetings and other interactions to promote consultation on thorny treaty issues and facilitate persuasion of reluctant treaty parties. Treaties need to be flexible enough to account for significant economic, social, and political changes either through amendments or protocols.

The normative model is not without its critics. For example, the enforcement model critiques the managerial theory's reliance on persuasion and positive incentives to explain treaty compliance. Under the enforcement model, definitive dispute resolution options combined with robust economic and/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 good 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 enforcement backed international law is more likely to change countries' behavior than international law that lacks enforcement mechanisms.

Moreover, the managerial school fails to accurately describe the practice of many UN human rights treaties. Implementation of the reporting requirements, much less the substantive requirements, of human rights treaties is weak. 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. [Discuss env treaties] At best, litigation provides only a weak supplement to the reporting functions. [Discuss env treaties- maybe Hathaway ozone study.] Moreover, the empirical studies on compliance with human rights treaties are fairly discouraging – they suggest that ratification may encourage worse human rights practices in oppressive countries, although ratification in democratic countries with strong civil societies may improve human rights behavior. Given these findings, some scholars are beginning to suggest that domestic integration of treaty norms is substantially more important to treaty compliance than norm enforcement through treaty mechanisms.

## B. Rational Choice

In contrast, the rational choice model of international law, defended by Jack Goldsmith and Eric Posner, assumes that “states engage in consequentialist means-end calculations, and state interests can be deduced from the state's material characteristics and the objective conditions it faces.” In addition, most rational choice scholars assume these preferences are “relatively stable across time and across issues.” Rational choice literature generally focuses on the country level as the relevant unit of analysis; sub-federal and nongovernmental actors tend to be peripheral to the analysis.

Rational choice scholars dispute the presumed causal linkage between treaties and compliance. 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 most powerful states,” they contend 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 just reveals proof of strong underlying interests.

Goldsmith and Posner posit four possible explanations for treaty membership. First, some treaties reflect a coincidence of interest between the parties. The treaty reflects preexisting patterns rather than changing the behavior of any participating country. The presence of a coordination game may also explain treaty membership. In this instance, each country can best recognize its interests if a group of countries engage in identical actions. Under such conditions, the payoff under the treaty is higher than if each state takes its preferred, but different actions.

Treaties also arise when cooperation yields long term benefits. So, for example, two countries will forgo territorial gains in each of their short term interests and instead agree to a border treaty. The border treaty allows both countries to recognize long term gains from stability and provides a framework to monitor violations. Finally, treaties also arise in the presence of coercion. If a powerful country seeks a particular objective, a weaker country might accede to the powerful state's demand for a treaty seeking that objective. The weaker state prefers the old status quo without the treaty, but realizes that the powerful state has already decided to alter the status quo so that it is no longer a viable option.

The rational choice model aptly explains high levels of non-compliance with human rights treaties and moderate levels of compliance with environmental treaties. So, for example, rational choice scholars would argue the end of the cold war, coordinated responses to abuses, and internal pressure explain existing levels of compliance for human rights treaties. In their view, nongovernmental organizations and governmental entrepreneurs need not depend on international law, but rather on the moral quality of the norms underlying the treaty. Norm entrepreneurs can publicize violations of human rights abuses independent of a nation's treaty membership. As discussed earlier, treaties may be used to influence domestic politics or convey the seriousness of a nation's desire to be bound, but 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 elects to sit outside of the environmental treaties like the Kyoto Protocol because the treaty imposes a great cost for a diffuse environmental benefit which will provide relative gains to other countries. The United States might also stay out of the treaty in order to maintain leverage over other non-compliant countries. Similarly, the United States stayed outside human rights regimes like the CEDAW where it objected to the treaty regime and had seemingly little to gain from domestic implementation. Explaining why the United States ratified the CERD poses a slight difficulty, but as it is non-self-executing, it imposes little cost on the national level without subsequently implementing legislation.

On the other hand, rational choice scholars have been criticized for treating aggregate actors such as countries as unitary actors despite the presence of varied domestic preferences. Many rational choice accounts of how international law was adopted as purely interest maximizing have been criticized as just-so stories. Relatedly, rational choice does a poor job at explaining how countries' interests change or new problems are recognized in a world without a corresponding change in material conditions. [develop/ more]

### 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 without federal ratification or implementing legislation, treaties can influence non-treaty members through sub-federal action. These mechanisms by which treaties precipitate sub-federal action include: reduced drafting costs for welfare maximizing legislation; focal points that cities and states can use to measure compliance; evidence of binding international consensus on the existence of - and approach to - a problem; production of a fully articulated framework by which to understand that problem; and 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 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 different way and create legislation that goes beyond treaty mandates.

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. While the civil rights movement was mostly home-grown, international law and international social movements may inform a second or third generation of human rights and environmental movements. The wake of World War II sparked the international community's interest in human rights protections which culminated in numerous multilateral human rights treaties. Similarly, the burgeoning environmental movement also turned to treaties as mechanism for affecting 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 rational choice accounts, as rational choice scholars have a difficult time explaining the emergence of social movements or what makes their arguments persuasive beyond recognition of material constraints.

Second, treaties and the subsequent implementing legislation of treaty parties can provide off-the-rack legislative solutions to cities and states. Rather than invest in developing their own legislation, they can copy from preexisting legislation. Sub-federal integration demonstrates that cities and states now include legislation derived from treaties when they make those calculations. Of course, cities and states will not always choose treaty approaches among all the existing options, rather sub-federal integration just demonstrates that treaties can have some effect beyond treaty parties. This mechanism is consistent with rational choice accounts. Once cities and states decide that they face a particular problem, they can assess the costs and benefits of existing legislative approaches to that problem. Even so, mere welfare maximization fails to explain why cities and states emphasize the treaty aspect of the legislation. They could just pass legislation that mimics a treaty without calling attention to the legislation's origin.

Third, treaties can provide a focal point for cities and states to 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 non-treaty members to adopt the same measuring system so that everyone can compare using the same baseline. Under this account, cities and states need not think the measuring system is the best one, 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

countries 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 publicized 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 recognizes the importance of both coordination and cooperation, while norm-based models help articulate why law appears as a more natural and salient focal point than other options.

Fourth, the very existence of treaties provides proof of a binding 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 learned wisdom. Treaties must have a certain number of ratifications in order to come into force. The large number of ratifications can add to the persuasiveness of the argument by evidencing the consensus of international community to undertake binding obligations. States may not ultimately fulfill these obligations, but it is conceptually different than purely aspirational or hortatory soft law. In addition, rather than emerging spontaneously, treaties generally emerge from prior soft law. As such, they formalize soft law's sentiments through a growing and deepening consensus. Norm-based models do a much better job than rational choice accounts of acknowledging this mechanism as it focuses on the importance of persuasion to international law compliance.

Relatedly, sub-federal actors can also use their support for treaties to express or signal a cosmopolitan identity.

Cosmopolitanism suggests that individuals ought to view themselves, as members of the world community prior to identifying ourselves through national or local allegiances. In other words, one should conceptualize him or herself a citizen of the world first with all other identities as secondary. As individuals have difficulties actualizing cosmopolitan motivations, governments might be better suited to undertake cosmopolitan obligations. Not only are many human rights treaties inherently cosmopolitan with their commitments to the inherent value of all humans as such, but self consciously identifying legislation with a treaty is a way to assert membership in the global community when more formal mechanisms like treaty ratification are unavailable. That expression might be to satisfy a domestic constituency or to signal to the rest of the world their membership in transnational society. Cities and states could just implement as a welfare enhancing measure, but they choose to identify themselves with the treaty. Rational choice has a difficult time grappling with cosmopolitanism as rational choice presumes that states and other actors seek to maximize their own welfare rather than the welfare of others. It also has difficulty explaining the emergence of this idea or why it would be persuasive to states or other governmental actors who experienced no change in their material conditions.

