

Legal Sidebar

Constitutional Limits on States' Efforts to “Uphold” the Paris Agreement

06/27/2017

Following President Trump’s [June 1 announcement](#) that the United States will withdraw from the [Paris Agreement](#)—an international pact intended to address climate change over the coming century—some American [cities and states](#) have promised to pursue the Agreement’s goals even after U.S. withdrawal. But with [constitutional limits](#) on the power of states to make legally binding treaties and compacts with foreign nations (discussed below), and [numerous Supreme Court opinions](#) stating that the federal government has superior power over the states in the field of foreign affairs, [some commentators](#) have raised the question: does the Constitution allow state and local governments to “uphold” the Paris Agreement? This Sidebar addresses two potential limits on state and local action on this matter: [Article I, Section 10](#) of the Constitution and [foreign affairs preemption](#).

What Actions have State and Local Governments Taken with Respect to the Paris Agreement?

Since the President’s June 1 announcement, a multitude of states and [localities](#) have formed “[alliances](#)” and issued [declarations](#) expressing their support for the Paris Agreement. In addition, California and China recently signed a nonbinding [Memorandum of Understanding](#) (MOU) pledging to cooperate and share information on a number of climate-related topics. ([Similar MOUs](#) had been signed before the withdrawal.) On June 6, the Governor of Hawaii signed two bills that his office [described](#) as supporting the Paris Agreement: [Hawaii Senate Bill 559](#) requires the State to expand strategies to reduce greenhouse gas emissions, and [Hawaii House Bill 1578](#) creates a “carbon farming task force.” Well before the Paris Agreement came into existence, [most states](#) had enacted some form of [legislation](#) intended to address climate change, and some had engaged in [international](#) or [interstate](#) climate initiatives. But the express statement of purpose in Hawaii’s latest [legislation](#)—“support[ing] the goals” of the Paris Agreement “[r]egardless of federal action”—may be a distinguishing feature.

Limits on States’ Power to Enter into Legally Binding Pacts with Foreign Nations

In the context of states’ efforts to enter into legally binding pacts with foreign nations, two clauses in [Article I, Section 10 of the Constitution](#) place limits on states’ power. Clause 1 provides that “*No State shall enter into any Treaty, Alliance, or Confederation;*” and Clause 3 (commonly known as the “[Compact Clause](#)”) provides that “*No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power[.]*” Whereas Clause 1 appears to create an [unqualified prohibition](#) on any “Treaty, Alliance, or Confederation,” the Compact Clause conditionally allows states to make “Agreements or Compacts” with foreign nations provided they receive congressional consent.

In practice, the interpretation of Article I, Section 10 is more varied and complex than its text suggests. In an 1840 Supreme Court decision, [Holmes v. Jennison](#), four Justices concluded there is an essential distinction between the types of relationships that are categorically prohibited by Clause 1 versus those that must be approved under the Compact Clause. But the [Jennison](#) Court did not reach a majority opinion, and there is [no definitive judicial decision](#) or scholarly consensus on how to differentiate between the treaties, alliances, confederations, and compacts addressed in Article I, Section 10.

Still, some rules of interpretation have developed through federal and state practice. The U.S. Department of State—which [advises](#) U.S. states and their foreign counterparts on the requirements of Article I, Section 10—[has interpreted](#) these constitutional restrictions to only apply to legally binding pacts. [Legal research](#) suggests that most states’ pacts with foreign nations—including past [declarations](#) and [MOUs](#) related to climate change—are not legally binding, and, therefore, not submitted to Congress for approval. The same result will likely occur for certain post-Paris Agreement state activity. For example, the recent California-China MOU expressly states that its provisions are not legally binding, making it unlikely that this MOU would trigger the restrictions of Article I, Section 10.

Limits on States’ Power to Enact Legislation in the Field of Foreign Affairs

Separate from the limits on states’ efforts to form binding pacts with foreign nations, the Supreme Court has identified restrictions on states’ power to enact legislation that intrudes on the federal government’s ability to conduct foreign relations. Although not expressly allocated in the Constitution, the Court has held that power over [“external affairs” is “vested exclusively”](#) in the federal government. When there is a conflict between state legislation and the foreign affairs policy of the federal government (as expressed in a [federal law](#) or [international agreement](#)), the [Court](#) has [deemed](#) the state law invalid under the doctrine of [federal preemption](#). Preemption has its roots in the [Supremacy Clause](#), which provides that laws and treaties of the United States “shall be the supreme Law of the Land.”

Even when there is no actual conflict between state and federal law or policy, the Supreme Court held in [Zschernig v. Miller](#) that a state law can still be deemed an unconstitutional intrusion into “the field of foreign affairs” if it results in something more than an “incidental or indirect effect” on U.S. foreign relations. In [Zschernig](#), the Court struck down an Oregon statute that limited noncitizens’ right to inherit property even though the federal government stated in an *amicus curiae* brief that the law did not unduly interfere with its conduct of foreign relations. The scope and continuing validity of [Zschernig](#), decided in 1968, is the subject of debate (discussed [here](#) and [here](#)). But the Ninth Circuit Court of Appeals relied on it in a 2012 decision, [Movsesian v. Versicherung AG](#), in which it held that a state law is unconstitutional, even absent a conflict with federal foreign policy, if it: “(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government’s foreign affairs power[.]”

To date, few state climate change laws have been challenged under the doctrine of foreign affairs preemption. This doctrine may have had limited applicability, in part, because some state laws were enacted under the framework of the [Clean Air Act](#)—such as through express [waiver authority](#) allowing state regulation of motor vehicle emissions. Moreover, in 2007, a federal district court [rejected](#) an argument that a Vermont law setting emissions standards for new automobiles constituted an “insufferable intrusion upon the field of foreign affairs.” And, in 2008, a federal district court in California [granted summary judgment](#) against a similar foreign affairs preemption claim on a California law despite [previously ruling](#) that the claim survived a preliminary motion to dismiss.

While foreign affairs preemption historically has not been a major barrier to state climate change legislation, some have interpreted [Movsesian](#) as requiring courts to inquire into whether the [“real purpose”](#) of a state law is to respond to foreign affairs events rather than address an area of traditional state responsibility. The Supreme Court has [long recognized](#) that each state has an interest in protecting [“all the earth and air within its domain.”](#) But the [Movsesian](#) inquiry into states’ motivation for passing legislation could place added judicial scrutiny on state laws that are heavily focused on expressing disagreement with the Trump Administration’s decision to withdraw from the Paris Agreement.

For further analysis, see this [two-part Legal Sidebar](#) and [In Focus](#) on withdrawal from the Paris Agreement, and [this report](#) and [live CRS seminar](#) on the general legal framework for withdrawal.