## II. Case Studies

This section develops three case studies to tease out the different mechanisms of sub-federal integration of treaty law. This section uses human rights and environmental case studies as unlike trade, prospects for federal ratification and implementing legislation are limited in these areas, and unlike security, subfederal actors enjoy a wide latitude to act in these areas. This section examines two unratified environmental treaties, the Kyoto Protocol and the Stockholm Convention on Persistent Organic Pollutants, along with one non-self executed human rights treaty, the Convention to Eliminate Racial Discrimination, and one unratified human rights treaty, the Convention to Eliminate Discrimination Against Women. Each case study includes a discussion of the federal negotiating position and the ensuing sub-federal attempts at integration. This section concludes with an assessment of how these case studies fit within the norm-based and rational choice models as well as identifying the presence of the treaty effects described above (newly constructed framework; reduced drafting costs; focal points; evidence of binding international consensus; and cosmopolitan self identification).

### A. Kyoto Protocol

#### Background

The specter of global warming has increasingly dominated the public consciousness. As a result of growing concern, countries negotiated an agreement to reduce greenhouse gas emissions. The resulting Kyoto Protocol commits developed countries already at a high level of emissions to reduce their overall emissions of greenhouse gases to 5% 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 tradeable permits. The protocol imposes no reductions on developing countries such as China and India. However, those developing countries that wish to engage in emission trading must accept binding

emission targets.

The United States actively participated in the Kyoto Protocol negotiations. The United States secured significant objectives such as flexible timetables for emission reductions; the inclusion of all greenhouse gases; and the allowance for a cap-and-trade system. The tradeable permit mechanism drew heavily from United States domestic experiences with such systems.

Despite early enthusiasm from the Clinton administration, the United States Senate vociferously opposed the Kyoto Protocol. In July 1997, the Senate issued Resolution 98 which declared that the United States should not sign Kyoto if (a) it was likely to cause serious harm to its 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 did not 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 administration also worried about the significant compliance costs.

## 2. Sub-federal Action

Many cities and states criticized President Bush for creating a regulatory void on greenhouse gasses. The explicit disavowal of the Kyoto Protocol spawned multiple sub-federal efforts. For instance, the US Mayors Climate Protection Agreement, passed this year, "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 5% below 1990 levels by 2012." The agreement also encourages Congress to pass the Climate Stewardship Act which would create a national tradeable permit regime. Signatory cities also made a voluntary commitment "to meet or exceed Kyoto Protocol targets." So far, 188 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 500-plus cities in more than 25 countries includes enough municipalities to "account for eight percent of anthropogenic greenhouse gas emissions." The Cities for Climate Protection program seeks to integrate the Mayors Agreement into the Kyoto Protocol by acting as brokers for private business and household reductions. The Cities for Climate Protection program also promotes city to city cooperative opportunities. For example, four United States cities and three Japanese cities are comparing climate protection strategies and sharing available research. Fort Collins, Colorado and Cebu City, the Phillipines have completed a climate related agreement to "exchange technical and practical know-how in the waste management field." Similarly, Miami-Dade County is working with local Mexican authorities to jointly implement their Cities for Climate Protection initiatives. The ICLEI also maintains a database of best practices and encourages conferences and seminars to facilitate information exchanges. The ICLEI is currently developing a multilingual database to allow cities to share "emission inventories, reduction targets, and mitigation action plans." Along with the international interactions, the ICLEI also promotes extensive domestic communications with numerous workshops and a Leadership council dedicated to informing member cities of new scientific developments and emerging policies as well as "actively engaging local elected officials in promoting the benefits of local climate protection strategies."

Another example of a sub-federal initiative in response to the federal failure to ratify Kyoto is the regional cap-and-trade system for nine Atlantic states. Initiated by New York governor George Pataki in 2003, the Regional Greenhouse Gas Initiative created a regional carbon market for power plant emissions with aspirations of creating a model for future national policy. The RGGI contemplates the possibility of inviting other countries to join or working within existing international frameworks - discussions of possible links to European trading systems are already underway. Although it is in an early stage, states are beginning to implement RGGI. Maine and Connecticut have both passed legislation formally adopting the regional goals of RGGI.

The RGGI acts as a governmental information and regulatory network. States share their past experiences with greenhouse gas regulation, listen to expert briefings, and emphasize uniformity of regulations across states. The RGGI website acts 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. RGGI states are creating a greenhouse gas registry that could be integrated with other pollution registry efforts.

In many ways, RGGI exists in the shadow of the Kyoto Protocol. For instance, the emission reductions are pegged to 1990 levels- a self-conscious effort to mirror 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 the Congress have not directly responded to either initiative. Congress has not passed preemptive legislation, no one has initiated

litigation, but the federal government has stopped short of endorsement.

## B. The Stockholm Convention on Persistent Organic Pollutants

### 1. Background

Longstanding concern about agricultural and industrial chemicals culminated in the Stockholm Convention on Persistent Organic Pollutants. This convention bans the production and use of the so called “dirty dozen” chemicals, commits state parties to minimizing Annex C chemicals, and provides for a precautionary approach to the future regulation of other chemicals. The convention also binds states to participate in information exchanges, public education campaigns, and research, development, and monitoring on persistent organic pollutants (“POPs”). In May 2001, the United States signed the convention and President Bush has been actively promoting ratification.

### 2. Sub-federal action

Many states have taken action on POPs prior to the Stockholm Convention, but a few seem to have responded directly to the treaty. For instance, Maine’s 2001 legislation on dioxin takes language directly from the treaty in identifying 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 PBT rule 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.”

## C. Convention to Eliminate Discrimination Against Women

### Background

In 1946, the United Nations established the Commission on the Status of Women to address the plight of women across the globe. These efforts culminated in the drafting of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) which applied the recent advances in the human rights field to “develop[] appropriate human rights language for women.” The CEDAW obligates states to use constitutional, legislative, and judicial measures to prohibit, eliminate, and ameliorate all discrimination against women. The United States actively participated in the drafting of the CEDAW. To date, 179 countries have ratified the CEDAW. 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. These reports focus on the legislative, judicial, and administrative measures taken to comply with the CEDAW. An Optional Protocol to the CEDAW allows individuals to directly file complaints in front of an international committee which may issue a ruling that binds the domestic courts of the individual’s country.

The evidence on international compliance with the CEDAW is decidedly mixed. Many countries have failed to meet their reporting requirements and they rarely provide judicial or legislative remedies for individual violations. Some signatories seem to be so in name only. On the other hand, activists credit CEDAW for discrete victories like the development of women’s citizenship rights in Botswana and Japan, inheritance rights in Tanzania, and property rights in Costa Rica. Similarly, Brazilian and Ugandan constitutions draw directly from CEDAW provisions. The United States, however, is a notable holdout. Sparking optimism about the treaty’s prospects, President Carter signed the CEDAW shortly after it was opened for signature in 1980. Although he submitted the treaty for advice and consent that same 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. 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.

### Sub-federal action

Numerous cities and states have urged federal ratification of the CEDAW, including nine states which have passed ratification resolutions. In 1998, twenty years after President Carter signed the CEDAW, San Francisco passed a local ordinance which implements its principles. The nonprofit group promoting the ordinance wanted both to demonstrate the benefits of CEDAW ratification and implementation to elected officials as well as to “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. The gender analysis included a "framework to evaluate and address any differential impact of service delivery, employment practices, and budget allocation." As a result of these analyses, the following changes were made: better allocation of resources to female offenders in juvenile probation; increased and improved collection of gender disaggregated data; changed placements of streetlights and sidewalk cuts; expansion of sexual harassment training, enhanced flexibility in meeting vendor requirements for women, and greater appointments of women to revenue creating commissions. While these changes may seem minimal given the scope of CEDAW's protections, the United States and San Francisco are already largely in compliance with the CEDAW.

Influenced by San Francisco, other cities and states are promoting similar initiatives. Activists interested in starting their own CEDAW campaigns are encouraged to have workshops, public hearings and to 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 CEDAW; educating legislators on the value of CEDAW ratification; 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 comprehensively address racial discrimination. The treaty 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 which 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, as well as encourages tolerance measures in the fields of education, culture, and information.

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

##### Sub-federal Action

Several states and localities have directly incorporated 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 drafted a bill defining discrimination and preferential treatment under article 31 (Proposition 209) of California's state constitution, as consistent with CERD's definition of discrimination. This bill, which became Section 8315, had the effect of allowing affirmative action in some contexts. Numerous legal challenges have been brought against Section 8315 for being violative of the state constitution and in *C & C Const. v. Sacramento Municipal Util Dist.*, 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 will have city agencies undertake data collection, analysis, and dissemination in hopes of proactively addressing racial and gender discrimination in all aspects of government from employment, service provision, contract work, and policing strategies. The legislative proposal is premised on the belief that more and better data will demonstrate evidence of widespread discrimination.

Although this article focuses on a few discrete examples, more 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 subfederal integration, some obvious candidates stand out. The UN human rights treaties are extremely visible to civil society and governmental entrepreneurs. Moreover, of the seven UN human rights treaties, the United States has signed, but not ratified the Convention on the Rights of the Child (CRC), the

International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family (ICPMW). In particular, the CRC is ripe for state implementation as state law governs the vast majority of the treaty provisions. Preliminary evidence suggests the beginning of just such a strategy.

#### 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 a cost benefit analysis and determined that greenhouse gas reductions were in their interests, despite the senatorial and executive belief that the Kyoto Protocol violated the national interest. Yet rational choice struggles to explain why cities and states invoke the Kyoto Protocol in order to jointly reduce greenhouse gases. Similarly, rational choice adequately explains the failures and limitations of sub-federal integration of human rights treaties, but lacks explanatory force as to why sub-federal entities chose these projects or their degree of ongoing compliance. So rational choice would probably rightly predict that sub-federal integration is unlikely in those places that reject self identification with the international community. Sub-federal integration is much more likely in San Francisco, Berkeley, and New York than Topeka, Peoria, and Jackson. Even so, rational choice would not predict the existence of sub-federal integration at all. Cities and states pick between lots of ways to help their citizens, rational choice does not provide a reason to think that cities and states would find treaties particularly useful.

In contrast, many aspects of the norm-based theories, particularly the managerial school, help inform 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 future, improved compliance. The managerial school focuses on the importance of the treaty regime in developing domestic capacity. While various states and localities do not receive foreign monies to accomplish the treaty's goals, they can learn from the treaty members through training, research, and education. More broadly, the managerial school relies on the use of argument and persuasion to influence state behavior. So the managerial school should predict that sub-federal actors would use other countries' experiences under the treaty as evidence of the possibility and the benefits of compliance.

While many sub-federal initiatives are in their preliminary stages, their current development suggests the possibility of extending treaty regime management to non-ratifying sub-federal units. In other words, many of the mechanisms thought by norm model theorists to be essential to encouraging compliance of treaty parties can and are being extended to nonratifying sub-federal actors. For instance, compliance theory's emphasis on data collection and self reporting strongly informs sub-federal practices in this area. Both the ICLEI and the RGGI emphasize information sharing and distill best practices. Many mayors plan on attending the Conference of Parties to the UN Framework on Climate Change in which state parties will be discussing how to improve Kyoto compliance. Similarly, both the San Francisco CEDAW and New York CERD view information gathering as the foundation from which other policy changes are possible. All four programs presume that governmental and private actors want to provide the requested data. 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 Kyoto to help design and implement the permitting schemes. The San Francisco CEDAW has emulated those 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 the need for capacity building to allow 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 initiative relies on data collection and networks with other human rights advocates. CERD advocates actively draw from the experiences of the San Francisco CEDAW. In contrast, the California CERD initiative implemented international human rights principles without linking to any of the transnational networks, requesting treaty management resources, or drawing on national efforts to implement CEDAW or CERD.

All of 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 by the United Nations Framework on Climate Change and then later by the Kyoto Protocol. Similarly, advocates suggest the human rights paradigm presents a different framework than existing United States legal approaches in

that they “recognize the interconnectedness of rights,” “account for unintentional [discriminatory impacts],” and obligate the government to take gradual and progressive steps to address inequality whether caused by governmental or private actors. The New York CERD information gathering scheme also reflects the human rights methodology of “promoting change by reporting facts.” The testimony in favor of this bill reflects a consistent attempt at frame shifting from a civil rights, litigation based framework to a human rights, proactive legislation framework.

In sum, the case studies suggest the importance 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 ability to use treaties as frames. Norm entrepreneurs can use treaties to informally extend these mechanisms to non treaty parties. The implementation of sub-federal efforts also demonstrates that when the underlying treaty norms and ideas are powerful enough, they can bypass federal unwillingness to internalize international rules.

In addition to utilizing treaties as new frameworks to approach a substantive problem, all three of the case studies provide some support for the reduced drafting costs and enhanced learning opportunities of subfederal integration of treaties. Both the RGGI and the Mayors Climate Protection Agreement drew from treaty language and looked 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. Note to self- need to cite specific examples.

The Mayors Climate Protection Agreement self consciously uses the Kyoto Protocol as a focal point for measuring compliance. This action facilitates comparisons to international initiatives and to more seamlessly integrate in the Kyoto tradeable permit regime. For instance, the RGGI intends to allow offsets to include EU Emission Trading scheme allowances and Clean Development Mechanism credits. 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 on a problem as a mechanism to persuade and the active pursuit of 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 our absence from the Kyoto Protocol as a reason for the need for city action. The Mayors agreement consciously decided to target like-minded cities - of the 188 city members, the vast majority are cities on the coast, although there are a few red cities like Billings, Montana; Macon, Georgia; and Topeka, Kansas. Yet self identification of a sub-federal initiative as a cosmopolitan policy can cut in both directions. For instance, the policy integrating CERD into state constitutional interpretation drew fire as an unwarranted international intrusion into the domestic process. Similarly, some resistance to RGGI as an international policy exists. In 2003, Representative Joy introduced a bill in the Maine legislature to prohibit “a state department [from] expend[ing] or award[ing] fund to implement in whole or in part, an international treaty United States has not ratified.”

### III. Comparing Sub-Federal Integration and Ratification

Although sub-federal actors cannot ratify treaties nor participate in their negotiation, as described above, sub-federal actors can integrate treaty law into domestic law by expressing support for ratification and/or implementing the treaty’s substantive provisions. Yet such integration does not perfectly mirror the federal ratification and implementation process. This section 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 section also contests the norm-based theorists prediction that sub-federal integration itself will spark treaty ratification. Rather this article concludes that while the existence of a treaty can help shape local preferences and change local practices through sub-federal integration, such integration is unlikely to change national interests in regards to ratification.

#### A. Distinguishing treaty ratification and sub-federal integration

##### Benefits

Treaty membership provides benefits to a country at both the international and domestic level. One potential international benefit is the ability to develop or strengthen an international compliance reputation. For those countries trying to establish themselves as good neighbors in the global community, both joining the treaty and

remaining a member in good standing provide such a signal. Empirical evidence suggests this signal is particularly important to new states and those states that have recently experienced a dramatic change in governance. So, 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 a stable place for investment. For those countries already seen as good neighbors, treaty membership might be necessary to exercise issue specific leadership. For example, the transnational legal process school suggests the United States cannot lead on human rights and environmental issues while it stays outside of treaties.

Rational choice scholars, however, 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 leadership in the area through massive increases in demining funding. 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 countries look to a country's treaty behavior in similar issue areas with similar compliance costs to gauge a country's reliability. So a country interested in determining Cambodia's likelihood of abiding by an environmental agreement would look to their participation in other environmental treaties, rather than to their ratification of human rights treaties.

Countries may also benefit from their participation in the treaty's governance structure. 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 political and fiscal resources. For treaty regimes with sanctioning powers, members determine when and how to deploy those powers. Treaty members also reap the diplomatic benefits of repeated interactions over time. In addition, treaty powers have access to information that may not be released to non-members. Finally, treaty membership may be a prerequisite to some other desired benefit such as foreign assistance or membership in a different organization.

At the domestic level, countries benefit from maximizing their interests. Under standard accounts, 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 lose or the country would not choose to join. At the very least, the treaty regime likely satisfies the aggregated preferences of the country better than as against the new status quo with the country staying outside the treaty. Governmental actors may also gain from joining a treaty. Some treaties shift decision-making away from one branch of government to another or from one level of government to another. For example, in the United States, treaties allow the executive to make decisions normally left to the Congress, although advice and consent guarantees that Congress still has some influence.

In addition to benefits that may flow to a country and its constituents, countries might join treaties that are internationally welfare enhancing even though their constituents will be net losers. Under such an account, institutions in wealthy countries bear cosmopolitan duties to benefit people and countries outside their own communities even if it violates their national interest. So, for instance, under cosmopolitan theory, the United States should join the Kyoto Protocol even if it would likely be a net winner under conditions of accelerated global warming. Regardless of whether most benefits would accrue to poor and low lying countries, an other-regarding United States should join such a treaty.

Sub-federal integration without ratification likely garners none of these national benefits. Sub-federal integration reflects local, rather than national preferences. Other countries seem unlikely to take note of sub-federal policies and those that do would not perceive them as indicators of federal policy. Thus, sub-federal integration cannot restore national issue specific leadership. Similarly, sub-federal agents cannot recognize many of the treaty membership benefits as only federal actors are allowed to participate in the treaty regime.

Sub-federal units can, however, capture many of the domestic treaty gains. In particular, the benefits of human rights treaties accrue to the individuals affected by domestic change regardless of whether other countries participate. For example, the benefit from addressing sex discrimination flows to an individual and to the society regardless of whether other countries also comply with their treaty obligations.

Environmental treaties are more complex. High levels of international compliance are often necessary for the country to receive the full benefit from compliance. Even so, compliance by the 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 obligations, the net emissions are still reduced and the problem Kyoto seeks to address is partially ameliorated regardless of whether Europe also complies with its obligations. Similarly, if multiple states band together to implement their own Kyoto, they will also reduce

net emissions.

Environmental treaties raise an additional complexity in that a compliant unit does not necessarily benefit commensurate with its obligations. For instance, holding unintended consequences constant, while all states 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.

Sub-federal units who share policy preferences with the ratifying countries can implement similar domestic legislation as the ratifying countries. This mimicry allows sub-federal units to reduce their legislative drafting costs as well as to learn from the experiences of the other states. The treaty still provides a framework from which to sell the legislation to the domestic public. The treaty text also provides focal points and benchmarks against which to measure the success of the implementation of the legislation.

## 2. Costs/Burdens

While sub-federal compliance forgoes the international gains of federal ratification, it also avoids the costs of joining multilateral treaty regimes. First, many of the multilateral human rights and environmental treaties create potentially objectionable governance structures. Rather than encouraging individual countries to determine for themselves what the language of the treaty means and what constitutes a violation, most treaties delegate that authority to a supranational body. In many instances, the United States and individual states and cities may prefer to interpret the language for itself. 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 power in international organizations, but coalitions and voting rules may thwart its desired outcomes. Sub-federal implementation can, although does not necessarily, better serve the related democratic concern of transparency – much of treaty bodies' decisionmaking is shrouded in mystery and difficult to access.

In addition, wealthy countries often bear the brunt of financing these governance structures. While the United States temporarily avoided some of these costs by refusing to pay its United Nations' dues, some future administration may feel compelled to pay for those structures in which it takes part. At the very least, the United States accrues the diplomatic costs of free riding. Similarly, many human rights and environmental treaties obligate wealthy countries to subsidize technology and other transfers to less wealthy states to facilitate their compliance. 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. In a similar vein, the absence of a supranational structure may allow for greater flexibility and speed of implementation because sub-federal actors would be guided by, but not bound by the treaty's structures.

The costs of reversing course are also higher under a treaty. Most treaties have a defined waiting period for withdrawal, if they allow it at all, whereas sub-federal policies can be repealed through normal legislative means. In theory, the United States could ignore limitations that a treaty places on withdrawal, but in practice the United States generally abides by defined withdrawal language. 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 underlying policy shift.

In sum, treaty ratification facilitates international reputational benefits along with the diplomatic and other benefits from participation in the treaty regime. Yet treaty ratification also risks participation in a regime that deviates from a nation's interests and commits the nation to unwanted resource expenditure. Subfederal integration can capture many of the domestic benefits of integrating the treaty's substantive norms, but it foregoes the benefits and burdens of treaty membership.

## B. Will Sub-federal Integration Influence Federal Ratification

The transnational legal process school suggests that 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*." 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, Professor 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, norm theorists should hypothesize that subfederal integration would increase the positive attention focused on the treaty; help reframe the policy debate; demonstrate popular support; and generally strengthen the forces urging ratification. So while the transnational legal process

scholars generally focus on national level integration, they should predict that widespread sub-federal integration would help cause federal ratification.

This article, however, suggests numerous reasons to be hesitant about the possibility of sub-federal integration changing federal policy on ratification. Successful sub-federal integration provides evidence about the domestic benefits of treaty implementation. For instance, San Francisco's CEDAW ordinance may persuade some of the need for legislation to address the city's treatment of women and the possibilities of that legislation's success. Yet such evidence may not convince domestic constituents to help provide those benefits internationally- much empirical evidence suggests that altruism declines as the beneficiaries become more distant in location and cultural affiliations. Even cosmopolitan cities and states feel substantially more attachment to their own citizens than to the abstract global community. In addition, subfederal integration fails to shed any light on the costs and benefits of joining the treaty regime itself. As discussed above, the United States may be wary of binding dispute resolution, unanticipated regime development and allowing other countries to influence the interpretation of state duties and burdens.

Similarly, Powell's contention that the federal government's role as a clearinghouse increases the chances of federal treaty ratification elides 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 efforts 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 coordinate best practices and support efforts to ratify Kyoto treaty at the same time the Senate has forbid the spending of federal money on Kyoto compliance.

Finally, the potential for a norm cascade may be more limited than treaty supporters acknowledge. While the empirical evidence suggests some tentative enthusiasm for the snowball potential of subfederal integration, the spread of subfederal integration of human rights legislation has been limited to cosmopolitan areas- big liberal cities like 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 cosmopolitanism.

Subfederal integration of environmental treaties, however, may be less limited. For instance, many of the cities supporting Kyoto are not traditional liberal cities but cities like Macon, Georgia. Similarly, the states taking part in the Regional Greenhouse Gas Initiative are not particularly cosmopolitan either. Then again, the RGGI is not actively promoting federal ratification. [needs more development]

Thus far, the limited empirical evidence suggests that ratification does not quickly follow sub-federal implementation. Yet most of these initiatives are such early stages that they have not been able to clearly demonstrate their benefits or trigger a norm cascade in support of treaty ratification. Develop

Even if subfederal integration increases domestic support for ratification over time, multilateral human rights and environmental treaty passage present an institutional difficulty. Some scholars suggest a unique American rights culture keeps the United States out of treaty regimes. Others rely on a combination of relative geopolitical strength, stable domestic institutions, "extreme conservatism of a vocal minority in the political system," and "the extreme decentralization of [the United States'] political institutions." Either way, as an empirical matter, the Senate ratifies few multilateral human rights treaties even when they have significant domestic support. Multilateral environmental treaties fare only slightly better.

Numerous procedural hurdles block many treaties. First, the Senate may only ratify those treaties which the executive 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. Even if the treaty escapes the committee, a single senator may still anonymously block the bill or the Senate can filibuster the treaty. Once the treaty reaches the full Senate, the two-thirds requirement for treaties often proves substantially more difficult to overcome than the majority requirement for domestic legislation. Thus, even treaties with widespread public support may not get ratified.

In addition to the ratification vote, treaties are subject to a host of reservations, understandings, and declarations ("RUDs"). RUDs range from substantive objections, interpretive issues, federalism understandings, preclusion of International Court of Justice jurisdiction, to declarations that treaties are non-self-executing. In the case of human rights, these RUDs work not only to prevent the treaty from weakening existing rights, but often to preclude requirements that are more protective of rights than preexisting law. 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.

Moreover, the Senate generally designates these treaties non-self-executing. In other words, the treaty lacks the force of law until Congress passes implementing legislation. Non-self executing treaties leave citizens unable to invoke the treaty as a binding obligation in domestic courts. Similarly, mere treaty ratification does not ensure the consent of the United States to have “individual complaints of rights violations heard by any of the other (UN) treaty bodies.”

Thus, while subfederal integration may trigger a norm cascade in like-minded states and cities to adopt similar propositions and to support treaty ratification, subfederal integration seems unlikely to spur treaty ratification. Subfederal integration lacks a persuasive mechanism to demonstrate the benefits of the treaty regime as distinguished from the benefits of treaty implementation. The focus on ratification, however, overestimates the benefits of treaty membership in a country where doctrines of non-self-execution and reservations, understandings, and declarations 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.

#### IV. Limits on State and Local Power

To understand the possibilities for sub-federal integration, this section briefly investigates the United States’ constitutional commitments as they limit the scope and breadth of integration. For instance, the Constitution restricts the authority of states to conduct treaties or agreements with other powers. In addition to these textual limits, sub-federal integration also implicates a longstanding foreign relations debate concerned with 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 upon foreign relations are reserved to the federal government. This section attempts to briefly expand this debate by looking at those instances when 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. It assigns particular duties to the executive and places many limitations on the states. In particular, Article I, Section 10 dictates that “[n]o 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 “ha[d] 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 need Congressional approval only for those arrangements that increase a state’s political power or encroach on the nation’s power.

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 United States federal government if they want to make binding commitments to one another. For those areas in which foreign countries or other states seek a binding commitment, such a commitment cannot be enshrined in a treaty. States, and by extension, cities have to find some other way to signal their intent to be bound. Even so, states and cities can draft model legislation so that everyone passes identical legislation. Similarly, states and cities can use memoranda of understanding and other non-binding pacts to signal their intentions. For instance, the RGGI’s structure may reflect a concern about the treaty and compact clause. Rather than adopt an interstate compact, the governors are signing 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 purely internal matters. So although a given state is free to reduce greenhouse gases through a permitting scheme, it has no influence over the details over the international permitting scheme as developed through Kyoto. If that state wants to interact with the Kyoto framework by selling permits to Europe in order to facilitate Europe's Kyoto compliance, the contract for the sale of permits may pose a constitutional question.

#### B. Preemption and Dormant Powers

In addition to textual limitations on sub-federal action, the federal government retains the power to preempt sub-federal initiatives. Congress may use statutes to preempt sub-federal action. The varieties of statutory preemption include: (1) express preemption in which a federal statute clearly expresses Congress' desire to exclude state activity; (2) obstacle preemption in which a state statute stands as an obstacle to the accomplishment of the purposes and objectives of a federal statute; (3) conflict preemption in which state statute makes it impossible to comply with federal law; and (4) field preemption in which the federal government has acted so definitely 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. The case law on preemption is very complex and the permissible limits of state action are quite murky.

While other scholars discuss this area at great length elsewhere, this section 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 Massachusetts 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 only allowed nonresidents to inherit property 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 the United States' foreign relations, the court struck down the law. *Zschernig* suggested the invalidity of any state laws with "more than an incidental effect" on foreign affairs regardless of any showing of direct conflict with federal actions or even any affirmative federal activity in the subject area.

*Zschernig* languished until 2003 without any subsequent Supreme Court citations and most academics took it to be an aberration. Yet in *Amer. Ins. Assoc. v. Garamendi*, the Supreme Court seems to have reinvigorated the foreign affairs preemption doctrine. The Court held that executive agreements with foreign countries to settle insurance claims arising out of World War II preempted a California state law forcing information disclosure of insurance companies operating during World War II. While the executive 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 volunteer 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 preemption authority.

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 . . . [I]t proscribes those [class of state foreign affair 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" while it "cannot negotiate with a foreign power in order to secure concessions." Such a treaty power flows from the President's authority over treaty negotiation. State defiance of the president's power (which is sometimes informed by Congress on the front end) should be understood as a "threat to the successful negotiation – as well as avoidance – of preemptive federal treaties." Although many instances of sub-federal treaty implementation easily satisfy existing preemption doctrine and theoretical dormant treaty powers challenges, some constitutional concerns linger. Under an expansive interpretation of *Garamendi*, subfederal integration which explicitly (or even implicitly) criticizes the United States' treaty position may fall prey to an executive branch preemption argument based on the executive's anti-treaty position. For example, the city initiative urging the federal government to ratify the Kyoto Protocol might run

interfere with the United States' ability to speak with one voice on the Kyoto Protocol and in future treaty negotiations. 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. 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 negotiations. These resolutions can be distinguished from Crosby and Garamendi which both criticize foreign governments and attempt 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 are unproblematic.

Ultimately, whatever constitutional limits exist, they will only constrain sub-federal action to the extent that sub-federal actors believe the federal government will enforce them. In many instances of sub-federal activism, the federal government has been reluctant to act. Despite the broad language in *Holmes*, states have conducted numerous covenants with foreign entities, including environmental pacts, without seeking congressional approval. Neither Congress nor the courts have spoken on these covenants. In addition, the executive never acted to preempt: city ordinances declaring non-binding nuclear weapons free zones; city policies divesting their stock holdings in firms doing business in South Africa and restricting procurement of goods and services where the bidder for a city contract did business in South Africa; and state legislation divesting from Northern Ireland. The federal government tolerated these policies despite the fact that they actively targeted the practices of other countries and risked foreign relations disputes. Sub-federal integration may be even less objectionable as it is definitionally sympathetic to the practices of the international community.

On the other hand, Congress did eventually expressly preempt state anti-boycott laws which prohibited state residents from conducting many transactions with Arab states. The Justice Department filed suit and defeated an Oakland ordinance which banned firms from doing weapons manufacturing work and limited the transportation of nuclear materials through the city's jurisdiction. Both Crosby and Garamendi suggest the federal courts may be practicing a more expansive preemption policy, which may encourage more challenges. At the very least, with the exception of the use of the CERD as an interpretive tool for the California constitution, no one has challenged the instances of subfederal integration discussed in this article.

## 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 in the environmental and human rights contexts, governmental policy entrepreneurs and nongovernmental organizations can help integrate treaties into domestic law in the face of federal lethargy or intransigence.

Sub-federal integration of treaties informs the current compliance debate between rational choice and norm-based theorists. Sub-federal integration suggests the norm-based theories display some valuable insights about the potential of treaties and the managerial school in influencing the development of sub-federal interests. Sub-federal integration also lends credence to rational choice's calculation of how treaties will affect the national interest. Although sub-federal integration may slowly change sub-federal interests, treaty advocates and legal scholars should be skeptical of its ability to cause ratification.

( Assistant Professor, Florida State University College of Law. Many thanks to Lisa Bernstein, Gerald Rosenberg, Alan Sykes, Adrian Vermeule, Douglas Baird, Rachel Brewster, Dave Fagundes, Michael Horowitz, Jonathan Masur, Erin Simpson, and the University of Chicago Legal Scholarship Workshop.

Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2d ed. 1979).

Two examples include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 23, 1989, U.N. Doc. EP/IG.80/3, reprinted in 28 I.L.M. 649 (1989); Hazardous Waste and International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966).

Existing literature is just beginning to address the role of sub-federal actors in implementing nonratified and non-self executing treaties. Add GW comment Cf, Stacy Laira Lozner, Note, Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative, 104 Colum. L. Rev. 768 (2004); Barbara Schulman, Effective Organizing in Terrible Times: The Strategic Value of Human Rights for Transnational Anti-Racist Feminists, 4 *Meridians: feminism, race, transnationalism* 102 (2004); Catherine Powell, Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States, 150 U.

Pa. L. Rev. 245 (2001); Gay J. McDougall, Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination, 40 *How L.J.* 571, 594 (1997) (arguing that civil rights groups should promote implementation of and compliance with the CERD through pressure to submit reports and litigation); Dorothy Q. Thomas, Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 *Harv. Hum. Rts. J.* 15, 21-22 (1996) (contending that domestic rights groups need to be more internationalized by promoting ratification and creating linkages with international colleagues).

See e.g. Harold Koh, Why States Obey International Law, 111 *Yale L.J.* 2599 (1997).

Give examples

Eight states and many cities, including Denver, adopted such policies. Michael H. Shuman, *Dateline Main Street: Courts v. Local Policies*, 86 *Foreign Pol'y* 158, 175 (1992).

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 such as the age of those allowed to enter the military.

Dec. 18, 1990, 30 *I.L.M.* 1517, 1523 (entered into force July 1, 2003).

Julian G. Ku, The State of New York Does Exist: How the States Control Compliance with International Law, 82 *N.C. L. Rev.* 457, pin (2004).

See Part IC; see also Ryan Goodman & Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 *Eur. J. Int'l L.* 171, 182 (2003). For a view that ratification is often negatively correlated with compliance, see Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 *Yale L.J.* 1935 (2002).

Thomas Risse & Stephen C. Ropp, International Human Rights Norms and Domestic Change: Conclusions in the Power of Human Rights, in *The Power of Human Rights: International Norms and Domestic Change* 234, 276-77 (Thomas Risse et al. eds., 1999).

William C. Bradford, International Legal Compliance: An Annotated Bibliography, 30 *N.C. J. Int'l L. & Com. Reg.* 379 (2004).

For a general discussion, see Oona Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 *U. Chi. L. Rev.* 469, 481 (2005).

George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 *J. Legal Stud.* S95, S100 (2002).

Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

*Id.* at 150.

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. Thomas Franck, *Fairness in International Law and Institutions* (1998).

Koh, *supra* note NOTEREF\_Ref120759961 \h \\* MERGEFORMAT 4 , at 2602.

*Id.* at 2641.

Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 *Hous. L. Rev.* 623 (1998).

See George Downs et al., Is the Good News About Compliance Good News About Cooperation, 50 *Int'l Org.* 379, pin (1996).

*Id.* 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).

*Id.* at 379.

Hathaway, *supra* note NOTEREF\_Ref120760091 \h \\* MERGEFORMAT 13 , at 500-501. This is particularly true for those countries that do not believe that international law creates an independent obligation

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 generally Anne F. Bayefsky, The UN Human Rights Regime: Is It Effective?, 91 *Am. Soc'y Int'l L. Proc.* 460, 467 (1997).

Kenneth Roth, The Charade of U.S. Ratification of International Human Rights Treaties, 1 *Chi. J. Int'l L.* 347, 349 (2000).

*Id.* (identifying the only concrete change from the genocide convention as the establishment of civil and criminal

liability for torture and the explicit prohibition on genocide).

Of the few litigated human rights cases, the Human Rights Committee deemphasizes cases from developed democratic states like the United States and has shied away from developing a broadly applicable jurisprudence. Anne F. Bayesky, *The UN Human Rights Treaty System: Universality at the Crossroads*, pin (2001).

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. Sociology* 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 NOTEREF\_Ref120760517 \h \\* MERGEFORMAT 10 (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 Research* 95 (1999) (concluding ICCPR ratification did not affect civil and political rights or personal integrity rights).

Christof Heyns & Frans Viljoen, *The Impact of United Nations Human Rights Treaties on the Domestic Level*, 23 *Human Rts. Q.* 483, 487 (2001).

Hathaway, *supra* note NOTEREF\_Ref120760091 \h \\* MERGEFORMAT 13 , at 478.

Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 *J. Legal Stud.* 307, 308-09 (2003).

Jack Goldsmith & Eric Posner, *The Limits of International Law* (2005).

*Id.* at 11-13.

Under this rationale, a state 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.

For example, rules of the road develop in such a manner. It does not matter if cars drive on the right or the 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.

Cooperation also explains bilateral arms control treaties like the ABM treaty between the United States and the former Soviet Union. Both countries had long term interests in weapons parity, but felt unilateral disarmament would jeopardize their short term interests. When the United States no longer viewed its treaty partner as a threat, it fundamentally undermined the original agreement with its reinterpretation.

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 and 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.

Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and the Pitfalls*, 31 *J. Legal Stud.* 285, 292-93 (2002).

For instance, the CERD drafters and supporters did not foresee local implementation as a possible compliance mechanism. Rather they thought, as one commentator noted, "ultimately, all depends upon the ratifications of the convention and the recognition by the ratifying States of the competence of the Committee established to consider communications from individuals . . . claiming to be victims of a violation by a State Party . . ." Lerner, *supra* note NOTEREF\_Ref120754758 \h \\* MERGEFORMAT 1 11.

Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 *Chi. J. Int'l L.* 121, 122 (2001).

Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *Va. L. Rev.* 1649, 1651 (2000).

*Id.* at 1654.

For instance, both the 1924 League of Nations Declaration of the Rights of the Child and the 1948 and the 1959 U.N. Declaration of the Rights of the Child strongly inform the Convention on the Rights of the Child.

Martha Nussbaum, *For Love of Country* pin (1996).

*Id.*

Art. 3.1.

Art. 2.1(a).

Art. 4.1.

Art. ?

Stuart E. Eizenstat, testimony, The Kyoto Protocol and Its Economic Implications, Hearing before the subcommittee on energy and power, y4.c73/8:103-108, 14-16

This resolution passed 95-0.

Letter from the President to Senators Hagel, Helms, Craig, and Roberts, Office of the Press Secretary, (2001) available at <http://www.whitehouse.gov/news/releases/2001/03>. But Bush left open the possibility of future administrations reviewing and joining the Protocol in 2012. Cooler Heads Campaign, U.S. Out of Kyoto for a Decade—At Least, (May 18, 2002) available at <http://www.globalwarming.org/article.php?uid=411>.

The costs of US compliance range anywhere from \$26 a ton of carbon to \$250 per ton of carbon. Worst case estimates suggest US compliance could cost 475 billion dollars. John P. Weyant & Jennifer Hill, The Costs of Kyoto Protocol: A Multi-Model Evaluation (May 1999), available at <http://www.iaee.org/en/publications/kyoto.aspx>.

J. Kevin Healy & Jeffrey M. Tapick, Climate Change: It's not Just a Policy Issue for Corporate Counsel- It's a Legal Problem, 29 Colum. J. Env't'l L. 89, 101 (2004). Berkeley and Santa Cruz both endorsed the Kyoto Protocol. Kyoto USA, U.S. Cities and Their Citizens Working Together to Address Global Warming, [www.kyotousa.org](http://www.kyotousa.org) (no date given).

Id. This language has since been removed and the agreement now urges general national legislation on the matter.

US Mayors Climate Protection Agreement, available at <http://www.ci.seattle.wa.us/mayor/climate/default.htm#who> (last updated Nov. 9, 2005).

Newsletter date? <http://www.iclei.org/ICLEI/news25.htm>. (In 1992, 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.").

Konrad Otto-Zimmermann & Karen Alebon, ICLEI: Working with Cities to Promote Sustainable Development, (2002), available at [http://www.unhabitat.org/cdrom/unhabitat\\_cdrom/html/forum2.html](http://www.unhabitat.org/cdrom/unhabitat_cdrom/html/forum2.html).

Newsletter date? HYPERLINK "<http://www.iclei.org/ICLEI/newsxx.htm>"

<http://www.iclei.org/ICLEI/newsxx.htm> (Aug 2003).

Id.

Newsletter date? HYPERLINK "<http://www.iclei.org/ICLEI/newsxx.htm>"

<http://www.iclei.org/ICLEI/newsxx.htm> (July 1999).

Cities Partner for Climate Action Newsletter date? <http://www.iclei.org/ICLEI/news36.htm>.

HYPERLINK "<http://www.iclei.org/ICLEI/newsxx.htm>" <http://www.iclei.org/ICLEI/newsxx.htm> . (Mar. 2001).

Miami-Dade County to Work with Mexico, Newsletter date? <http://www.iclei.org/ICLEI/news25.htm>.

Konrad Otto-Zimmermann & Karen Alebon, ICLEI: Working with Cities to Promote Sustainable Development, (2002), available at [http://www.unhabitat.org/cdrom/unhabitat\\_cdrom/html/forum2.html](http://www.unhabitat.org/cdrom/unhabitat_cdrom/html/forum2.html).

CCP Campaign Heats Up; Id.

HYPERLINK "<http://www.iclei.org/ICLEI/newsxx.htm>" <http://www.iclei.org/ICLEI/newsxx.htm> . (Nov. 1999) discussing international speakers who relay international success stories at domestic conferences.

Otto-Zimmermann & Alebon, supra note NOTEREF\_Ref120836354 \h \\* MERGEFORMAT 6 5.

Id.

Id.

Peter Fontaine, A New World Order, Public Utilities Fortnightly (Feb. 2005).

Dave Algosio & Michael Goggin, Getting on Track: New England's Rising Global Warming Emissions and How to Reverse the Trend (Feb. 2005) <http://vpirg.org>.

HYPERLINK "<http://www.rggi.org/about.htm>" <http://www.rggi.org/about.htm>.

Action Plan, <http://www.rggi.org/action.htm>.

David R. Jones, In Northeast, Republicans, Democrats Join to Forge Carbon Trading Market, Inside Energy with Federal Lands (Mar. 28, 2005).

Tony Dutznik & Rob Sargent, Stopping Global Warming Begins at Home: The Case Against the Use of Offsets in a Regional Power Sector Cap-and-Trade Program, source 10, 11, 15 (Sept. 2004).

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 non-binding agreement to focus on the development of energy efficient technology.

Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 [hereinafter Stockholm Convention].

Art. 3.

Art. 5.

Art. 8.

Art. 9.

Art. 10.

Art. 11.

See generally Center for International Environmental Law, U.S. States and the Global POPs Treaty: Parallel Progress in the Fight Against Toxic Pollution (May 2005).

Public Laws of Maine. Chapter 277. SP 479- LD1543. An act to reduce the dioxin from consumer products into the environment. [http://janus.state.me.us/legis/ros/lom/LOM120th/6Pub251-300/Pub251-300-51.htm#P1424\\_277970](http://janus.state.me.us/legis/ros/lom/LOM120th/6Pub251-300/Pub251-300-51.htm#P1424_277970).

Washington State draft PBT rule (Jan. 3, 2005) available at [http://www.ecy.wa.gov/programs/ea/pbt/rule/docs/conclusion/draft\\_rule\\_strikethrough.pdf](http://www.ecy.wa.gov/programs/ea/pbt/rule/docs/conclusion/draft_rule_strikethrough.pdf).

Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1978, 1249 U.N.T.S. 13, U.N. Doc. A 34/180.

See Working Group on Ratification of UNCEDAW, Human Rights for All 8 (2001) available at [HYP ERLINK "http://www.amnestyusa.org/cedaw/cedawcolor.pdf"](http://www.amnestyusa.org/cedaw/cedawcolor.pdf) <http://www.amnestyusa.org/cedaw/cedawcolor.pdf>.

Art. 2.

Lars Adam Rehof, Guide to the Travaux Preparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 55, 69 (1993) (including 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).

Art. 18 and Art. 20.

For now- Rina Jiminze-David, Downgrading Women, Phillipine Daily Inquirer (Apr 2, 2005). Just cite to optional protocol itself

Bayesky, supra note NOTEREF\_Ref120760853 \h \\* MERGEFORMAT 27 , at xiii.

For instance, Laos and Zaire have never submitted reports. See Rehof, supra note NOTEREF\_Ref120754510 \h \\* MERGEFORMAT 91 , at 359-361 update

See Working Group on Ratification of UNCEDAW, supra note NOTEREF\_Ref120754656 \h \\* MERGEFORMAT 8 9.

Id. at 37.

Senate Consideration of CEDAW, 96 A. J. I. L. 971, 972 (2002).

CEDAW: Treaty for the Rights of Women, [http://www.womenstreaty.org/facts\\_history.htm](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). Something at 973.

See Working Group on Ratification of UNCEDAW, supra note NOTEREF\_Ref120754656 \h \\* MERGEFORMAT 89 ; Harold Hongju Koh, Why America Should Ratify the Women’s Treaty, 34 Case W. Res. J. Int’l L. 263, 274 (2002).

Lozner, supra note NOTEREF\_Ref120754359 \h \\* MERGEFORMAT 3 , at pin. It was later amended to reflect the principles of the Convention on the Elimination of All Forms of Religious Discrimination (a treaty that the US ratified, but has not implemented).

Need citation.

Emily M. Murase, Testimony, Governmental Operations Committee Apr. 8, 2005.

Testimony of Krishanti Dhamaraj of WILD for Human Rights, Governmental Operations Committee Apr. 8, 2005.

Both Los Angeles and Chicago have passed similar CEDAW ordinances. Efforts are also underway in Seattle, Palo Alto, Santa Cruz County, and Santa Clara. State and Local Implementation of the Women’s Convention, <http://www.legalmomentum.org/issues/whr/cedaw.shtml>.

See generally, Women’s institute for Leadership Development for Human Rights, Local implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (1999).

House Bill 706, available at <http://www.mass.gov/legis/bills/house/ht00/ht00706.htm>

The Massachusetts CEDAW Project [HYPERLINK "http://www.suffolk.edu/cwhhr/Mass\\_CEDAW.html"](http://www.suffolk.edu/cwhhr/Mass_CEDAW.html)  
h [http://www.suffolk.edu/cwhhr/Mass\\_CEDAW.html](http://www.suffolk.edu/cwhhr/Mass_CEDAW.html) .

<http://www.wildforhumanrights.org/ourwork/cedawus.html>.

Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 *Int'l & Comp. L. Q.* 996, 996 (1966).

Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* 200 (2d ed. 1980). 660 U.N.T.S. 195.

Art. 2.

Art. 3.

Art. 4.

Art. 7.

Lerner, *supra* note NOTEREF\_Ref120754758 \h \\* MERGEFORMAT 111 , at 200.

U.S. Dep't of State Bull. 653 (1966). "[The US Constitution] contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation . . . incompatible with the [Constitutional] provisions."

U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of Racial Discrimination, 103 Cong., 140 Cong. Rec. S7634 (daily ed. Jun 24 1994).

Reprinted in Thomas M. Franck & Michael J. Glennon, *Foreign Relations and National Security Law: Cases, Materials and Simulations* 790 (2d ed. 1993).

Applied Research Center, *Defining Racial Discrimination Assembly Bill 703, State of California 2003*, available at HYPERLINK "http://www/" http://www . . . .

Connerly v. Davis, verified complaint for declaratory and injunctive relief (2003). The suit was dismissed for a lack of standing

18 Cal.Rptr.3d 715, 725 (ct app 3d dist 2004) (As procedural error prevented the court from ruling on the argument that ratification made the definition binding on the states, in dicta the court contended that "by adopting section 31 (proposition 209), the People have determined, by implication that special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles."). In contrast, in a prior case, in *Avila v. Berkeley Unified Sch. Dist.*, an Alameda Superior Court held that a voluntary school desegregation plan that used race as one factor in determining school assignment was consistent with the definition of section 8315. need to put in citation

*Id.* at 727.

Intro 512-A Human Rights in Government Operations Audit Law

Testimony of Diana Salas, researcher for Women of Color Policy Network, Governmental Operations Committee Apr. 8, 2005.

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.

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 age eighteen and arguably, the right to life.

For instance, the "expansion of child specific refugee determination" was influenced by the invocation of the CRC. Jacqueline Bhabha, *More Than Their Share of Sorrows: International Migration Law and the Rights of Children*, 22 *St. Louis U. Pub. L. Rev.* 253, 269 (2003).

Often treaty framework 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 nations 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.

International Talks on Global Warming FAQ (2005) available at <http://www.seattle.gov/mayor/climate/pdf/MontrealFAQ.pdf>.

Martha F. Davis, Testimony before the Massachusetts Joint Judiciary Committee Hearing on the Human Rights for All Bill (HB 706) (June 7, 2005).

Dorothy Q. Thomas, *Holding Governments Accountable by Public Pressure in Ours by Right: Women's Rights as Human Rights* 83 (Joanna Kerr ed., 1993).

See e.g., *Questions & Answers About the NYC Human Rights Initiative*

Hathaway, *supra* note NOTEREF\_Ref120760091 \h \\* MERGEFORMAT 13 , at 500 (adding to the argument that only need to look to treaty terms and domestic institutions to make predictions about the

internalization of international rules).

What is the US Mayors Climate Protection Agreement, available at <http://www.ci.seattle.wa.us/mayor/climate/> (last updated Nov. 9, 2005) (declaring that participating cities commit to “strive to meet or beat the Kyoto Protocol targets” and urge other governmental actors to “meet or beat the greenhouse gas emission reduction target suggested for the United States in the Kyoto Protocol.”).

RGGI Staff Working Group, Revised Staff Working Group Package Proposal (Aug. 24, 2005), available at [http://rggi.org/docs/rggi\\_proposal\\_8\\_24\\_05.pdf](http://rggi.org/docs/rggi_proposal_8_24_05.pdf)

Endorsing the U.S. Mayors Climate Protection Agreement, (June 13, 2005) available at [http://www.ci.seattle.wa.us/mayor/climate/PDF/Resolution\\_FinalLanguage\\_06-13-05.pdf](http://www.ci.seattle.wa.us/mayor/climate/PDF/Resolution_FinalLanguage_06-13-05.pdf).

Amanda Griscom Little, City City Bang Bang (Interview with Greg Nickels), *Grist* (June 15, 2005) <http://www.grist.org/news/maindish/2005/06/15/little-nickels>.

US Mayors Climate Protection Agreement, available at <http://www.ci.seattle.wa.us/mayor/climate/default.htm#who> (last updated Nov. 9, 2005).

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.” Compl. at 7.

The Bill was voted “ought not pass” and thus has died.

Cite Downs.

See Working Group on Ratification of UNCEDAW, *supra* note NOTEREF\_Ref120754656 \h \\* MERGEFORMAT 89 , at 7 (2001) (“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.”).

Lesley Wexler, *The International Campaign to Ban Landmines*, *Ariz J Intl. Comp L. Rev.* (2003).

Downs & Jones, *supra* note NOTEREF\_Ref120761136 \h \\* MERGEFORMAT 14 , at S97.

Anne-Marie Slaughter, *A New World Order* 134 (2004).

See Lloyd Gruber

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, (forthcoming *Va. L. Rev.* 2006).

See Martha Nussbaum, Michael Green, Iris Young, Thomas Pogge

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.” Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 1667 *Stan. L. Rev.* 1667, 1676 (2003).

Duncan B. Hollis, *Why State Consent Still Matters- Non-State Actors, Treaties and the Changing Sources of International Law*, 23 *Berk J. Int’l L.* 137, pin (2005) (noting that even the federal government cannot keep track of mouse that roared policies).

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.

For instance, the United States once owed one billion in assessed dues. *Washington Publicly Chastised for Reneging on U.N. Payments*, *Hous. Chron.*, Sept. 28, 1995 at A23.

See Larry Helfer’s new book

Even when the United States pursues some other action that constitutes de facto withdrawal such as the redefinition under the ABM treaty, it was a lengthy and politically contentious action.

Koh, *supra* note NOTEREF\_Ref120761332 \h \\* MERGEFORMAT 20 , at 679.

Powell, *supra* note NOTEREF\_Ref120754359 \h \\* MERGEFORMAT 3 , at 273 (contending that “co-competition” between sub-federal agents and the federal government will incentivize states to ratchet their standards upward through cooperative pressures).

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 272. 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, states often draft model legislation.

Goldsmith, *supra* note NOTEREF\_Ref117943209 \h \\* MERGEFORMAT 152 , at 1677.

Cite Nussbaum patriotism book.

See Part IIA.

Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in *American Exceptionalism and Human Rights* 25-29 (Michael Ignatieff ed., 2005).

In fairness, current domestic support for treaties is often very shallow with no real sense of the costs and benefits of joining the treaty. Cite Goldsmith. Perhaps subfederal integration would deepen as well as widen treaty support.

Need citation.

Moravcsik, *supra* note NOTEREF\_Ref120761433 \h \\* MERGEFORMAT 164 , at 25-29.

Roth, *supra* note NOTEREF\_Ref120761495 \h \\* MERGEFORMAT 25 , 347.

*Id.*; Joel Eisen, *From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law*, 32 U. Rich. L. Rev. 1435, 1451 (1999). But see David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129 (1999).

Roth, *supra* note NOTEREF\_Ref120761495 \h \\* MERGEFORMAT 25 , at 349.

For instance, the Mayors Climate Protection calls for national legislation apart from Kyoto ratification and implementation.

Cite Jack Goldsmith and Curtis Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 Berk. J. Int'l L. 282 (2002).

See Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. State Rights in Foreign Affairs*, 70 U. Colo. L. Rev. 1277 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).

14 Pet. 540 (614) (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).

Abraham C. Weinfeld, *Comment What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. Chi. L. Rev. 453, 464 (1935-36); In *Dover v. Portsmouth Bridge*, the New Hampshire Supreme Court allowed concurrent state legislation from two separate states to create a contract to build a bridge over a navigable river despite lack of Congressional consent. Full cite for *Dover*.

This distinction comes from *Union Brand R. Co. v. East Tennessee & Georgia R. Co.*, 14 Ga. 327 (1853).

Andrew A. Bruce, *The Compacts and Agreements of States with One Another and with Foreign Powers*, 2 Minn. L. Rev. 500, 514 (1917-18).

Margaret Kriz, *Warm-Up Drills*, Nat'l J. (Mar. 26, 2005).

About RGGI available at [HYPERLINK "http://www.rggi.org/about.htm" http://www.rggi.org/about.htm](http://www.rggi.org/about.htm). 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.*

Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. Ct. Rev. 175 (2000) (developing this useful taxonomy of preemption cases).

For a comprehensive discussion- see Edward Swaine, full cite

120 S.Ct. 2288, 2291 (2000).

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. Brandon P. Denning & Jack H. McCall, *International Decision Crosby v. National Foreign Trade Council*, 94 A.J.I.L. 750, 757 (2000).

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

For example, in *Barclay's Bank PLC v. Franchise Tax Board*, full cite 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.

*Amer. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003).

Dissenting Justice Souter suggested that *Garamendi* stands for the proposition that the "President has a degree of independent authority to pre-empt state law." *Medellin v. Dretke*, 125 S. Ct. 2088 (2005).

Brandon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm & Mary L. Rev. 825, 928 (2004) (acknowledging that *Garamendi* could increase executive power, but contending that *Garamendi* merely reflected the court's dissatisfaction with the "peculiar and overreaching scope of the [disclosure] statute . . .").

Edward Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127 (2000). *Id.* at 1190.

For instance, subfederal integration of ratified, but unimplemented treaties is relatively unproblematic.

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 *Pace Env'tl L. Rev.* 53, 79 (2003) (also concluding that state and local greenhouse initiatives are "directly solely at local activities" and thus constitutionally inoffensive).

David Fagundes, *State Actors as First Amendment Speakers*, 100 *Nw. L. Rev.* (forthcoming 2006) (on file with the author); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech*, 35 *Stan. J. Int'l L.* 1, 34 (1999); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 *A.J.I.L.* 821, 826-27 (1989); but see Mark Yudoff, *When Government Speaks*, 42-44 (1983).

Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 *Geo. Int'l Env'tl L. Rev.* 141, 169-172 (1995) ( ); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 *Foreign Pol'y* 158, 163 (1992).

Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 *Foreign Pol'y* 158 (1992).

David D. Caron, *The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of Apartheid-Era South Africa Ordinances*, 21 *Berkeley J. Int'l L.* 159, 161 (2003); a suit was filed against the Baltimore ordinance but the Justice Department declined to join the suit. *Bd. of Trustees v. City of Baltimore* (1989).

Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Policy Trade Restrictions*, 13 *Nw. J. Int'l L. & Bus.* 563, 567 (1993).

See e.g., Peter J. Spiro, *Role of the States in Foreign Affairs: Foreign Relation Federalism*, 70 *U. Colo. L. Rev.* 1223 (1999)

Fenton, *supra* note NOTEREF\_Ref117322570 \h \\* MERGEFORMAT 197 , at 567.

*United States v. City of Oakland*, fill in the rest of the cite (1990).